Lawyers Question Fairness Of Calgary Judge Accused Of Racist Remarks

Justice Kristine Eidsvik Apologized On Friday For Comments 'Insensitive To Racial Minorities'

CBC News

Lucie Edwardson

January 9, 2018

Some lawyers in Alberta are questioning the impact on future clients if they go before a judge accused of making racially insensitive comments.

Court of Queen's Bench Justice Kristine Eidsvik came under fire last week for comments to a law class at the University of Calgary that were understood as her expressing a fear of "big dark people."

Eidsvik promptly apologized, saying she knew her comments were wrong and she "felt sick" about them.

But Alberta lawyer Avnish Nanda said an apology doesn't cut it.

"Most of my clients are people of colour, are marginalized people, and I would be extremely concerned as to if these people get a fair hearing before this justice if she has those feelings toward them," he told CBC News on Monday.

Nanda said he thinks it's the responsibility of the legal community to push for racial sensitivity training for judges.

"I think it's incumbent on both the legal professions, the justice involved and her colleagues to push toward some sort of racial sensitivity training, address the unconscious or conscious biases the justice has toward people of colour," he said.

Calgary lawyer Elias Munshya said he doesn't believe all people who make racist comments are truly racist, and he doesn't think Eidsvik's perceived views affect her decision-making.

"I don't think she's a racist and I would look forward to appearing before her knowing she would fairly adjudicate my cases," he said.

Munshya said he doesn't know of any prior complaints lodged against Eidsvik, and said the fact she realized immediately her comments were inappropriate and apologized should speak volumes.

"Judges are human," he said.

Munshya said he thinks the real problem in Alberta is a lack of diversity on the bench, and he wants that addressed by the government.

"It is very sad, looking at all the judges, of all the judges in Alberta right now — from provincial court to court of appeal — you don't have big, dark people, as justice Eidsvik has said," he told CBC News.

"We need black judges. The government must appoint diverse judges, and I think that would help inspire confidence in the judiciary, in the courts, as representative of the people of Alberta."

Kelly Ernst, president of the Rocky Mountain Civil Liberties Association, agrees with Nanda about offering judges more racial sensitivity training.

"Everybody benefits from training of this nature. Nobody loses in that kind of training," he said. "And, the more you give it across organizations instead of focusing on specific people, the more people will actually benefit when interacting with those organizations."

'Jordan' ruling will impact Canadian legal system
Lethbridge Herald
Delon Shurtz
January 8, 2018

In 1990, an appeal heard before the Supreme Court of Canada established the criteria and standards by which Canadian courts determine whether an accused's rights under the Canadian Charter of Rights and Freedoms — to be tried within a reasonable time — has been infringed.

The case was R. v. Askov.

In 1983, Elijah Anton Askov was charged with extortion, brandishing and pointing a sawed-off shotgun, and assault with a weapon. However, 34 months spent waiting for a trial was ruled too long and unconstitutional, and all charges against Askov were stayed.

Following that ruling, in Ontario alone, lower courts dismissed more than 47,000 cases.

Up until July of last year, Askov was regularly referenced in court whenever there was a risk that an adjournment might contribute to an unreasonable delay and ultimately a stay of proceedings. Since July 2016, however, a new word has replaced Askov, and "Jordan" is now the name referenced on almost a daily basis.

In R. v. Jordan, the Supreme Court of Canada made broad and sweeping changes to the framework that determines whether an accused has been tried within a reasonable time under section 11(b) of the Charter. The issue, just like Askov, was whether there was too much delay in the criminal proceedings against the accused.

Barrett Richard Jordan was arrested in December 2008 and charged with offences relating to drug possession and trafficking. He was released with conditions two months later, and a preliminary inquiry was scheduled for May 2010. The hearing was adjourned, however, and finally in May 2011 Jordan was committed to stand trial. By the time the trial was over in February 2013, just over four years had passed from the time the charges had been laid.

During his trial Jordan applied for a stay of proceedings, but it was dismissed. It was also rejected by the British Columbia Court of Appeal. The Supreme Court of Canada overturned the appeal court's ruling, however, in a 5-4 majority.

Lethbridge lawyer Greg White says the burden is on the Crown to prove there hasn't been unreasonable delay, and the new framework takes away any guesswork and prevents both sides from being lackadaisical when it comes to moving matters along.

"I think it's good," White says of the decision. "It makes things easier."

White has already successfully used the Jordan decision to get a stay of proceedings in a case that goes back to 2012.

Nearly six years ago Jorden Van Voorthuizen was arrested in Greece and accused of sexually assaulting two young boys in the late 1990s. The former Taber man was brought back to Alberta in April 2012 and stood trial in 2014. He was found guilty, and sentenced to nine years in a federal prison.

He was granted an appeal, however, and in November 2017, on the second day of his new trial in Court of Queen's Bench, Justice D.K. Miller ruled the accused had not been tried in a reasonable amount of time, and he stayed the charges.

"Timely justice is one of the hallmarks of a free and just society," Miller said.

The judge based his ruling on R v Jordan and determined that too much time had expired between Van Voorthuizen's arrest and the new trial.

In the Jordan case, the Supreme Court of Canada rejected the criteria traditionally used to determine whether an accused has been tried within a reasonable time. The court replaced the old framework with a ceiling of 18 months between the time the charges are laid to the end of trial in provincial court without preliminary inquiry, and 30 months in higher courts.

There are some exceptions, however, depending on the circumstances. For example, any delay that is attributable to, or waived by, defence does not count toward the presumptive ceiling, and neither does any delay that is not the Crown's fault.

When the ceiling is exceeded, it is automatically presumed that the delay is unreasonable. The Crown may only rebut this presumption by establishing that a "discrete" event occurred that was reasonably unforeseen and reasonably unavoidable, such as an illness or unexpected event at trial, or that the case was particularly complex and required an inordinate amount of trial time or preparation time.

Where the ceiling has not been exceeded, an accused may still claim delay and establish that it is unreasonable by showing that defence made a sustained effort to expedite the proceedings and that the case took markedly longer than it reasonably should have.

White is also defending a client in a drug case in which it took 18 months just to obtain disclosure from the Crown. By the time the case goes to trial in February, 22 months will have passed since the accused was charged, four months beyond ceiling set by Jordan.

White is working to resolve the matter with the Crown, but if it goes to trial, White will argue his client's Charter rights were breached.

Despite lingering concerns that the new framework is too inflexible, it appears the superior court is standing by its decision. White points out that a number of provincial Attorneys General asked the Supreme Court to modify the Jordan framework, which would have provided for more flexibility in deducting and justifying delay relating to another case in R. v. Cody.

In that case the accused, James Cody, who was charged with possession of drugs and prohibited weapons, waited five years before his five-day trial was scheduled to begin. He argued the delay breached his Charter rights. The Court applied the Jordan framework and unanimously ordered a stay of proceedings.

Because the Crown is alive to the fact that it bears the burden of proof should a case exceed the Jordan ceiling, the name is referenced almost daily in Lethbridge provincial court. Sometimes a delay may be attributed to the Crown, but when it's not, the Crown often requires defence to "waive Jordan." If a case exceeds the new ceiling, and the court is faced with a Jordan application, the Crown can point out defence was responsible for some of the delay, which may be deducted from the total time.

White says courts, at least in Lethbridge, appear to be providing more trial time to help speed up cases, and prosecutors and defence lawyers seem to be handling the new rules without too much trouble. Because of that, he doesn't believe there will be a lot of Jordan applications.

"It's not going to happen very often," he predicts.

Five things that may, and should, happen in 2018
Predictions were so much less risky when newspapers were wrapping fish the next day
National Post
John Ivison
January 8, 2018

Predictions were so much less risky when newspapers were wrapping fish the next day. Now, they tend to linger online like a fetid, fermented herring.

Nonetheless, here are five observations and advice on what may, and should, unfold in 2018:

1) The Liberals really, really need to legalize pot by Canada Day. The party's brand has been tarnished by the "promise-breakers" tag – the fall-out from cancelling the commitment to electoral reform and small budget deficits once in office. The government's own pledge tracker suggests 68 of 364 mandate letter commitments have been met – less than one in five – with another 216 "underway and on track". Beset

by problems like the breakdown of NAFTA and the Phoenix pay system debacle, it would be easy to lose drive and direction. But if the Trudeau Liberals are to retain the trust of voters, they have to show they are keeping their side of the bargain – the most visible manifestation of which is legalized pot. If they don't fulfil more of their election promises from 2015, why should anyone believe anything they say in 2019?

2) At the same time as he is implementing his myriad commitments on inclusiveness, indigenous issues and climate change, Justin Trudeau needs to find new ways to keep voters enthused as he heads into the next election. Polling numbers for the Liberals remain strong, a reflection of an economy that has just recorded its best unemployment numbers in 40 years. But the initial wave of enthusiasm for the Liberals has passed and in 2018, Trudeau needs to start explaining what a second term government might look like. He is going to have to come up with a new slate of ideas that are more radical, more inclusive and more ambitious than the last batch of promises – most of which have yet to be met. The danger for the Liberals – and the opportunity for the Conservatives – is that they risk drifting in their definition of "fairness". In 2015, it meant making taxes more fair for the middle class. In 2019, the Liberals needs to guard against being on a different wavelength from people with aspirations who are making their own way in life and want to keep more of their income. Developing a strategy against Conservative leader Andrew Scheer may be the easy part. Without a compelling vision, the government is in danger of running out of steam.

3) Andrew Scheer is going to have to move the dial on public support this year or he may find himself under pressure from his caucus colleagues. Remember, his leadership wasn't ratified with any great enthusiasm – he received the support of just one in five Conservative members on the first ballot. Rather, it's fair to say Maxime Bernier's candidacy was repudiated. My year end interview with the Conservative leader suggested he sees no need to reform a party that lost 60 seats at the last election – that a rebranding job will suffice. He has made little effort to change his party from its previous Harper incarnation. As such, he has played core voter politics – gearing all his energies to ensuring that people who voted Conservative at the last election do so again. That's ok, as long as it is a platform for launching a sales pitch aimed at increasing Conservative support above the 30 per cent ceiling, against which it has been bumping under Scheer. Kicking Senator Lynn Beyak from caucus for promoting the idea that indigenous Canadians are lazy is a good start to the year. Scheer needs to define the values that would guide him in government – and they need to be a little more progressive and a little less conservative, if he is to attract the swing voters he needs to block another Trudeau majority. Scheer has to offer hope and positivity. He must explain more clearly why he, and not Justin Trudeau, is the future.

4) The new jobs numbers are welcome news for the government – "the real results of a plan that is working," according to finance minister, Bill Morneau. That plan involves the economy growing faster than the debt the Liberals are piling on, thereby reducing the debt-to-GDP ratio. Having abandoned its own fiscal anchors, the government has given no time-line on a return to balanced budgets. The finance department projects red ink until 2045-46. But the Liberals' "invest and grow" strategy is vulnerable to attack, particularly in the event of an unexpected shock like new tariffs at the American border. In 2018, the Liberals need to come up with a plan that shows that they have spending and debt under control.

5) The carillon on Parliament Hill is scheduled to play the theme from the Muppets on the day MPs return to work. Who could argue? Honourable members are often reduced to the status of children's entertainers – puppets of the party whips. But sometimes, backbench MPs can make a difference. As British Conservative MP, Rory Stewart, described his own rebellion: "I began to think of Parliament as though it was an elderly Alsatian – generally placid by the fire but just occasionally, if someone stepped on its tail, waking up in a wild fury of barking." In 2018, we may hear some more barking from MPs, particularly Liberals, who feel like they are wasting their talents in Parliament. There are 183 Liberals in the House, many highly qualified, of whom 31 are in Cabinet. There have already been four shuffles and many on the government backbench must already know they will never make it around the top table. The conditions are ripe for more Liberal MPs to live up to the promise made in their election platform – to represent their communities and hold the government to account.

Opinion: Bonjour-Hi motion stands to have legal repercussions

While it's not a law, it can be cited in future arguments before the courts as evidence of French's fragility in Quebec.

Montreal Gazette

Michael N. Bergman

January 8, 2018

In the five weeks since the National Assembly's unanimous Nov. 30 adoption of the anti-"Bonjour-Hi" motion, some observers have taken care to underline that, despite the vote, no law has been adopted, and so Bonjour-Hi is not in fact illegal. The only sanction for not adhering to the National Assembly's prescription concerning public commercial etiquette will be, presumably, the Assembly's disdain and whatever social impact there may be.

However, while it is true in the narrow sense that the motion is not a law, it is not without legal impact. It may, in my view, figure in a determinant fashion in future legal arguments before the courts concerning the status of the French language in Quebec, as evidence of its ongoing fragility.

Legal arguments related to language legislation and its necessity are undergirded by the presentation of factual evidence justifying the protection of one language at the expense and restriction of another. It is in this context that the anti-"Bonjour-Hi" motion has legal meaning.

In language litigation over the past few decades, the constant refrain of the courts, including the Supreme Court of Canada, has been that French in Quebec requires protection even if this protection encroaches on the individual liberty of citizens to use the language of their choice. The only restraint on the enforcement of the Charter of the French Language is that its aims must be proportional and consistent with the limited constitutional protection of other languages, notably, English. This basic principle of jurisprudential interpretation of language laws means that every time some article of the Charter is disputed, evidence must be brought concerning the current status of the language in Quebec.

The evidence presented in court, whether by Liberal or Parti Québécois governments, invariably consists of demographic studies, census data and statistical analyses, usually dating back to the 1970s through

1990s, to prove that French in Quebec remains under siege, and is easily overwhelmed by English. The direct consequence of this, or so it is pleaded, is that Quebec's English-speaking community, deliberately or not, is the thin edge of the wedge, and if not restrained by law, will sooner or later overwhelm French Quebec.

Within this legal framework, the anti-"Bonjour-Hi" motion has legal relevance. It demonstrates, once again, the sense of a strong sociopolitical need to restrain even the most innocuous of greetings. The exclusion of the word "Hi" can be understood, in legal argument, as a reflection of the majority's linguistic fear and insecurity.

Three weeks after the motion, in a Dec. 20 ruling relating to the language of commercial signs, a unanimous judgment of the Quebec Court of Appeal sustained, as a matter of fact and law, that French remains threatened in Quebec. This case concerned the appeal of charges brought against several Quebec businesses whose signage or websites, in one way or another, were not predominantly or exclusively in French. The Quebec Court trial judge had heard arguments from the accused businesses asserting that French is no longer in need of special protection that entails restrictions on English. The accused, though, were found guilty. They appealed to the Superior Court and lost again. They appealed to the Quebec Court of Appeal and lost again. The Court of Appeal ruled that it will take "solid, compelling and unequivocal" evidence to ever successfully demonstrate that French is no longer threatened.

Although the Court of Appeal did not have the anti-"Bonjour- Hi" motion before it, and would not have taken it into consideration, the court has upheld the view that English on commercial signs can threaten the "visage linguistique" of Quebec.

It is not much of a leap from that judgment to imagine the spoken word "Hi" being held one day in court to be a threat to the "son linguistique" of Quebec.

Michael N. Bergman is a Montreal lawyer.

Union calls federal plan for public servants overpaid by Phoenix a "half-measure"
iPolitics
Kathryn May
January 8, 2018

The federal government is offering a reprieve to the thousands of Canada's public servants who have to return the overpayments the problem-plagued Phoenix pay system improperly issued them last year.

Public Services and Procurement Canada is giving employees, who were overpaid in 2017, until Jan. 31 to report their overpayments and make sure they are recorded in Phoenix.

As long as they do that, employees will only have to repay the net amount of overpayments they received and not the gross pay — which includes taxes and other deductions.

The offer is aimed at addressing an employee outcry that public servants are being forced to pay back money they never actually received. The Public Service Alliance of Canada called the offer a “half-measure.” It is demanding a blanket exemption so no one has to repay the gross amount whether they meet the deadline or not.

Under this plan, employees who don’t make that Jan. 31 notification deadline will have to repay the gross amount (the amount that includes deductions made at source on the employee’s behalf).

As a compromise, the government will delay collecting repayments from these employees until after Canada Revenue Agency has processed their tax returns and they have received tax refunds.

The department said these employees will receive an amended 2017 tax slips that will show their correct annual earnings, as well as any taxes on the overpayment, and they will be eligible for a refund of the tax withheld.

Also, those who received overpayments with more than 10 per cent of their biweekly pay can put their repayments on hold and follow up with the government for a flexible repayment plan.

The reprieve is the result of longstanding discussions with unions which argued from the start that employees should not be expected to pay back money they never received. The argument also won over many MPs who felt being forced to repay the gross amount was unfair.

“It is absurd that our members are forced to pay the government back more money than they received in overpayment and hope that everything works itself out during tax season,” said Robyn Benson, president of the Public Service Alliance of Canada.

“We are not satisfied with the government’s half-measure to pay back the net amount before the January deadline, and we will continue to push for a full exemption from repaying the gross pay for all employees who received an overpayment due to Phoenix.”

Unions maintained the errors are the fault of employees and he government should be responsible for recovering the difference between the net and gross overpayments.

PSAC pressed as year-end approached last month that employees be given a blanket exemption so none would have to pay the gross amount of the overpayments.

Overpayments have been an ongoing issue since Phoenix went live nearly two years ago. Their plight has not been as big a priority as ensuring employees who were underpaid or not paid at all were taken care of, such as with emergency or priority payments.

PSPC can’t say how much money has been issued in overpayments or what proportion of the outstanding cases they account for in the backlog which, at last count in November, stood at about 619,000 cases.

But stories have abounded of public servants receiving payday surprises of small amounts or thousands of dollars in overpayments since the day Phoenix went live.

Some people have been paid two salaries, one regular salary and another, full acting salary when filling in jobs. Some continued to receive paycheques after retiring. Others continued to get paid after taking a leave. And others received double severance payments.

And in some cases, the system can't catch the error: the government won't know about the overpayments unless employees report it. Employees also faced endless problems trying to pay the money back.

Take a public servant who moved to a new job in another department and Phoenix pays him twice for both jobs. He, for example, receives a extra $8000 on his pay cheque but the $10,000 gross pay includes $2,000 in taxes and other deductions withheld at source. The employee has been required to repay the gross amount.

PSPC says it has no idea how many cases of overpayments because many are in the backlog and haven't been processed yet.

But internal documents leaked last August showed overpayments were the second largest type of errors plaguing Phoenix. At that time, the government had about 28,000 overpayment cases – second only to problems with acting pay which accounted for about 78,500 cases sitting in the queue.

The overall backlog has increased dramatically since then and at last count in November had reached about 619,000 cases.

Employees who have received overpayments, sometimes over many pay periods, faced significant claw backs, and the government had offered options for repayment, which can be done over multiple pay periods, to help minimize the financial hardship.

Last year at this time, there a huge push for employees to repay 2016 overpayments before year-end since Phoenix will churn out T-4 slips that reflect overpayments if they aren't repaid before year-end.

The government's Jan. 31 deadline, however, only applies to overpayments made during 2017.

Agressions sexuelles et stéréotypes devant la Cour suprême
Radio-Canada
9 janvier 2018

Voici un aperçu de quelques-unes des questions qu'étudiera le tribunal désormais présidé par le Québécois Richard Wagner.

Comme les neuf juges, à part rare exception, prennent plusieurs mois avant de rendre leurs décisions, l'année 2018 sera donc bien entamée ou peut-être même finie lorsqu'on aura le dernier mot dans ces affaires.
En ordre chronologique

9 février : victimes d'agressions sexuelles et stéréotypes
L'année 2017 aura donné beaucoup de place aux victimes d'agressions et de harcèlement sexuels. Leurs révélations ont déboulonné quelques statues et mis fin à quelques carrières. Il y a eu le mouvement #moiaussi. Mais il y a eu aussi #ibelieveyou.

Dans cette cause albertaine, la Cour suprême du Canada doit répondre à la question suivante : le juge du procès a-t-il commis une erreur en s'appuyant sur des suppositions stéréotypées à propos du comportement d'une victime d'agression sexuelle?

La victime alléguée est la belle-fille de l'accusé. Le juge de première instance, de l'avis de deux des trois juges de la Cour d'appel de l'Alberta, a commis une erreur parce que, pour apprécier la crédibilité de la plaignante, il s'est appuyé sur un mythe ou un stéréotype à propos de la façon dont une victime d'agression sexuelle devrait se comporter. La Cour d'appel a ordonné un second procès. Mais comme il y a eu dissidence, la cause arrive de plein droit au plus haut tribunal du pays.

15 mars : voyeurisme et Assemblée nationale
Le président de la Chambre, Jacques Chagnon En juillet 2012, trois gardiens de sécurité de l'Assemblée nationale sont congédiés par le président de la Chambre, Jacques Chagnon, lorsqu'on découvre qu'ils utilisaient une caméra de l'Assemblée pour regarder dans les chambres d'un hôtel du quartier.

Leur syndicat a déposé un grief contre ce congédiement. Le président de l'Assemblée a contesté la compétence du tribunal, invoquant le privilège parlementaire et son droit de gérer ces lieux comme bon lui semble. Selon le président, la Constitution lui garantit le privilège de gestion du personnel et le privilège d'expulser les étrangers de l'Assemblée nationale et de ses environs. Le tribunal de première instance lui a donné raison. La Cour d'appel du Québec a renversé cette décision, à deux juges contre un.

21 mars : loi électorale et patience
Des citoyens canadiens invoquent la Charte des droits pour protester contre le fait qu'ils perdent leur droit de vote après avoir résidé plus de cinq ans à l'extérieur du pays.
Le procureur général du Canada a demandé, une première fois, que la Cour suprême du Canada reporte l'audience de cette cause, soulignant que le gouvernement Trudeau a déposé un projet de loi pour modifier la loi électorale. Mais voilà, C-33, déposé en novembre 2016, en est toujours à sa première lecture. C'est-à-dire que le projet de loi a été déposé aux Communes et n'a jamais été débattu depuis son dépôt.

Les magistrats de la Cour suprême jugeront donc de la cause en utilisant la loi telle qu'elle est et non pas telle qu'elle sera, éventuellement. Justement, le projet de loi C-33 propose de supprimer la condition de résider à l'étranger depuis moins de cinq ans pour avoir droit de vote.

22 mars : Valeurs mobilières, prise deux
La Cour suprême a donné raison à Québec, une première fois, en 2011. À l'époque, elle s'était penchée sur le projet de loi du gouvernement Harper qui voulait imposer une commission des valeurs mobilières unique. L'Alberta et le Québec s'y étaient opposés et avaient gagné. « Intrusion massive » du Parlement fédéral dans le champ de compétence des provinces, avait tranché le plus haut tribunal du pays.
Le gouvernement conservateur était donc retourné à ses planches à dessin et avait concocté une seconde version. Cette fois, l'adhésion à la commission pancanadienne serait totalement volontaire. Et quatre provinces, dont l'Ontario et la Colombie-Britannique, se sont empressées de s'y joindre.

Le Québec n'était pas plus convaincu. En juillet 2015, il s'est donc tourné vers sa Cour d'appel où il a argué que la nouvelle loi empiète tout autant sur ses champs de compétence parce qu'elle prévoit des lois provinciales uniformes et une loi fédérale complémentaire qui s'appliquerait même aux provinces non participantes.

La Cour d'appel, à deux juges contre un, a jugé la nouvelle loi inconstitutionnelle, à moins qu'on en retire quatre articles. Au tour de la Cour suprême du Canada de replonger dans ce dossier.

Pas de Google pour les juges !
Utiliser les moteurs de recherche est contraire au code d'éthique de la magistrature, affirme l'Association américaine du Barreau.
Droit Inc
Jean-François Parent

Un magistrat peut utiliser des moteurs de recherche pour se documenter sur des faits qui sont de notoriété publique et qui ne sont pas contestés.

Mais « googler » des concepts, des situations ou des faits et ainsi aller au-delà de ce qui leur a été soumis pendant un procès est un accroc aux règles d'éthique, conclut un avis légal publié en décembre 2017 par l'Association américaine du Barreau.

Selon le ABA Journal, l'avis juridique de l'ABA relate que les décisions d'un juge doivent être fondées sur la preuve et les faits soumis lors des audiences ou versés au dossier de la cour. Ces informations doivent également être accessible à toutes les parties au litige.

Déjà, faire ses propres recherches relativement à des faits litigieux est prohibé par le Code d'éthique de la magistrature, peut-on lire dans l'Avis légal 478 de l'ABA.

L'avis se fonde notamment sur la règle selon laquelle « un juge ne doit pas effectuer des recherches de façon indépendante, et il ne peut tenir compte que de la preuve soumise », rapporte le ABA Journal. Le code d'éthique va plus loin en ajoutant que l'interdiction de faire ses propres recherches s'applique à tous les supports d'information.

Si les juges veulent creuser davantage une question par eux-mêmes, l'ABA recommande une grille d'analyse.

Ainsi, si l'information s'avère nécessaire au processus décisionnel, il est possible que le résultat de la cueillette d'information relève d'un avis judiciaire.

Par ailleurs, si la recherche est effectuée pour établir une corroboration, pour rejeter des éléments factuels ou pour éclaircir des aspects de la preuve, « si ce sont des faits contestés », il n'est pas approprié d'effectuer une recherche.

La documentation relative à l'une ou l'autre des parties est également proscrite. Cependant, s'il ne s'agit que peaufiner certaines questions d'ordre général, sans objet avec la cause en cour, alors on peut surfer le web sans contrainte.

L'ABA interdit également aux magistrats de se documenter sur une partie au dossier, ou sur les jurés, en utilisant les médias sociaux.

Quant à la recherche portant sur les avocats qui se présentent devant lui, l'avis juridique de l'ABA se veut plus nuancé. Pour simplement avoir une idée de la pratique d'un avocat, un juge peut consulter internet. Mais si la recherche porte sur la personnalité de l'avocat, afin de se faire une opinion sur les faits que ce dernier soumettra au tribunal, alors la recherche est interdite.

Au Québec, le Code de déontologie de la magistrature est muet sur la question d'internet et de la recherche en général.

IA: priorité à la protection des renseignements personnels
Droit Inc
Antoine Guilmain
9 janvier 2018

Le recours à l'intelligence artificielle explose, apportant de nouveaux enjeux légaux. Une réflexion s'impose pour le réguler, estiment Mes Antoine Guilmain, Antoine Aylwin et Karl Delwaide, avocats au cabinet Fasken Martineau DuMoulin. Ils ont rédigé cette opinion publiée dans Le Devoir.

« Quand je me regarde, je me désole; quand je me compare, je m'affole… » Cette expression détournée résume, à elle seule, le bilan de l'année 2017 concernant les interactions entre intelligence artificielle (IA) et renseignements personnels.

Alors qu'actuellement les projets et réussites se multiplient au Canada dans le secteur de l'IA, particulièrement à Montréal, les discussions demeurent embryonnaires sur « l'après » : comment passer de l'effervescence à la pérennité pour cette industrie en puissance ? Force est de constater que cette question mobilise trop peu l'attention.

Aussi, comme plusieurs observateurs, croyons-nous qu'une réflexion s'impose pour réglementer — à tout le moins réguler — le recours à l'intelligence artificielle à différents niveaux. L'objectif ultime étant de garantir une sécurité juridique pour tous les intervenants (secteur public, secteur privé et citoyens), tout en favorisant l'innovation et les investissements dans le domaine. En d'autres mots, un cadre

normatif équilibré et compétitif. Plus avant, l'un des chantiers les plus importants est selon nous celui de la protection des renseignements personnels.

Pourquoi ? Les mégadonnées (« Big Data » en anglais) couplées avec le recours aux différentes techniques d'IA (dont le « Machine Learning ») apportent de nouveaux enjeux en matière de traitement des données. En voici quelques aspects : (i) la tendance à collecter et à analyser « toutes les données » ; (ii) la réutilisation des données à des fins qui n'avaient pas été préalablement envisagées ; (iii) la collecte de nouveaux types de données (observées, dérivées ou encore inférées) ; (iv) l'imprévisibilité des algorithmes ; ou (v) la réidentification d'individus à la suite d'une « anonymisation » des données.

Cette nouvelle réalité remet en question les principes essentiels de la protection des renseignements personnels, tant pour les organisations que pour les individus. Comment respecter le principe de transparence ? Comment ne pas contrevenir au principe de limitation de la collecte et de l'utilisation des renseignements personnels ? Comment obtenir le consentement de toutes les personnes concernées ? Comment préserver les droits d'accès et de rectification des individus ? Autant de questions qui font l'objet de nombreuses réflexions dans le reste du monde.

Du chemin à faire

Ailleurs ? En 2017, l'intelligence artificielle a fait couler beaucoup d'encre chez les autorités étrangères responsables de la vie privée. On pense par exemple au document de l'Information Commissioner's Office au Royaume-Uni portant sur Big Data, Artificial Intelligence, Machine Learning and Data Protection, qui pose concrètement les défis et pistes de solution concernant l'IA. Ou encore en France au rapport de décembre 2017 de la Commission nationale de l'informatique et des libertés intitulé Comment permettre à l'homme de garder la main, offrant une perspective plus aérienne et conceptuelle des enjeux de l'IA.

Plus fondamentalement, au sein de l'Union européenne, c'est surtout le Règlement général sur la protection des données, en vigueur à partir de mai 2018, qui a fait l'objet de nombreux travaux et analyses. En effet, il contient des dispositions spécifiques sur « la prise de décision individuelle automatisée » qui permettent à l'individu concerné de s'y opposer (sous certaines conditions) ou d'obtenir de l'information à ce sujet.

Chez nous ? Pendant ce temps, au Canada, il y a encore du chemin à faire. La Commission d'accès à l'information du Québec effleure le sujet dans son rapport quinquennal 2016 au moyen des termes « mégadonnées » ou « algorithme », sans vraiment aborder la question de l'IA. Le Commissariat à la protection de la vie privée au Canada, quant à lui, cible l'IA dans son rapport annuel 2016-2017 comme un sujet important, en promettant de publier des recherches sur le sujet. La vaste consultation sur le « consentement » ainsi que les documents afférents est d'ailleurs une belle initiative en ce sens. Toutefois, pour l'heure, il ne semble y avoir aucune proposition concrète pour adapter nos lois sur la protection des renseignements personnels à l'IA…

Et puis ? Le futur étant maintenant, 2018 devra être le point de rencontre entre IA et vie privée. En effet, tant sur le plan provincial que fédéral, aussi bien pour les organismes publics que pour les

entreprises privées, on ne peut qu'exhorter à de vastes consultations sur l'IA et la réévaluation des lois sur la protection des renseignements personnels. L'idée ne serait pas tant de « parler pour parler », encore moins de « changer pour changer », mais bien d'amorcer une réflexion mature sur la relation entre IA et renseignements personnels. À nos yeux, la priorité pour 2018.

Antoine Guilmain, Barreau 2016, est membre du groupe Protection de l'information et de la vie privée. Antoine Aylwin, Barreau 2003, est associé et sa pratique est axée sur le litige successoral et fiduciaire, l'accès à l'information et la protection des renseignements personnels. Karl Delwaide, Barreau 1979, est associé et conseille des entreprises privées et des organismes publics, et les représente dans ces domaines, devant la Commission d'accès à l'information du Québec et d'autres tribunaux, y compris la Cour fédérale.

Former top judge Beverley McLachlin to become published novelist in May
Debut novel focuses on defence attorney trying to unravel secrets around high-profile murder
The Canadian Press
CBC News
January 9, 2018

She may be hanging up her robes, but Beverley McLachlin isn't leaving the courtroom behind.
A legal thriller by the recently retired chief justice of the Supreme Court of Canada will be published May 1st.
Simon & Schuster Canada says the debut novel, entitled Full Disclosure, is about a defence attorney who tries to unravel a web of secrets around the murder of a wealthy man's wife.

In the potboiler, tough-as-nails Jilly Truitt agrees to defend "affluent and enigmatic" Vincent Trussardi despite concerns the case is a sure loser and warnings to stay away from his family.
Word emerged last year that the publisher would release McLachlin's first book, but there were few details.

In a statement today, McLachlin says the tale of lawyers, private eyes and informants grew out of her lifelong experience with the criminal justice system, which includes 28 years on the Supreme Court.
Although McLachlin retired from the high court last month, she will continue to have input into judgments on cases she has heard, as long as they are released by June 15.

Medical, dental benefits 'interrupted' as problems persist for Phoenix pay system
The short-term denial of medical and dental benefits is just one of the latest issues many federal employees are struggling with.
Terry Pedwell
The Canadian Press
January 9, 2018

A trip to the dentist has resulted in more than just a sore tooth for hundreds of federal civil servants caught up in the ongoing battle with the problem-plagued Phoenix pay system, federal officials say.

The short-term denial of medical and dental benefits is just one of the latest issues many federal employees are struggling with as problems with the pay system persist.

Public Services and Procurement Canada had initially said in mid-December that the issue of civil servants being denied benefit coverage as a result of incorrect paycheques was not widespread.

The department has since revealed that hundreds of government employees whose work terms were extended could have been denied benefits or experienced processing delays.

“We did identify approximately 530 term employees whose work term had been extended and who may have had their coverage interrupted because of processing delays,” Public Services spokeswoman Michele LaRose said in an email.

The department maintains, however, that the problem isn’t far reaching, and that the issues that caused the benefit cut-offs in the first place have been resolved.

“There is no generalized problem with group benefit coverage,” LaRose said. “This situation has since been resolved and processes have been modified in order to mitigate any further issues.”

In the meantime, any employees who have had claims for dental or medical expenses rejected, or new employees whose group insurance benefits haven’t yet kicked in, can submit claims retroactively “once their pay situations are resolved,” the department said.

For those who’ve had to borrow to pay for medical or dental coverage, the government said they can claim the interest on those loans and will be reimbursed.

The auditor general reported in November that more than 150,000 civil servants — about half of the people employed by government departments and agencies — had experienced pay problems since early 2016, ranging from being overpaid to underpaid or not paid at all — in some cases for months.

During that time, the backlog of problem files has swelled to nearly 620,000, prompting suggestions that a permanent, lasting fix could take years and cost taxpayers $1 billion or more.

Public Services has also revised how it collects money overpaid to civil servants as tax filing time approaches.

In a statement Monday, the department said employees who were paid too much in 2017 will have until the end of January to report the overpayments to Phoenix administrators.

Those employees will then only have to repay the net amount of overpayments they received, which do not include taxes and other deductions from the overpaid amounts, according to the new guidelines.

But civil servants who miss the Jan. 31 deadline will have to pay back the gross amount, including the deducted amounts they never actually received.

"If the overpayment was not recorded in Phoenix before the end of January 2018, the original tax slips for 2017 will reflect the overpaid earnings and associated deductions," said the department.

"An amended tax slip will be produced for you."

The Public Service Alliance of Canada, which represents most federal employees, called the deadline a disappointing "half measure."

The union has demanded that the government only recover the net overpayments that were made to employees through Phoenix.

Some retired civil servants also say they aren't able to calculate how much they've been overpaid since they lost access to the government's pay website when they left the government.

Trop stressés, les avocats?
Droit Inc
Jean-François Parent
9 janvier 2018

Selon un récent sondage réalisé par le recruteur Robert Half Legal, le tiers des avocats canadiens interrogés citent la réduction du stress comme priorité pour augmenter leur satisfaction professionnelle.

Dans un coup de sonde auprès de 150 avocats canadiens, les spécialistes de la dotation juridique voient dans la gestion du stress en milieu de travail l'un des outils de rétention les plus efficaces.

Le sondage, qui n'a aucune prétention scientifique, relève l'importance de prendre du temps pour soi afin de réduire le stress professionnel. « Plus de la moitié des avocats disent que l'activité physique est la meilleure façon de réduire le stress », écrit Robert Half Legal dans le communiqué annonçant les résultats du sondage.

Prendre une pause arrive bon deuxième, avec 21 % des intéressés disant y trouver un facteur de réduction du stress.

Ce sondage a été réalisé dans la foulée de l'étude Bonheur au travail, de Robert Half Legal, où le recruteur explore les facteurs de satisfaction professionnelle.

Lorsqu'on leur demande le changement qu'ils prioriseraient dans leur leur carrière, le tiers des répondants dit vouloir réduire le stress. Quant aux perspectives d'avancement, c'est un changement prioritaire pour 23 % des avocats, tandis que 18 % citent plutôt une augmentation du temps personnel ou la diminution des heures de travail.

« Le stress omniprésent et les longues heures peut mener au départ d'employés et à une baisse de productivité », selon la directrice principale de Robert Half Legal, Jamy Sullivan. Pour la rétention des

talents et répondre aux doléances des avocats surmenés, les employeurs du milieu juridique offrent des horaires flexibles, des journées de congé additionnelles et le télétravail, observe-t-il.

Des abonnements au gym, des services de garderie et des repas font partie des avantages sociaux de certaines firmes souhaitant réduire les facteurs de stress de leurs avocats.

Dans l'étude portant sur le bonheur en milieu de travail, on relate que la profession juridique est celle où la reconnaissance est le plus important facteur dans la satisfaction professionnelle.

La fierté tirée de l'organisation et du travail, ainsi que d'être bien traité sont les seconds piliers de la satisfaction professionnelle chez les avocats.

Parmi les huit professions sous étude, le milieu juridique est celui comptant le plus grand nombre de praticiens surmenés.

On the Reasonableness of Reasons: Association of Justice Counsel v Canada
TheCourt.ca
Bailey Fox
January 10, 2018

In Association of Justice Counsel v Canada (Attorney General), 2017 SCC 55 [Association of Justice Counsel] the Supreme Court of Canada (SCC) elaborated on the relationship between the provisions of reasons and the reasonableness standard of review.

As Dunsmuir v New Brunswick, [2008] 1 SCR 190 [Dunsmuir] and ensuing Supreme Court decisions have established, there is now an almost universal standard of reasonableness when reviewing administrative decisions. This standard asks whether the administrative decision is one falling within a reasonable range of possible interpretations and does not necessarily distinguish between facts and law. However, the reasonableness standard of review is not necessarily correlated with the provision of reasons or perhaps even the reasonableness of those reasons (to the extent the reason can be considered independently of the result). In Association of Justice Counsel, the SCC grappled with the relationship between the reasonableness standard and the provision of reasons.

The case arose out of a labour dispute between Immigration Law Directorate counsel and the Department of Justice. In the 1990s, the office had established a system where lawyers would volunteer for “standby shift” during evenings and weekends to respond to emergency calls. Lawyers were compensated with paid leave irrespective of whether they were actually called into work. After completing a collective bargaining agreement in 2009 that made more lawyers eligible for overtime pay, management changed the standby program so that lawyers would only be compensated if they actually worked while on standby. This change in policy meant that lawyers stopped volunteering for standby shifts. The lack of volunteers further led to the employer issuing a directive that all lawyers must be available for standby shifts one to three times a year.

This mandatory directive was what was at issue in the case. While the collective bargaining agreement was silent on the issue, section 5.01 of the agreement is a "management rights" clause, one that reserves any residual powers not allocated in the agreement with the employer. Section 5.02, however, constrains management's power since it requires the employer to act reasonably and in good faith. The question at arbitration was whether the unilateral directive issued pursuant to section 5.01 violated section 5.02 in that it was unreasonable and unfair.

At Public Service Labour Relations and Employment Board (PSLREB) arbitration, the adjudicator recognized the Department of Justice's need for a standby system where lawyers would be available to respond to emergencies. However, the arbitrator found that the imposing standby duty was unfair and unreasonable and that it further infringed the lawyers' Section 7 Charter right to liberty. The employer appealed this finding to the Federal Court of Appeal (FCA), where Justice de Montigny set aside the adjudicator's directive and returned the grievance to the PSLREB. The FCA included in its instructions to the PSLREB that the board should consider the directive fair and reasonable and it should not find a Section 7 Charter infringement.

The Supreme Court addressed a few issues in its analysis and reasons regarding the relationship between administrative decision making and judicial review. While the primary issue was the reasonableness of the decision, the Court also addressed the role of the adjudicator and the relationship between justification and outcome under a review for reasonableness. Notably, Justice Karakatsanis for the majority of the Court assessed the outcome and the justifications separately, finding that both fall within the scope of "reasonable." In arriving at the decision, the adjudicator considered the facts and the context, meaning the particularities of the collective agreement and the policy change. Although she analyzed the reasons separately from the outcome, Justice Karakatsanis applied Newfoundland and Labrador Nurses Union v Newfoundland and Labrador, [2011] 3 SCR 708, which holds that reasons should be assessed as part of the holistic assessment of a substantive outcome. In other words, unreasonable reasons that meet the Dunsmuir indicia of justification, intelligibility, and transparency (Dunsmuir, para 47) will likely not invalidate a decision falling within a reasonable range of outcomes. Justice Karakatsanis rejected the Department of Justice's claim that the adjudicator's reasons were unreasonable, even though she also rejected the adjudicator's finding of a Section 7 infringement. In concluding that the decision would have been the same regardless of the Section 7 analysis, the adjudicator's original decision stands as reasonable.

The dissent, however, scrutinizes the reasons provided in more detail, in effect narrowing the scope of a reasonable or defensible outcome. Justice Côté, also relying on Dunsmuir, found that the adjudicator erred in both fact and law. The errors mean that the adjudicator's decision is not one that could fall within a range of possible acceptable outcomes and therefore, the issue should be remitted to the adjudicator.

This case is significant not so much in its application of the standard of review but more so in its discussion of two issues: first: the relationship between reviewing courts and front-line administrative adjudicators; and second: the interaction between reasonableness review and reasons.

Both the majority and dissent reject the FCA's instruction to future adjudicators as to how to decide the case. Both agree that the "balancing of interests" test developed in the jurisprudence is the proper legal test to be determined by the adjudicator. To override the adjudicator's decision and instruct future adjudicators how to decide the case, the Court held, is to effectively impose the FCA's legal analysis over the PSLREB's. This type of instruction seems to me as exceeding the bounds of reasonableness review and perhaps even entering correctness territory. The majority maintains the distinction between administrative decision making and administrative review, and adds a reminder of the important role of expertise in structuring the administrative review process (para 47). Deference is an essential element of administrative review not simply out of respect for statutory schemes but because of the assumption that local, expert decision makers (in this case labour arbitrators) are best suited to interpret collective agreements. Maintaining such a division of roles – first line, context specific adjudication versus review on a standard of reasonableness – is essential for the functioning of labour schemes and administrative law as a whole.

Association of Justice Counsel is also a reminder of the different role reasons play in administrative law. Procedural fairness, of course, is reviewed on a standard of correctness. Depending on the nature of the decision, a lack of justification may invalidate the decision, irrespective of the outcome. So the existence of reasons, or lack thereof, is a powerful indicator of the fairness and the process' validity. Conversely, when reviewing the outcome of a decision, the provision and content of reasons may assist in determining whether the decision was reasonable but reasons are neither essential nor determinative. Justice Côté's review of the adjudicator's language in dissent and the near absence of a similar analysis in the majority's opinion demonstrates just how much deference is accorded to front-line decision makers and their reasons under a reasonableness standard. The dissent uses weaknesses in the reasons to conclude that the outcome is unreasonable. The majority finds the outcome reasonable and potential weaknesses in the reasons insignificant since these problems would not have changed the outcome. This is in direct contrast to the importance of reasons when reviewing courts consider procedural fairness. So even though the lack of reasons can invalidate a decision on procedural fairness grounds, Association of Justice Counsel enforces the insignificance of provided reasons when reviewing the outcome of the decision.

This case is significant in that it reinforces a wide scope for the reasonableness standard. The decision further emphasizes that the front-line adjudicator's task is one of contextual balancing of interests. Association of Justice Counsel reminds practitioners and students of the limited utility of reasons when reviewing the outcome of the decision and the importance of expertise in administrative decision making, especially in the labour context.

Canada worked with India in attempt to 'secretly' extradite honour killing suspects: defence lawyers
New documents outline how Badesha and Sidhu were 'clandestinely' moved from Vancouver to Toronto in the 'dead of night' before their lawyers intervened
National Post
Douglas Quan
January 10, 2018

The Canadian government “secretly” conspired last fall with India to whisk away two B.C. residents accused in an alleged overseas honour killing before their legal options had been exhausted and without regard for new evidence, their lawyers allege in court filings.

The documents obtained by the National Post outline for the first time details of how the accused pair were awoken in the “dead of night” and transported from Vancouver to Toronto without their lawyers’ knowledge and the feverish steps their lawyers later took to halt their extradition.

What transpired last September amounted to a clear “abuse of process,” their lawyers allege in the B.C. Court of Appeal filings dated Dec. 15.

Police in India allege Surjit Singh Badesha and his sister, Malkit Kaur Sidhu, Canadian citizens living in the Vancouver area, ordered the killing of Sidhu’s daughter, Jaswinder Sidhu, after she had secretly married Sukhwinder Singh Sidhu, a rickshaw driver, instead of a wealthier older man who had been chosen for her.

The couple were attacked by armed men in 2000 in the Punjab region of India. Jaswinder Sidhu’s body was found the next day, her throat slit. Her husband was badly beaten.

A B.C. trial court judge approved the pair’s extradition in 2014, but the decision was overturned on appeal. Last September, the Supreme Court of Canada ruled the extradition could go ahead, citing assurances the federal government had received that the pair would not be mistreated.

But prior to the top court decision, lawyers for the accused presented the Justice Department with evidence they said raised fresh concerns about mistreatment and torture of prisoners in India.

Included in the evidence were affidavits from various people who had been held in custody in India, including two other co-accused from the same case.

“Both of these affidavits disclose what can only be described as shocking prison conditions,” Michael Klein, Badesha’s lawyer, wrote to the department.

One affidavit described the presence of flies and mosquitoes in the jails and the ease with which disease could spread. Another affidavit stated that whenever a prisoner falls sick, “there is no arrangement of doctors and the sick persons (sic) dies.”

But on Sept. 20, before the justice minister had rendered a decision on that new information, the accused were transferred to the Vancouver International Airport, their lawyers say.

Badesha says in an affidavit he was approached by guards at the North Fraser Pretrial Centre at 5:30 a.m. and told to get ready to be moved.

“I thought I was going to be moved to another unit within the institution, but then the guards said to put all my belongings into a bag, including bed sheets, pillows and laundry,” he said.

Liberal government looks to update fight against online child porn
Report says software could spare RCMP officers from trauma of search for online child sexploitation images
CBC News
Dean Beeby
January 10, 2018

With online child sexploitation growing "exponentially," the Liberal government is looking at developing artificial intelligence (AI) programs to help relieve officers traumatized by scanning the web for gruesome images of child-porn.

Public Safety officials are also considering new legislation to require all communications providers — such as website owners, not just Internet Service Providers (ISPs) — to report child pornography when they spot it.

The proposed measures are outlined in a memo for Public Safety Minister Ralph Goodale, which also calls for more resources for law enforcement, including better training for Crown counsel and judges.

"Greater investments in technological tools and innovative approaches are needed to better allow industry and law enforcement to respond to the exponential growth in online CSE [child sexual exploitation] material, the growing use of the dark web, and ever-changing encryption methods," says the July 18 memo.

"This could include investments in artificial intelligence to improve the speed with which online CSE material is identified, and incentives for industry to put in place anti-online CSE measures."

"A greater reliance on technology to detect and categorize CSEM [child sexual exploitation material] would also have the benefit of decreasing officer exposure to this material, which can seriously impact personal health and well-being."

CBC News obtained a copy of the memo under the Access to Information Act.

The document summarizes consultations with interested parties, including industry, prosecutors, police and others, on how to update a 2004 federal initiative. The National Strategy for the Protection of Children from Sexual Exploitation on the Internet is currently funded at more than $15 million annually.

Much has changed since 2004, including:

The rise of "sexting" — the sharing sexually explicit images online.
"Sextortion" — coercing images from young people.
Live streaming of child sexual abuse.
Web services such as Snapchat, which can be abused to lure children.
The memo says the Spencer decision, a 2014 Supreme Court ruling that ended the ability of police to demand basic subscriber information from ISPs without a formal production order approved by a judge, has "impeded" child-porn investigations.

And it says investigators remain hampered by legal impediments preventing police from accessing password-protected information on laptops and other devices they seize from suspects.

Further, the document notes the Criminal Code prevents industry, academics or non-government organizations from accessing or possessing CSE material that would help them create sophisticated software that can keep up with child-porn innovations.

"The inability to use CSE material in computer learning/artificial intelligence development limits the effectiveness of such technology in detecting and categorizing CSE material," says the memo.

"Addressing these issues would require legislative changes."

RCMP spokesperson Sgt. Harold Pfleiderer said the Mounties themselves do have the ability to access the unsavoury material for research, testing and development of artificial intelligence and computer-learning programs, often in partnership with outside groups in industry and elsewhere.

He also confirmed that post-Spencer rules, requiring police to apply for judicially authorized production orders, have slowed down investigations "significantly."

"Most ISPs are taking at least 30 days to respond to these judicial orders and in some cases, much longer (60-90 days)," Pfleiderer said in an email.

The Mounties' Ottawa-based National Child Exploitation Co-ordination Centre has seen huge increases in tips and requests for assistance in recent years. In 2016-2017, the centre handled 33,256 such items, a 93 per cent rise over the previous year — partly a reflection of the massive global increase in child porn online as well as greater vigilance by the public and others.

At the same time, the centre has seen just two positions added to its ranks in the last five years, now with 55 staff, and its budget holding steady at about $6 million annually over the same period, said Pfleiderer.

Budget 2017 added $1 million
The Liberals' 2017 budget promised Public Safety an additional $1 million annually to fight online child sexploitation. Almost all that extra money is going to the Canadian Centre for Child Protection (formerly

Child Find Manitoba) in Winnipeg, which runs cybertip.ca — a website that allows Canadians to report online child sexual exploitation images.

A spokesperson for Goodale declined to say when or in what ways the government plans to respond to the recommendations in the memo.

"Work is underway to modernize the National Strategy for the Protection of Children from Sexual Exploitation," said press secretary Scott Bardsley.

"The Government of Canada is committed to keeping Canadians safe while respecting their rights and freedoms."

Bardsley also noted that Project Arachnid, developed through the Canadian Centre for Child Protection, is being improved to help industry purge more child-porn from websites.

The software "crawls" links on websites that have been previously reported to cybertip.ca, to identify child sexploitation images and, if found, to request the provider hosting the site to remove them. Bardsley said the project has resulted in about 700 removal notices to providers each day.

Justice reform consultations ask Canadians to think beyond law-and-order
CTV News
Joanna Smith
The Canadian Press
January 10, 2018

The Justice Department is asking Canadians to think beyond their preconceived notions about crimes - and the people who commit them - as the Liberal government readies long-promised reforms to the criminal justice system.

The interactive online consultation includes a survey asking participants to weigh in on a number of stories, such as one about a young single father caught stealing $800 from his employer, resulting in a criminal record that makes it harder for him to find a job.

The survey notes that theft under $5,000 makes up a quarter of all Criminal Code offences and asks participants to consider whether the judge should have considered other options, such as a requirement to repay the money or attend a community-based program where the young man would get support.

Throughout the exercise, there are statistics and other details meant to deepen understanding of the issues being addressed.

That includes the fact administration of justice violations - such as someone drinking or breaking curfew while on probation - make up 23 per cent of all cases in criminal court, or that the crime rate in Canada has been generally on the decline for decades.

Carissima Mathen, a University of Ottawa law professor, said the consultation could help to educate the public while at the same time preparing them for potentially controversial criminal justice reforms on the horizon.

"I think it is useful for any government to have a sense of where the real sites of public resistance or apprehension are in criminal justice policy," said Mathen.

She said Liberal government has made it clear they are planning a different approach than the tough-on-crime agenda the previous Conservative government brought in - despite repeatedly pushing back the timeline for action - but that could come with its own challenges.

"I think (the Liberals) know very well that public opinion can be whipped up to support that in ways that don't actually comport with the evidence of crime in Canada," she said.

Another section of the consultation lets Canadians watch a video of a real-life personal story, such as a family affected by court delays following the homicide of their son, or the victim of an alleged sexual assault who found the experience of going to trial so difficult she would warn others against it.

Canadians can then take part in an open online discussion, where the opinions are wide-ranging and a government moderator can step in to ask a contributor to point to any research they are aware of to back up their assertions, such as the claim that many make false accusations.

Steve Mihorean, the senior civil servant overseeing the review, said the department wanted to allow people to share their perspectives on these issues while also arming them with knowledge that might not be as widely known by average Canadians.

"I'm just of the view to say, be open about those questions to the public, tell them what the challenges are, give them a bit of information, let them go away on their own and think about it," said Mihorean, director general of the criminal justice system review secretariat at the Justice Department.

Ottawa-based criminal defence lawyer Michael Spratt said he is concerned the additional consultations with the public, instead of relying on evidence-based research that has been around for years, could lead to more delays.

"The closer that we get to an election, the more worried I am that we actually won't see anything," he said.

The online consultation, which Mihorean said has so far seen about 4,800 people take part in the survey element, ends Jan. 31.

Report obtained by CTV News shows lack of confidence in military justice system
CTV News
Mercedes Stephenson
January 10, 2018

The military justice system, operated by the Canadian Armed Forces, is where troops are supposed to find justice, but an internal report obtained exclusively by CTV News reveals a lack of confidence that extends to the highest levels.

Ordered in May 2016, the 560-page draft document titled "Court Martial Comprehensive Review Interim Report" was completed in July 2017 but it still has not been released to the public.

Senior commanders have criticized the military justice system for being slow, light on punishment, and failing to protect victims' rights.

The head of Canada's special operations forces, Maj. Gen. Mike Rouleau, who has had first-hand experience with the military justice system, called it "intolerably slow," and Canada's most elite operators raised concerns that the system is run by officers (lawyers and judges) with no combat experience.

Other senior military commanders said the system is "broken" and often hands down "lenient" sentences for those convicted.

Sailors on one Canadian ship noted that the court martial process is seen among the ranks as "a way to escape the consequences of misconduct."

The report also outlined concerns about the speed of military justice. It takes, on average, 434 days from when charges are laid to completion of the court martial, compared to the median 112 days from first appearance to completion of the trial in civilian criminal cases.

One alleged victim of sexual assault says she has been waiting nearly two years since charges were laid against the man she says attacked her for him to appear in court.

"I felt like I've been failed by the system, they forgot about me. I felt like I'm not important in that process, there was nothing that was geared towards helping me… and knowing that it's so long, you can never move on," she told CTV News.

Another issue raised in the report is the cost of the military justice system. Calculations in the report show that the cost of conducting a trial within the current court martial system is approximately 30 times more expensive than conducting a trial in civilian criminal courts.

Some senior military brass told the report's authors they believed some serious offenses would be better handled in the civilian justice system.

Canada should work to arrest Iranian official hospitalized in Germany, says lawyer
CBC News
January 10, 2018

A powerful Iranian political figure is in Germany for medical treatment — and human rights activists are say this is Canada's opportunity to bring him to justice.

The Ayatollah Mahmoud Hashemi Shahroudi was Iran's Chief Justice from 1999 to 2009.

More than 2,000 people are known to have died in Iranian custody under his watch, including Canadian-Iranian Zahra Kazemi, who was tortured and killed in Evin prison in 2003.

The ayatollah is already facing a political complaint from German politician Volker Beck, a former Green Party MP.

Canadian human rights lawyer Payam Akhavan is urging Canada to step in too.

"I think that Canada should be requesting the German authorities to detain Mr Shahroudi," Akhavan, a former UN prosecutor, tells The Current's Anna Maria Tremonti.

"And we should be sending some Canadian officials to Hanover, Germany to question him, because he knows exactly what happened with the murder of Zahra Kazemi at the hands of his direct subordinate… I think the Canadian government has a duty to pursue this matter."

Akhavan has been working with Iranian NGOs putting together evidence against Ayatollah Shahroudi.

"There has been a widespread systematic policy of serious human rights abuse under his watch," says Akhavan. "Under international law, someone such as Mr Shahroudi bears responsibility for what amounts to crimes against humanity."

Like Canada, Germany has universal jurisdiction crimes. This means charges can be pressed no matter where the crimes were committed — and crimes against humanity fall into that category.

Akhavan also hopes this situation could send a wider message to those accused of crimes against humanity in their own countries.

"Part of the effort to bring such perpetrators to justice is to send a message to them that they're not safe if they leave their country in which they hold power, that they will be pursued," says Akhavan.

He hopes the Canadian government will pursue Ayatollah Shahroudi. The Current contacted Global Affairs Canada — they said they were not ready to comment on this case yet.
"It would be very unfortunate and it would send the wrong signals if the Canadian government doesn't act," says Akhavan. "It would send a signal that we really don't care about the brutal rape, torture and murder of a Canadian citizen."

'Common-sense' demands: unions want Tax Act exemption, more staff to deal with Phoenix

It may be a new year, but the two largest federal public service unions continue to fight the Phoenix pay system woes.

Hill Times

Emily Haws

January 10, 2018

Imagine someone gives you $30, but you only see $20 of it because of extenuating circumstances. Then they want $30 back, leaving you with $10 less than you started with.

On a much larger scale this is what public service employees are experiencing as a result of the troubled Phoenix pay system, which has left many of the government's 300,000 workers overpaid, underpaid, or not paid at all.

According to federal law, if an overpayment is given back within the tax year it was issued, only the net payment (what was received after deductions) needs to be repaid. If it is in a different tax year, which is now any public servant who was overpaid in 2017, then they owe the gross overpayment. The overpayments would be worked out come tax time, but in the meantime it could leave public servants thousands of dollars in the hole.

The overpayment issues is just one of five Phoenix-related focuses of the Public Service Alliance of Canada—the 180,000-member federal public service union—for 2018.

"[The demands are] all very common-sense in my mind, but I don't know for sure [inside] the government," PSAC national president Robyn Benson told The Hill Times in late December.

Employees experiencing overpayments must report them by Jan. 19 so the government will only take back the net amount. PSAC considers this a half-step to solving the issue.

Ms. Benson, formerly of the Canada Revenue Agency, said the government should change the Tax Act to allow an exemption for public servants to pay back the net amount at any time once they've reached "steady state," which is the government term for people being paid properly, on time.

Nicolas Boucher, media relations officer for Public Services and Procurement Canada (PSPC), said it will not begin recovering overpayments until after employees have received their returns, which allows the government to first adjust tax accounts to take into consideration the deductions it's owed.

"Employees who are in an overpayment situation will be notified and will be given options to repay the government through a lump sum or instalments, by cheque or payroll deduction," he said in an emailed statement.

The government's latest numbers indicated there were 27,000 overpayment open cases as of August 2017, but unions said there are likely more.

“We acknowledge that many employees have been waiting for their transactions to be processed,” said Mr. Boucher. “This is completely unacceptable.”

Along with addressing overpayment recovery, PSAC is asking the government to recognize that employees are owed damages due to Phoenix, dedicate staff to helping decipher members’ pay and figure out what they are owed, and stop the recoveries of emergency salary advances until everyone has reached a steady state.

PSAC also wants to increase the number of compensation advisers in both the Public Service Pay Centre, the central office that processes most employees’ pay stubs, and in government departments. The Pay Transformation Project, which started in 2009, included two parts: configuring off-the-shelf payroll software to government systems, known as Phoenix, and moving compensation advisers generally found in the National Capital Region to Miramichi, N.B., known as the Public Service Pay Centre.

Meanwhile, the Professional Institute of the Public Service of Canada (PIPSC), which represents over 57,000 federal professionals and scientists, will continue its quest to convince the government to let its members build an alternative pay system. President Debi Daviau told The Hill Times PIPSC also supports PSAC’s initiatives.

“We’re hopeful that the government is looking at [the alternative system] based on the comments we’ve had from PSPC,” she said, adding officials said they are not married to the system.

Launched in February 2016, the Phoenix pay system was supposed to save the government about $70-million annually, but so far the Liberals have sunk about $400-million into fixing it. Despite the expense there looks to be no end in sight, with auditor general Michael Ferguson predicting in his fall report on Phoenix it will cost far more than the $540-million the government plans to spend.

There are a total of 589,000 open cases, referred to as “transactions,” waiting to be processed at the Miramichi Pay Centre, according to the latest “dashboard” update, which tracks the backlog. This includes 415,000 cases with financial impact, and 54,000 collective agreement implementation cases, as well as several thousand others. One person may have more than one case.

More than half of public servants have experienced some sort of pay issue, according an October dashboard update.

“There [are] … those who want to retire and unable to retire because they can’t figure out if they’ve got the accurate monies in there,” said Ms. Benson.
If an employee is underpaid and in financial need, the government has set up a program so they can get emergency salary advances. This program is not working sufficiently, said Ms. Benson, because the government is asking for the repayment too soon.

“When the emergency payment is given, it’s collected off the first available monies,” said Ms. Benson. “What we’re saying to government is you need to wait until everyone is at the steady state.”

If someone is given an advance, it is collected off the next paycheque, said Ms. Benson, meaning "you don't get the cheque you should have gotten—they'll take that cheque, that second payday, take that money from you so you're sitting with nothing."

PSAC has long said the government needs to increase capacity to effectively deal with the backlog.

The union wants more bodies specifically to help public servants determine whether money is owed to them by examining their paycheques, which changed under the Phoenix system.

"Because there has been so much in terms of the up and downs, the no payments, some payments, and the way that the new paystub looks, there is no way for you to figure it out accurately," Ms. Benson said.

Mr. Boucher said approximately 380 employees have been hired in the last six months, mainly to process pay transactions and implement collective agreements. Another 300 employees are expected to start at the pay centre this month to further increase pay processing capacity.

"[In February 2016] there were 550 compensation staff at the pay centre," he said. "As of today, there are 1,203 employees working at the pay centre in Miramichi and in satellite and remote offices supporting government pay activities across the country."

"People power" as Ms. Benson calls it, can only go so far, as the system itself needs fixing. Up to 60 PIPSC members are working on solving the reported 1,000 computer bugs along with other IT staff, but the union said there has been too much system patchwork done to be stabilized and eventually upgraded.

"What my members are telling me is that it's not fixable, it's too far gone," Ms. Daviau said, meaning they are continuing push for an alternative system developed by federal IT workers.

The new system would be built while Phoenix is still running, and then eventually switched over, which Mr. Ferguson said he doesn't believe is a viable option.

Ms. Daviau noted she feels Treasury Board is a partner in solving Phoenix, as it advocated for unions to be present. With PSPC, she said it's "kind of like they're still protecting their turf a bit."

Mr. Boucher said the government "is committed to stabilizing the pay system and is exploring longer-term options to ensure we have a sustainable, reliable and efficient pay system." He also pointed out the measures taken already to stabilize the system, such as conducting a third-party, independent study.

Lac-Mégantic : une preuve faible, dit le juge
Le magistrat est connu pour son franc-parler et ses déclarations parfois colorées
Radio-Canada
11 janvier 2018

« Je suis conscient de la faiblesse de la preuve, mais il ne m'appartient pas de l'évaluer. Cette tâche revient au jury », a affirmé le juge de la Cour supérieure Gaétan Dumas. Il a d'ailleurs fait des reproches à la Couronne à plusieurs reprises lors de discussions qui ont eu lieu hors jury.

Au procès de Thomas Harding, Jean Demaître et Richard Labrie, accusés de négligence criminelle causant la mort des 47 victimes de la tragédie de Lac-Mégantic, tous les échanges qui se sont déroulés en salle de cour sans la présence des 14 jurés n'ont pas pu être dévoilés publiquement. Maintenant que le jury est isolé pour les délibérations, il est possible de le faire.

Deux avocats ont demandé au juge d'acquitter leur client

Tout au long du procès, la poursuite a tenté de démontrer que, en tant que superviseurs, Jean Demaître et Richard Labrie n'ont pas respecté leur devoir. « Leur échec à prendre les mesures appropriées pour empêcher le mouvement du train est une cause significative du déraillement », a exprimé la procureure aux poursuites criminelles et pénales Véronique Beauchamp.

Or, après l'audition des 31 témoins de la poursuite, les avocats de l'ancien directeur de l'exploitation de la MMA au Québec, Jean Demaître, et du contrôleur de la circulation ferroviaire, Richard Labrie, ont considéré que la preuve présentée ne permettait aucunement d'établir la culpabilité de leur client. C'est pour cette raison qu'ils ont déposé le 11 décembre des requêtes pour un verdict dirigé d'acquittement. Selon Me Guy Poupart et Me Gaétan Bourassa, un jury bien instruit en droit ne pouvait raisonnablement aboutir à des verdicts de culpabilité.

Après avoir entendu les parties, le juge a rejeté les requêtes. Toutefois, il a reconnu « la faiblesse de la preuve ». « Il n'appartient pas au juge du procès d'évaluer la qualité de la preuve. (...) Cette tâche revient au jury », a-t-il précisé.

Le tribunal, « l'arracheur de dents »
Le juge Gaétan Dumas est connu pour son franc-parler et ses déclarations parfois colorées. Après que la poursuite eut annoncé que sa preuve était close, les avocats au dossier devaient s'entendre sur différents points de droit avant de commencer les plaidoiries. Pendant ces discussions hors jury, le juge s'est montré quelques fois impatient, particulièrement envers la poursuite.

Me Véronique Beauchamp a répliqué du tac au tac qu'elle et ses collègues pouvaient assurément fournir toutes les réponses à ses questions.

Le juge a répondu : « Le tribunal a l'impression depuis le début de ce dossier d'agir comme un arracheur de dents, alors que ce n'est pas son rôle. » Gaétan Dumas a renchéri en affirmant qu'il a été très difficile d'obtenir une théorie de la cause. « Ça a eu l'air de faire très mal d'arracher ça », a-t-il dit.

À titre d'exemple, le juge a mentionné qu'aucun témoin n'a pu expliquer la cause de l'incendie qui s'est déclaré dans la locomotive de tête du convoi de pétrole brut moins de deux heures avant que le train ne parte à la dérive. « Le rôle du jury n'est pas de jouer au sorcier et de savoir ce qui a causé le feu. »

Rappelons que la poursuite a notamment reproché à Jean Demaître de n'avoir pris aucune mesure lorsqu'il a été informé qu'une défectuosité touchait cette même locomotive quelques heures avant que le train quitte Farnham vers Nantes le 5 juillet 2013. La locomotive produisait beaucoup de fumée lorsque Thomas Harding a immobilisé le train sur la voie principale à Nantes.

« Si vous essayez de dire (au jury) que le fait de changer la locomotive aurait évité l'accident... C'est pas ça qui a causé l'accident », a dit le juge. « La mère de M. Demaître n'est pas accusée! Si elle ne l'avait pas mis au monde, ce ne serait pas arrivé », a-t-il poursuivi. Son ton empreint de sarcasme laissait entendre qu'à ses yeux le lien annoncé par la poursuite dès le début du procès ne tient pas la route.

Une fois le jury mis en isolement pour les délibérations mercredi, le juge a cependant lancé un message pour souligner le professionnalisme des avocats au dossier tout au long des procédures, autant de la Couronne que de la défense.

Government workers angry, frustrated, as they try to report Phoenix overpayments
CTV News
Terry Pedwell
The Canadian Press
January 11, 2018

Federal government workers who've been overpaid through the troubled Phoenix pay system are voicing frustration with a plan to report the overpayments in order to avoid costly tax implications.

Public Services and Procurement Canada has given civil servants until Jan. 19 to declare overpayments so the pay centre can register the amounts in the Phoenix system by Jan. 31.

Under the plan, employees who report by the deadline will only have to pay the net amount they received.

Those who don't declare the overpayment on time will have to repay the gross overpayment, including tax and other deducted amounts that they never actually received, which for some could add up to thousands of dollars.

But many of those civil servants have complained of busy signals or being put on hold indefinitely when calling the Phoenix pay centre.

One woman, who identified herself as Jo JJ, posted a video on YouTube Wednesday of her trying to call the centre to report what she described as a "small overpayment" that predated the 2017 tax year.

"I've been trying to call this number for days -- about a week already," she said, holding her cellphone's speaker to the camera as it beeped.

"As you can hear, it just gets a busy tone and it just hangs up. You can't even get through to a voice mail, can't leave a message, nothing."

Public Services acknowledged the centre is experiencing higher-than-normal call volumes as the deadline approaches and recommends employees fill out an online form instead.

Other civil servants complained that deductions were already being taken from their paycheques for overpayments, even if they didn't receive any extra pay or had already paid money back.

"I can't get an explanation why they are taking the money or how much they think I owe," Lindsey Welsh wrote in a Facebook message.

"I am a single mom so if I had received any extra monies I would definitely notice."

More than half of all federal civil servants -- about 180,000 workers -- have reported being overpaid, underpaid or not paid at all since the Phoenix pay system went live nearly two years ago.

But those receiving overpayments have been treated as a low priority as the government struggles to ensure employees who are underpaid or not paid get the money they earned.

In some cases, public servants who have moved to jobs in a higher classification have been paid two salaries. Others who have retired continued to receive paycheques after leaving government while some received double severance payments.

Public Services was unable to provide a tally Thursday of the number of civil servants who have received overpayments to date, but reports last year indicated the figure was in the tens of thousands by summer.

A report by the auditor general released in November indicated that, as of June 2017, 59,000 employees owed the government a total of $295 million as a result of overpayments. Another 51,000 employees who were underpaid were owed $228 million at that time, the report said.

Shortly after she retired from the former Industry Canada in May 2016, and again several months later, Ann Speers received overpayments and spent countless hours trying to give the money back.

She and the government finally settled on an amount owed and Speers paid it. But in August, when she contacted the pay centre about money she was owed as a result of retroactive changes to civil service contracts, she was informed that the government lost track of her reimbursement, Speers said.

More than a year-and-a-half later, Speers received a third, revised T4 slip last week for her 2016 taxes and it's still wrong, said the Toronto resident.

"And now I'm getting another amended T4, which means not only are my taxes for 2017 going to be screwed up, 2016 is going to continue to be an issue," she said.

"And this is going to spill over into the 2019 calendar year."

Supreme Court decision will mean fewer dangerous offender applications, says Yukon legal aid society
In a 1st for territory, lawyer argues dangerous offender legislation violates rights in Canada's top court
CBC News
Alexandra Byers
January 11, 2018

For the first time in the Yukon, the territory's legal aid society has played a role in a Supreme Court of Canada charter challenge.

The Yukon Legal Services Society was given intervenor status on a case out of B.C. — meaning it was allowed to participate in the proceedings — in Canada's top court last year. The case, R v. Boutilier, focused on whether two aspects of the country's dangerous offender legislation violate the Charter of Rights and Freedoms.

Donald Boutilier was labelled a dangerous offender and given an indeterminate prison sentence after pleading guilty in May 2012 to six offences, including robbery and assault with a weapon.

Under the Criminal Code, Crown prosecutors can apply for certain offenders to be declared dangerous offenders. If the person meets the criteria, the judge is obligated to impose an indeterminate prison sentence, unless the defence can prove the offender's risk to the public can be managed by other means.

Changes made in 2008 to classification and sentencing of dangerous offenders generally made it easier to apply the law to anyone with multiple convictions.

In his appeal, Boutilier argued those changes violate the Charter of Rights and Freedoms, because they removed judicial discretion and became too broad.

'Too many people are being designated'
In Yukon, Vincent Larochelle, a public defender with Yukon Legal Services Society, had been considering mounting a similar charter challenge of his own.

He believed the criteria used to identify dangerous offenders was too broad, and took issue with the fact the judge has no discretion, and must give the designation if the criteria are met.

According to Larochelle there are two problems with this.

"The first is too many people are being designated, and the second is for those people who are designated and shouldn't be, it then leads to a sentencing regime which is too harsh," he said.

Larochelle pointed to other complications. For instance, once somebody is designated a dangerous offender, they need to convince a judge the community they reside in has adequate services to control him or her.

"If you're in Montreal, Vancouver, Toronto, there are all sorts of resources at your disposal: professionals, parole officers, programming," he said.

"Not so much in the Yukon — if you're from Ross River it's even more difficult to prove to the court the resources exist in the community to make sure you're not a danger."

While researching case law for his own charter challenge, he discovered R v. Boutilier was being heard by the Supreme Court.

"Why not skip the queue and go right up to the top?" he thought.

Larochelle presented those arguments to the Supreme Court in May on behalf of the legal aid society. The court issued its ruling on Dec. 21.

Ruling provides more direction to judges

Eight out of nine justices found the Criminal Code's provisions to designate and sentence dangerous offenders do not violate the charter, but provided some direction about the amount of discretion a judge has.

In its majority decision, the court found a sentencing judge must be convinced that an offender's dangerous behaviour is "intractable" and "unable to surmount." The judge must consider whether that offender is treatable before labelling them a dangerous offender, and the court ruled the judge still can exercise his or her discretion.

The court also found a sentencing judge isn't purely limited to indeterminate sentences. It's simply one of a number of other sentencing options that may be "more proportionate" to the offence in question.

While the Supreme Court may have ruled against his arguments, Larochelle still considers the judgment a win.

"I think (they) made quite clear this is a very important step in the sentencing process, and only a very narrow group of offenders should be targeted by this (designation)," he said.

"I think we're going to see a reduction in the number of designations and applications in the Yukon."

'The Supreme Court of Canada only knows what the lawyers bring to its attention'

The ruling also underscores the importance of participating at even the top-most level of the justice system, says Larochelle.

"We must remember the Supreme Court of Canada only knows what the lawyers bring to its attention. It's a very lofty place," he said.

"They don't necessarily know and understand the realities of Northern and rural communities. So it's important for lawyers and organizations from across the country to bring that to their attention."

Supreme Court Justice Andromache Karakatsanis was the one judge to offer a dissenting opinion, and while Larochelle doesn't want to take all the credit, he believes the legal society's argument played a role in that.

"Justice Karakatsanis basically agreed with some of the submissions presented on behalf of [the legal society]," he said. "That was just one judge, of course, but if it had been five? Who knows?"

What the jury in the Lac-Mégantic trial didn't hear

Justice Gaétan Dumas rejected motions to acquit 2 accused but scolded Crown for weakness of case

CBC News
Marie-Hélène Rousseau and Claude Rivest
January 11, 2018

While the jury was out of earshot, the Quebec Superior Court judge presiding over the trial of three men indicted for their roles in the Lac-Mégantic rail disaster acknowledged the Crown's case against two of the accused was not persuasive.

"I'm aware the evidence is weak," Justice Gaétan Dumas told the court in the absence of the jury on Dec. 11. "However, it's not up to me to evaluate it. That's the jury's job."

Dumas made the comments after rejecting a defence motion to acquit two of the men, former Montreal, Maine and Atlantic (MMA) railway traffic controller Richard Labrie, 59, and ex-MMA operations manager Jean Demaître, 53. Along with former locomotive engineer Tom Harding, 56, they are each charged with criminal negligence causing the deaths of 47 people.

Now that the jury in the marathon trial is sequestered and has begun its deliberations, CBC News is free to report on arguments and motions that had been subject to a publication ban.

Throughout the three-month trial, the Crown attempted to demonstrate that, as Harding's supervisors the night of the disaster, Labrie and Demaître hadn't done their jobs.

"Their failure to take the appropriate measures to prevent the train from moving was a key cause of the derailment," prosecutor Véronique Beauchamp argued.

After hearing from the Crown's 31 witnesses over more than two months, however, lawyers for Labrie and Demaître argued the Crown hadn't met the burden of proof of the case against their clients.

Demaître's lawyer, Gaétan Bourassa, said there was no rule in effect in July 2013 that required locomotive engineers to inform their supervisors that a train had been properly secured.

As a result, Bourassa told the judge, his client had no reason to wonder if Harding had engaged a sufficient number of handbrakes when he left the 73-car fuel train idling at Nantes, Que., 13 kilometres from downtown Lac-Mégantic.

Labrie's lawyer, Guy Poupart, argued in the case of his client, not a single Crown witness testified that the railway traffic controller was supposed to have been informed by a locomotive engineer "that he was now ready to leave the site where the train was secured."

Dumas ultimately rejected the defence motion for a directed verdict to acquit the two men.

"It's not up to the judge to examine the quality of the evidence," he said, citing legal precedents.

"It's the jury's job to determine if Demaître and Labrie ... took steps to avoid bodily harm to other people."

'Like pulling teeth'

Dumas, who is known for his direct manner and sometimes colourful speech, made no secret of his frustration with legal counsel, especially with the Crown, when the jury was not present.

He said at times, getting answers to key questions from the prosecution was "like pulling teeth."

"Four Crown prosecutors have worked full time on this case for three years," he said at one point. "That's the equivalent of 12 lawyer-years. I can tell you had I had 12 years on one file, I would have been able to respond to questions about it."

Dumas cited the example of the fire in the smokestack of the lead locomotive, put out by local firefighters called to the train, which had been left idling in Nantes two hours before the derailment.

No Crown witness could explain what caused the fire.

"It's not up to the jury to play wizard," Dumas said.

The Crown had also reproached Demaître for not doing anything when he learned there was a mechanical problem with the lead locomotive a few hours before Harding drove the convoy to Nantes on July 5, 2013.

"If you're trying to suggest [to the jury] that changing the locomotive would have prevented the accident … that's not what caused the accident," Dumas chided the prosecution.

He continued, sarcastically, "Mr. Demaître's mother isn't charged! If she hadn't brought him into the world, this wouldn't have happened."

TSB report ruled inadmissible

The trial of the ex-MMA employees began more than two years after the federal Transportation Safety Board issued its report on the Lac-Mégantic tragedy, concluding, "no one individual, a single action or a single factor" caused the derailment.

The TSB report left no doubt about problems with the MMA railway company, however.

"The TSB found MMA was a company with a weak safety culture that did not have a functioning safety management system to manage risks," the agency said.

The TSB report identified 18 causes of and factors contributing to the accident, including gaps in training, employee monitoring and maintenance practices at MMA, a failure by Transport Canada to audit the railway often or thoroughly enough, and the fact that the rail line between Nantes and Lac-Mégantic is the steepest slope in Quebec — and the second-steepest in Canada.

Even before the TSB report was issued, the agency made urgent recommendations to revise the way crude oil and other highly volatile materials are carried by rail.

The jury will not consider any of the TSB's conclusions in its deliberations, however. Before the trial began, Dumas deemed the report inadmissible.

Judge has faith in jury's smarts

That played into other arguments from which the jury was excluded.

One of the Crown's key witnesses was a railway expert, Stephen Callaghan, who had been hired by the Quebec provincial police to help in its investigation.

Before Callaghan testified, the Crown argued his report on the disaster should not be entered as evidence, because it referred to the inadmissible TSB report.

Dumas rejected the Crown's argument.

"This is like saying the jury isn't intelligent, so we won't give them the expertise," he said.

Safety of one-man crews

MMA had instituted one-man crews on the run through Lac-Mégantic just months before the disaster.

The jury heard expert evidence that the only other railway in Quebec with a one-man crew operation, Quebec, North Shore & Labrador (QNSL) railway, had to respect 69 conditions imposed by Transport Canada before it could adopt them, while MMA had to comply with a single condition — the addition of a rearview mirror to the driver's side of the lead locomotive.

The jury also heard that MMA employees did not like the single-person crews, and Harding's lawyer, Thomas Walsh, wanted to analyze their safety.

"One-man crews aren't safe," Walsh argued, in the absence of the jury, pointing out the day after the derailment, they were discontinued.

"Somebody caught on. We should be able to present evidence of that."

Dumas rejected that argument.

"We are not here to try the rules," he concluded.

Judge resigns for making racist remarks to a class of law students
Daily Times
Rana Tanveer
January 12, 2018

TORONTO: A Calgary judge, accused of making racist remarks to a class of law students, has resigned her position as Judge in Residence at the University of Calgary.

The Canadian Judicial Council is also reviewing a complaint against the judge which it received during last week amid lawyers questioning impartiality of the judge in cases involving people of colour.

Court of Queen's Bench Justice Kristine Eidsvik was guest lecturing to a University of Calgary second-year law class last week when she told a story about being nervous in a room full of "big dark people."

Following condemnations by students, staff and rights activists, Justice Eidsvik apologized to the class the next day, saying she "felt sick" about her comments.

"Calgary judge apologizes to law students for comments 'insensitive to racial minorities', Faculty of law dean Ian Holloway said in an email sent to staff and students. "I am writing to let you know that Madam Justice Eidsvik has today resigned from her position as judge in residence", he said. In a separate statement published on its website, the university said, "Justice Kristine Eidsvik resigned from her position as judge-in-residence in the Faculty of Law on Wednesday, Jan. 10, 2018. The Judge-in-Residence program provides wonderful learning opportunities for students, faculty and staff, and we appreciate the contributions Justice Eidsvik made to the law school during her tenure."

The review by Canada's judicial watchdog could take several months in deciding complaint against the judge. Justice Eidsvik was appointed to the Court of Queen's bench in 2007.

Lawyer Avnish Nanda and some of colleagues have questioned the impartiality of the judge. Nanda said an apology doesn't cut it. "Most of my clients are people of colour, are marginalized people, and I would be extremely concerned as to if these people get a fair hearing before this justice if she has those feelings toward them, he said.

Nanda said he thinks it is the responsibility of the legal community to push for racial sensitivity training for judges. "I think it's incumbent on both the legal professions, the justice involved and her colleagues

to push toward some sort of racial sensitivity training, address the unconscious or conscious biases the justice has toward people of colour," he said.

In March last year, a federal court judge had resigned after Canada's judicial watchdog recommended his removal from the bench for his offensive remarks to a victim of sexual assault. Federal Court Justice Robin Camp, during a sex assault trial in 2014 ignited controversy as a provincial court judge she he asked the complainant "why she did not resist an alleged rape by simply keeping her knees together".

In its ruling, the Canadian Judicial Council (CJC) said Camp "showed obvious disdain for some of the characteristics of the regime enacted by Parliament in respect of sexual assault issues."

"We find that the judge's conduct, viewed in its totality and in light of all of its consequences, was so manifestly and profoundly destructive of the concept of impartiality, integrity and independence of the judicial role that public confidence is sufficiently undermined to render the judge incapable of executing the judicial office," the council's ruling read.

French language still needs protection, Quebec Court of Appeal rules
Lawyer's Daily
Luis Millan
January 11, 2018

A bid to overturn Quebec's sign law by a group of anglophone merchants suffered another setback after the Quebec Court of Appeal upheld two lower court rulings which maintained that the French language is still vulnerable in Quebec and continues to need protection even though it has made "modest progress" in recent decades.

In a ruling hailed as significant by constitutional law experts, the Appeal Court underlined that jurisprudence held that the alleged violations of freedom of expression and the right to equality were justified under the Canadian Charter of Rights and Freedoms and the Quebec Charter of human rights and freedoms.

"The ruling is important because if the evidence demonstrated that the French language situation had fundamentally changed in Quebec, then the courts would have been justified to shelve the conclusions reached by the Supreme Court of Canada in its two landmark rulings in Ford and Devine," said professor David Robitaille, who teaches constitutional law and human rights at the University of Ottawa. "But the burden of proof is very high."

French is the official language of commerce and business in Quebec, and companies must have a French language name and French language signage. However, merchants may advertise in several languages including English as long as the French language information is "markedly predominant."

Eleven anglophone businesses operating in the Montreal area, all of whom were charged under the Charter of the French language (CFL), argued that the French language in Quebec is no longer in

jeopardy and therefore certain sections of the language charter infringed upon their fundamental rights and freedoms as guaranteed by both the Canadian Charter and the Quebec Charter.

More specifically, they alleged violation of their freedom of expression and their right to equality and liberty. In other words, the merchants essentially sought to depart from the precedents established by the Supreme Court in Ford v. Quebec (Attorney General) [1988] 2 S.C.R. 712 and its companion ruling Devine v. Quebec (Attorney General) [1988] 2 S.C.R. 790.

In these two decisions, the nation's highest court struck down the sign law, which at the time required that all public signs be in French only, as a violation of freedom of expression. But the top court declared in obiter dictum that "requiring the predominant display of the French language" would be justified under s. 1 of the Canadian Charter and s. 10 of the Quebec Charter.

The court then proposed two constitutionally valid alternatives — one in which French could be required in addition to any other language, and the other in which French could be required to have greater visibility than accorded to other languages.

The trial judge, Court of Quebec Judge Salvatore Mascia, held that while the "visual landscape" in Quebec since the SCC's decision in Ford and Devine was now predominantly French, that is because of the language charter. Judge Mascia noted that there would be an "obvious incongruity in using the success of the sign provisions in the CFL as fodder for its dismantling. The CFL cannot become a victim of its own success." He concluded that the language situation had not changed much since the 1988 SCC rulings, and therefore he could not review the conclusions of the SCC in Ford and Devine.

All but one of the 23 businesses were found guilty of violating the language charter. Quebec Superior Court Justice Claudine Roy, now a Quebec Appeal Court justice, upheld the decision as did the Quebec Court of Appeal.

"The limitations on the language of commerce and business contained in the CFL consist in prohibitions of a public nature which in the opinion of the legislature better the common good," said Appeal Court Justice Mark Schrager in 156158 Canada inc. v. Attorney General of Québec 2017 QCCA 2055.

The Appeal Court also found that unilingual English websites are also subject to the French language charter. Justice Schrager found there were no differences between a commercial brochure printed on paper and one in electronic form. "If the publications on a website aim to conduct or promote business in the territory of Quebec, then they are part of the 'visage linguistique' of Quebec" and thus subject to the French language charter.

"In my view that's a precedent," said Robitaille. "In the end, the technological revolution does not change the legal debate. In other words, the new means of communication does not fundamentally change the legal analysis the courts must conduct."

But the Appeal Court also appears to have "opened a door" to new legal challenges to the signage law under s. 15 of the Canadian Charter and s. 10 of the Quebec Charter, added Robitaille.

The merchants argued that the joint use of French restricts anglophones' right to express themselves on the same basis as francophones. This requirement in turn imposes economic and psychological burdens, they added.

But Justice Schrager found that the legislation does not prevent the merchants from advertising "with their desired form and content." It merely requires them to add a concurrent or "markedly predominant" French version if they want to advertise in English. Moreover, the merchants did not provide any evidence of an additional economic burden stemming from this requirement. However, Justice Schrager noted that a "disadvantage" could "potentially arise" in the form of an additional economic burden placed on an anglophone business required to advertise in two languages rather than one.

"If the business is thus obliged to incur additional expense for translation, website construction or printing, there might be in some cases, additional burden created," said Justice Schrager. "Such burden might constitute discrimination for a small enterprise where the total revenue is such as to make the additional costs disproportionate and overly burdensome."

While the Appeal Court seemed to recognize that the French language charter potentially creates an additional economic burden for small business, Robitaille believes that the Appeal Court would quickly shut down that fissure in the French language charter.

"In my opinion the court would come to the conclusion that the violations of freedom of expression and the right to equality would be justified," said Robitaille.

According to constitutional law professor Patrick Taillon, the ruling reveals the fragility behind the SCC's landmark rulings in Ford and Devine. "I am pleased that the Quebec Appeal Court did not review the criteria established by the SCC in Ford and Devine," said Taillon, who teaches at the Université de Laval. "But one of the worries I have is that measures that are considered to be reasonable today will no longer necessarily be the case in the future, and that it will no longer be considered to be justified because of a change in context, an evolution in society, or because of technological changes."

Québec ne veut pas payer pour les juges
Québec va s'opposer à une requête des juges de la Cour supérieure qui souhaitent obtenir le remboursement de leurs frais d'avocats
Droit Inc
Martine Turenne
12 janvier 2018

C'est ce qu'a appris Le Journal de Québec. Un porte-parole du ministère de la Justice, Boris Lavoie-Isebaert, a confirmé au quotidien cette décision, prise cette semaine. « La Procureure générale du Québec entend contester la demande de provision pour frais en matière constitutionnelle en vue du paiement des honoraires extrajudiciaires et des débours des requérants », a-t-il dit au Journal.

Rappelons que les juges de la Cour supérieure réclament non seulement le remboursement de leurs frais d'avocats, dans le litige qui les oppose à Québec et à Ottawa, mais aussi que le montant des sommes qui leur serait versé demeure confidentiel en vertu du secret professionnel. Ils ont déposé le 21 décembre une requête à ce sujet devant la Cour d'appel, comme l'avait rapporté Le Journal de Montréal.

Au coeur de ce litige: les juges demandent à ce que les magistrats de la Cour du Québec cessent d'entendre les causes dont la valeur dépasse 10 000 $. Les juges contestent le fait que la Cour du Québec puisse avoir une compétence « exclusive » en civil, ainsi que le seuil de 85 000 $ qui lui est attribué.

Les juges de la Cour supérieure, l'Honorable juge en chef Jacques R. Fournier en tête, sont représentés dans ce dossier par Me William J. Atkinson, ainsi que deux juristes de Langlois, Mes Sean Griffin et Véronique Roy.

L'avocat qui représente le Conseil de la magistrature du Québec, Me Marc-André Fabien, a affirmé au Journal que l'organisme, qui représente les juges de la Cour du Québec, n'a pas encore de position sur les frais.

On ignore pour l'instant si le Procureur général du Canada contestera également la requête des juges d'obtenir un remboursement.

Un autre avocat quitte l'Enquête sur les femmes autochtones
La vague de démission ne semble pas se tarir et mine la crédibilité de l'Enquête...
Radio-Canada
12 janvier 2018

L'avocat québécois Alain Arsenault confirme avoir quitté l'Enquête nationale sur les femmes et les filles autochtones disparues et assassinées (ENFFADA) en raison de « divergences professionnelles importantes », et non pour des raisons personnelles, comme l'a soutenu la porte-parole de l'enquête, Nadine Gros-Louis.

Ce départ, ainsi que celui de la directrice générale Debbie Reid, après seulement trois mois en poste, et annoncé jeudi, portent à 10 les démissions depuis l'automne, illustrant les divergences profondes qui persistent chez les membres de la Commission quant à l'approche à adopter pour rendre justice au millier de femmes et de filles autochtones disparues et assassinées ainsi qu'à toutes les autres victimes de violence.
À tort ou à raison, le meurtre et la disparition des filles et des femmes autochtones avaient toujours été avant tout une histoire du Canada anglais.

La très vaste majorité des victimes provenaient des provinces de l'Ouest, puis de l'Ontario. Au Québec, l'ENFFADA a levé le voile sur de lourds secrets qui hantaient les communautés innues de la Côte-Nord depuis des décennies. Les membres de l'enquête ont fait des efforts titanesques pour gagner leur confiance et les convaincre de parler.

L’un de ces membres stratégiques était l’avocat Alain Arsenault.

Or, selon nos sources, tout juste avant Noël, il a baissé les bras et a remis sa démission.
Joint à son bureau de Montréal, Alain Arsenault refuse de discuter des raisons de son départ et invoque le secret professionnel qui le lie à son client.

La porte-parole de l’Enquête, Nadine Gros-Louis, est tout aussi discrète et se limite à dire qu'« il a mis fin à son contrat pour des raisons personnelles ».

Mais vendredi, Me Arsenault a finalement senti le besoin de commenter la situation, par courriel, en affirmant avoir « quitté l’enquête nationale, non pas pour des questions personnelles ou de nombre d’heures épuisées à mon contrat, mais bien pour des divergences professionnelles importantes ». Il dit cependant croire toujours en son bien-fondé.

Selon plusieurs sources qui ont accepté de se confier à Radio-Canada, ce départ est symptomatique des divergences stratégiques et philosophiques profondes au sein de l’Enquête nationale.

Divergences profondes
Rappelons le départ fracassant, en juillet 2017, de la commissaire Marilyn Poitras.
Bachelière en droit de l'Université de la Saskatchewan et maître en droit de Harvard, cette spécialiste du droit constitutionnel a dit qu'elle se sentait incapable de mener à bien son mandat selon les paramètres fixés par le gouvernement.

Le départ cette fois de l’avocat Alain Arsenault révèle les mêmes dilemmes, les mêmes difficultés.

Car, selon nos sources, les divergences internes qui ont mené à de nombreux départs dépassent les écueils bureaucratiques et les piètres communications avec les familles; elles touchent le coeur même de l’enquête.

Les commissaires ont fait le pari de donner la priorité à la voix des familles des victimes, celles pour qui cette enquête a été créée.
Or, selon nos sources, certains auraient favorisé une approche beaucoup plus judiciaire. Leur objectif : aller au-delà des histoires individuelles dans l’espoir de démontrer les problèmes systémiques qui ont guidé les autorités au fil du temps.

Phoenix built to fail, HR report finds
Public service pay system 'deliberately customized' to commit errors, according to document obtained by CBC
CBC News Exclusive
Julie Ireton
January 12, 2018

The government's problematic Phoenix payroll software was "deliberately customized" to perform a number of tasks that have led to a cascade of pay errors, according to a document obtained by CBC.

The June 2017 report, titled "Issues with Phoenix as identified by the HR community," was produced by the office of the government's chief human resources officer and obtained through access to information legislation.

The document identifies a series of ongoing issues between the government's pay and human resources systems that have frustrated managers and workers alike for nearly two years.

When it comes to new hires, "Phoenix was 'deliberately customized'... to default to the lowest rate of pay within their classification, rather than to the amount quoted in their letter of offer," the report found.

That went for "any new casual or term employee, any new indeterminate employee, students and employees transferred to a new department or agency."

Those workers are paid improperly until a compensation adviser manually changes the pay rate, a process that can "take a significant period of time, especially at the Pay Centre," according to the report.

Half of workforce affected

At the end of November, the government reported the total number of outstanding financial and non-financial Phoenix claims had reached 551,000, affecting approximately 156,000 government workers, or more than half of the workforce.

The union representing a majority of federal employees calls the revelations in the document concerning.

"Phoenix was deliberately set up to make sure people were paid at the lowest amount," said Chris Aylward, national executive vice president of the Public Service Alliance of Canada. "So they deliberately set up the system ... to have issues."

No fix yet.

According to the report, Phoenix was customized to:

Recover overpayments from workers before notifying or making arrangements with the employee first, leaving some employees with "limited to no funds."

Freeze an employee's account when he or she leaves a department or the government.

Calculate overpayments which are in some cases "recovered multiple times from the same employee."

The report also raises concerns about missing, incomplete and incorrect data caused by Phoenix, noting that "government-wide reporting is impacted by this inaccurate data."

"And that's the most frustrating part for the workers [at the federal government pay centre] in Miramichi, is when they try to fix one portion of this, something else goes wrong and it's almost like a domino effect," Aylward said.

Hiring in 2018

The department in charge of Phoenix, Public Services and Procurement Canada, told CBC progress is being made when it comes to improving the pay system.

"We are hiring 300 additional compensation advisors in early 2018 in order to continue to increase capacity at the Pay Centre," the department told CBC. "The objective is to create modernized, efficient processes that will decrease manual treatment, processing times, underpayments, overpayments and wait times for employees."

But it's all too little, too late for the Public Service Alliance of Canada.

"We will certainly be seeking compensation for the damages and we're not going to stop there. We need to continue our escalation of our actions," Aylward said.

Investigation underway on whether top military lawyers suppressed damning report
CTV News
January 11, 2018

Top military officers are under investigation over whether they unlawfully suppressed a report that is critical of the military justice system, CTV News has learned.

The Judge Advocate General (JAG) oversees the administration of military justice in the Canadian Armed Forces. High-ranking officers within the office of the JAG are the focus of the probe, which is looking into how officials responded to a request for a 560-page draft document that revealed a lack of confidence in the justice system.

Days after the report was completed in July 2017, an Access to Information Request was filed. But the JAG's office denied that the report existed.

Hiding documents from an access to information request is illegal.
Now, police and prosecutors are trying to determine if the military lawyers broke the rules.

CTV News obtained the internal document and reported details of its findings on Wednesday.

Sources tell CTV News' Mercedes Stephenson that an RCMP officer embedded with the Military's National Investigative Service has taken the lead on looking into the allegations.

In a statement, military police said they will not "discuss, confirm or deny the existence of ongoing investigation(s)."

Today, Minister of National Defence Harjit Sajjan insisted he is confident in military justice and the JAG.

"When our new JAG was elected she has a vision. And I'm going to give her the space and time to conduct a thorough review," Sajjan said.

The report, titled “Court Martial Comprehensive Review Interim Report,” examined the Courts Martial system and found a lack of confidence in military justice from rank-and-file to top commanders.

The report criticized the system for lenient sentences. Some went so far to call the system broken.

The report also highlighted significant delays within the military justice system. On average, it takes 434 days from when charges are laid to completion of the court martial, compared to the median 112 days from first appearance to completion of the trial in civilian criminal cases.

The report’s authors were told by some senior members of the military that they believed some serious offenses would be better handled by the civilian justice system.

Sources say the Judge Advocate General’s office was concerned that releasing the report would breach solicitor client privilege. Sources added that the JAG was not happy with the conclusions of the report and wanted more concrete recommendations.

Former military lawyer Rory Fowler said issues of fairness in the system must be seriously addressed.

“Nothing really comes as a surprise because we’ve heard a lot of these complaints before,” Fowler said. “I would want to see a much more comprehensive review of military justice writ large.”

With a report from CTV’s Mercedes Stephenson in Ottawa

Editorial: Justice, finally, for Hassan Diab
Ottawa Citizen Editorial Board
January 12, 2018

Hassan Diab is now a free man, for the first time in nearly 10 years, thanks to a long overdue decision from two French investigating judges that has brought a possible end to the terrorism case against him.

The former University of Ottawa professor had been waiting for three years in pre-trial detention at a maximum security prison outside Paris, a length of time in prison without charges being officially laid that has been condemned by Amnesty International.

The Canadian government — and Justin Trudeau in particular — has been shamefully quiet in public regarding Diab’s plight. On Friday, Cameron Ahmad, a spokesman with the Prime Minister’s Office, referred a request for comment from Trudeau to Global Affairs and declined to respond to questions about Diab’s case.

“Canada welcomes the recent court decision to release Hassan Diab,” said an email from Brittany Venhola-Fletcher, with Global Affairs. “Consular officials have provided assistance to Mr. Diab throughout his detention in France and stand ready to assist Mr. Diab with his return home.”

It's a tale that starts in October 1980, with a synagogue bombing that left four passersby dead and more than 40 injured. Diab, a Lebanese-Canadian, was the sole suspect in the bombing and was arrested in November 2008 by an RCMP tactical team. After a six-year court battle in Canada, he was extradited to France in November 2014.

The case has been troubling, and troubled, since the beginning.

During Diab's extradition hearings, Superior Court Justice Robert Maranger declared the evidence against Diab would be too weak to convict him in Canada, and was "convoluted and confusing (with) suspect conclusion." But extradition law has lower standards, Maranger concluded.

Indeed, Diab risked facing a trial with evidence that may have been extracted under torture and handwriting samples that, in Canadian courts, had been discounted.

Eight times, Diab had been ordered released on bail in France. Eight times, appeals court judges had overturned those decisions.

France along with many nations, has been gripped by fears of terrorism.

Diab's lawyers have argued this is one reason why his bail orders have been overturned; nobody wants to appear soft on terrorism or crime. Despite the pressure, and the desire for the state to protect its citizens, politics must never interfere with justice.

There's the possibility of an appeal, but French judges have declared the evidence against Diab unreliable.

For now, Diab is a free man.

'He didn't have a choice': How depression cost Gerald Le Dain his Supreme Court post
CBC News
Bonnie Brown
January 14, 2018

It was, she thought, a routine request.

Cynthia Le Dain, Justice Gerald Le Dain's wife, had gone to the Supreme Court of Canada. It was September 1988 and the court was about to start its fall session. But her husband had been struggling with his workload. He was anxious, not sleeping and had just been diagnosed with depression. She feared he was heading for a breakdown. So she asked Chief Justice Brian Dickson if he could have some time off.

Expecting compassion and permission for a short reprieve for her ailing husband, she was instead confronted with a response that stunned her: Gerald's judging days were over.

Le Dain was a tireless worker, a highly respected judge and had served on the court for four years. But within two weeks, an officer of the court was sent to Le Dain's home to formalize his exit.

"He didn't have a choice," says Caroline Burgess, the couple's daughter. "There was no offer of support. No sense that his illness was treatable, that he could come back. What could he have done? Get a lawyer and fight it? He was ill."

Burgess says being forced to give up his prestigious and highly public position intensified the severity of her father's illness and that his condition "rapidly became almost critical." He was admitted to hospital soon after.

"It was devastating to him. His identity — his life, in a sense, had been taken away from him."

Le Dain's formal resignation was announced in November 1988. He was 63 years old. He recovered from his illness, but he never worked again.

'A man ahead of his time'

A devoted family man with six children, Le Dain is often described as a charismatic and intense man, with a brilliant mind and a playful sense of humour. He'd had a stellar career as a lawyer, a law professor at McGill University and a professor and dean of Osgoode Hall Law School. He also served nine years on the Federal Court of Appeal before his appointment to the Supreme Court.

Yet he's remembered almost exclusively for his work as chair of the four-year Commission of Inquiry into the Non-Medical Use of Drugs in the early 1970s.

It was internationally renowned for both its ambitious research into recreational drug use, and its recommendations to decriminalize the possession of marijuana and to treat drug addiction as a health issue rather than a crime.

Though ignored by policy-makers for decades, the commission's work has become increasingly relevant as the country moves to legalize cannabis later this year and grapples with a mounting opioid crisis that has already taken thousands of lives.

"I think he was a man ahead of his time," says Ontario Court Judge Melvyn Green, who worked with Le Dain on the inquiry. "There is a sense that Gerry has not been sufficiently respected for his work."

'He could have contributed much more'

Claire L'Heureux-Dubé, who served on the Supreme Court with Le Dain, describes him as a great thinker and an ideal colleague. She says that in 1988, all the judges were struggling with the burden of the new and numerous Charter of Rights and Freedoms cases, and that Le Dain's rigorous approach could be slow.

But she says she was shocked to learn that Le Dain would not be given time off to recover from his illness.

"He was the type of person that should have remained on the court — with his mind, his wonderful ability to decide cases," she says. "He could have contributed much more."

David Butt, a criminal lawyer in Toronto who clerked for Le Dain at the court, calls his treatment "appalling."

He acknowledges that the pressure on the court was intense, but adds, "how long can a court continue to function one judge down? You just sit with seven judges for a little longer. You hire more clerks. There were certainly alternatives, and they weren't taken."

Dickson died in 1998, but his handling of Le Dain's illness is chronicled in a biography co-authored by Robert J. Sharpe, Dickson's executive legal officer at the time.

Sharpe declined The Sunday Edition's request for an interview, but he wrote in 2003 that while it was "a difficult and distasteful decision," Dickson "was persuaded that Le Dain's prognosis was poor" and that the court, facing a large backlog of cases, "simply could not afford to wait" for him to recover.

A question of optics?

But Richard Janda, a professor on McGill's law faculty and Le Dain's clerk in 1988, believes Le Dain's mental illness was a significant factor in the decision. "How it might bear upon the reputation of the court, was something of great concern to the chief justice."

He points out that Le Dain continued to provide input on his outstanding cases during his hospitalization, particularly on the Ford case, which would determine the constitutionality of Quebec's French-only sign law in Bill 101. It had landed at the court in the middle of the Meech Lake crisis, and Le Dain had been wrestling with the decision for months.

He fell ill before it was finished, but Janda says the judgment ultimately released by the court, which struck down the sign law, was based almost entirely on Le Dain's draft.

Reduced to an asterisk

Yet the chief justice marked Le Dain's name with an asterisk on the case, stating that he "took no part in the judgment." At a rare meeting, Janda tried to persuade Dickson to reconsider, in part at Le Dain's request.

As he tells it, the chief justice heard him out, but "in Chief Justice Dickson's view, for Gerald Le Dain to be hospitalized for mental illness and part of a panel that came up with this decision, could give rise to poor public perception of the decision."

Janda disagrees. He believes Le Dain's contribution to the Ford case should be formally acknowledged.

'There was never an apology'
Le Dain died in 2007, and neither he nor his family and supporters ever spoke publicly about the circumstances of his resignation from the court until now.

"That's the way we were brought up — that it was important to protect the integrity of the institution of the Supreme Court of Canada," says Burgess. "We didn't talk about it, not through shame, but because we had the sense that it would reflect poorly on the court. And it does. And you can't get around it."

Burgess and her siblings say they want the record set straight, so that the cloud that hangs over their father's reputation and his accomplishments can finally be lifted.

"I think it was cruel. I think it was unconscionable. There was never an apology," she says. "It never should have happened."

Bonnie Brown is an award-winning news and documentary producer with CBC. She has worked for The World at Six, The National and The Magazine. Bonnie is originally from Winnipeg, is now based in Toronto, and has a law degree from McGill University.

How the Star's Legal Affairs reporter navigates Ontario's complex justice system
"For the Canadian justice system to retain its credibility, it needs to be open and transparent," says journalist Jacques Gallant.
Toronto Star
Kenyon Wallace
January 12, 2018

This story is part of the Star's trust initiative, where, every week, we take readers behind the scenes of our journalism. This week, we focus on how Jacques Gallant, the Star's Legal Affairs reporter, keeps tabs on what goes on in Ontario's justice system.

There is an aphorism often quoted by lawyers and the journalists who cover legal proceedings: "Not only must justice be done; it must also be seen to be done."

That saying, which originated more than 90 years ago from Gordon Hewart, lord chief justice of England, is constantly in the back of Jacques Gallant's mind while he navigates the complex world of Ontario's courts and tribunals.

As the Star's Legal Affairs reporter, Gallant takes readers inside the justice system, highlighting precedent-setting cases and rulings that impact the public, and pointing out problems, such as delays in cases coming to trial.

To find stories, Gallant talks to lawyers and members of the public about cases they are involved in, checks with the various colleges that regulate health-related professions, such as the College of

Physicians and Surgeons of Ontario, to find out which of their members are facing disciplinary hearings, and mines CanLii, a free online database containing most Canadian court decisions.

But keeping readers enlightened about the goings-on of our legal system relies on the assumption that the courts and tribunals are by default open to the public, as they should be. In practice, however, Gallant has found this is not always the case.

“The courts are supposed to be presumptively public, which means that anyone should be able to walk into a courthouse and request to view the file from a court case,” said Gallant.

But on numerous occasions, Gallant has encountered courts and tribunals that seem to have secrecy as their default setting — meaning Star readers, and by extension the public, aren’t able to get a full picture of what is going on in these public institutions.

“In my own experience, I’ve dealt with courthouse staff across the GTA who give me strange looks when they find out I’m not a lawyer, but rather a journalist,” Gallant said. “I’ve had to wait weeks to get access to even the most basic of court documents, known as ‘the information,’ which lists the charges an accused person is facing as well as their next court date.”

Indeed, early last year, the Star launched a legal challenge against the provincial government to end the secrecy surrounding the province’s tribunal system, which handles accusations around human rights abuses, police misconduct, and environmental offences. The Star’s case is ongoing.

Gallant said accessing court exhibits, even in cases that are no longer active and for which higher courts have ruled that exhibits should be public, is also often difficult.

“Documents such as these are crucial in order to accurately and fairly report on a legal matter,” he said.

Case in point: when reporting on the ongoing case of Dr. Javad Peirovy, a Toronto doctor found by the College of Physicians’ discipline committee to have sexually abused four female patients, and who is fighting in court to keep his medical licence, Gallant had trouble accessing documents related to the case.

In 2016, the discipline committee ruled to suspend Peirovy for six months, rather than revoke his licence. The college disagreed with this ruling, and appealed the decision by its own committee to the Divisional Court.

At the time, in order to provide readers with a full picture of the case, Gallant sought to obtain Peirovy’s arguments at Divisional Court for why Peirovy should retain his licence. As it turned out, this was not an easy task.

When Gallant asked the Divisional Court for Peirovy’s official response to the appeal, a court official told him the file was with the judges and could not be accessed.

So Gallant reached out to Peirovy's lawyer, who would not provide the official response either.

Gallant then had to reach out to the Ministry of the Attorney General to make his case that the file should be made available to him. The ministry, in turn, contacted the court, and a few days later Gallant was told he could now view the file at the Divisional Court.

"If not for (the ministry's intervention), I would not have been able to report a complete picture of the Peirovy case," Gallant said.

The college ended up winning its appeal, but Peirovy then appealed to the Court of Appeal. A decision has yet to be released.

These types of situations — where public documents are not readily accessible to the public — discredit the legal system, Gallant said.

"For the Canadian justice system to retain its credibility, it needs to be open and transparent," he said. "The public needs to be assured that the justice system is working, and reporters act as their representatives in court."

Why Trudeau Should Stop the Deportation of Abdoul Kadir Abdi
Abdi's story is a Canadian one, shaped by compounding government failures.
Vice News
Melayna Williams
January 12, 2018

This week, Canadians have seen the story of Abdoul Kadir Abdi, a Halifax raised, Somali man who faces deportation to Somalia due to his criminal record.

The first thing we need to acknowledge is that Abdi's story is a Canadian one. Through it, we have witnessed anti-Blackness inherent in the workings of three intertwining systems: criminal justice, immigration and child welfare. For people living, working or working with Canadians on the margins of society, this intersection is not new. For many others, it is difficult to understand the role the state can play in policing every aspect of a person's life.

Even those who admit to the failure of the systems at play here have called this a case study or opportunity for a policy shift. What these perspectives forget is twofold: Abdoul is not an example, he is a living person that we can help immediately. Also, we do not need any more opportunities or examples. Treating this case like an opportunity only pushes us, and the government to do less. Moreover, we have information, data, and statistics on the multiple ways Canada has historically harmed, discriminated against and impeded the progress of Black people.

Canada's relationship with Somalia is as well documented as it is fraught. The civil war and discord in Somalia that brought Abdoul Abdi and his family to Canada is a story that thousands of Somali Canadians share. We cannot ignore the legacy and implications of colonialism that inform Somalia's

state globally, especially the ways in which Somali people migrate and seek refuge in countries like Canada. Even as Canada has been a home for Somali people, anti-Blackness has often defined much of the relationship, as evidenced by Abdi's story.

Abdoul's apprehension from his aunt's home to a child welfare system that has been documented as culturally incompetent and punitive is the story of thousands of Black and Indigenous children in Canada. More shocking than Abdoul's aunt telling Desmond Cole last Sunday she did not understand why he was apprehended from her in the first place and his shifting through 31 homes throughout his childhood and youth, is the fact that none of the child welfare agents responsible for his well-being pursued the process of Abdoul becoming a Canadian citizen. The continued shortcomings of child welfare service to non-white children has brought us here. Our Prime Minister recently told Abdoul's sister that the care system had failed him. But rather than see this as a system that has failed Abdoul, we have to see it as one that was built to do exactly that.

Justin Trudeau's appointment of Ahmed Hussen as Minister of Immigration, Refugees and Citizenship was lauded for a number of reasons. Not only was Hussen a seasoned politician and Somali refugee, but his story had the makings of a liberal Canadian dream, and upheld Canada as a safe and welcoming haven. Hussen has himself highlighted this narrative—particularity when he is relating to Black and Somali constituents. Last month, at the National Black Canadian Summit in Toronto, activists pressed Hussen on Abdoul Abdi's case specifically, asking that Abdoul receive a warning letter instead of facing deportation, only to be met with deflection. Similarly, during his comments on Abdi, Prime Minister Trudeau invoked Hussen's success story to frame Canada as a place of safe refuge, strength and growth.

In Canada, we need to focus on, amplify and assist the vulnerable, meaning the Abdoul Kadir Abdis, not the present-day Ahmed Hussens. Instead of highlighting success stories like Minister Hussen as the standard, we have to look at the ways Canada can effectively render stateless individuals fleeing violence as stateless again, not belonging, but being controlled by the state. Yesterday, the Canadian Civil Liberties Association (CCLA) implored Hussen and Ralph Goodale, Minister of Public Safety and Emergency Preparedness, to end any admissibility or deportations against Abdoul Abdi, and to order the granting of his citizenship.

The way the Canadian press has depicted Somalis has been largely negative, from the infamous Project Traveller raids to last year's Dixon documentary. While our media landscape has been long known to lack an equity lens that fails to tell stories that present Black Canadians in a positive light, Somali Canadians have additional stereotypes to fight. Canadian media is beginning to catch up to the tireless work of anti-racist activists and include stories and a vocabulary that is inclusive and intersectional. A broad understanding and working knowledge of intersectionality would equip our government, state agents, and general public with the tools to address multiple and compounding issues that Canadians face.

I asked Abdoul Abdi's lawyer, Benjamin Perryman, if Canadians are understanding the intersections of the systems at play that have led to Abdi's circumstances:

"No. Most politicians themselves don't understand those interconnections, let alone the general public. This starts right at the beginning—the Nova Scotia Department of Community Services had no policies in place for non-citizen children in care." Echoing the sentiments of anti-racism advocates in Canada, he stresses the importance of tracking data to address the issue. Perryman is unsure if Nova Scotia even tracks and collects information pertaining to child welfare agencies, non-Canadian children and decisions pertaining to their immigration status. He highlights Ontario's extensive data that acknowledges racism and prejudice toward Black and Indigenous children in the child welfare system alongside Canada's undisputed racism and prejudice problem in the criminal justice system where Black and Indigenous people are more likely to be arrested, charged and incarcerated. "Those two problems of prejudice join when a person does not have citizenship and makes certain people more at risk of being deported than others."

If we ever hope to become the country Prime Minister Trudeau insists we are, we can start by saving Abdoul Abdi from deportation and admitting the systemic, multiple failures at play are indeed Canadian in nature.
Melayna Williams holds a J.D., and is the director of the Rights Advocacy Coalition for Equality (R.A.C.E.). Follow her on Twitter.

Fraud charges stayed against bankrupt Nunavut taxi operator
Crown may choose to revive prosecution within one year
Nunatsiaq online
Steve Ducharme
January 12, 2018

Crown lawyers have stayed a long-standing fraud charge against Rankin Inlet taxi operator David Wiseman with only weeks to go before a trial by jury was scheduled.

According to documents filed with the Nunavut Court of Justice in Iqaluit, Crown prosecutor Shannon O'Conner filed paperwork on Dec. 30 that stays one count of fraud that Wiseman had been facing.

To "stay" a charge is a legal term for discontinuing a prosecution of an alleged act.

But it's not the same as complete withdrawal of a charge.

In a stay of proceedings, lawyers have up to a year to revive a prosecution.

Wiseman, the former owner of S&G Taxi Co. in Rankin Inlet, was accused of one count of committing a fraudulent act, under section 380(1)(a) of the Criminal Code.

That charge replaced two earlier counts of falsifying documents and using misleading receipts laid against Wiseman in 2015, stemming from allegations that Wiseman filed bogus insurance claims with Aviva Canada in 2013 after a fire at his garage.

But further review of potential evidence by the RCMP, at the request of the Crown, failed to turn up a reasonable prospect for conviction, the Public Prosecution Service of Canada's Nunavut office confirmed to Nunatsiaq News, Jan. 11.

The alleged fraudulent claims in question were valued at over $50,000.

Wiseman's trial by jury was scheduled to take place in Rankin Inlet on Jan. 29.

According to court documents, seven witnesses had already been subpoenaed by the Crown to testify at the trial.

They included an insurance fraud investigator employed by Aviva Canada and the RCMP officer responsible for laying the original charges.

Aviva Canada's original accusations against Wiseman alleged that he falsely requested compensation for the rental of industrial heaters after a fire at his taxi garage, and included "a fictional vendor" on the invoice for the heaters.

Aviva's allegations are still described on the insurance company's website.
Investigators had already ruled that the fire itself was accidental.

In submissions to the court, the Crown alleged that Wiseman had a possible motivation to commit the alleged fraud because of his "dire financial situation" after accepting a $941,105 loan from the Nunavut Business Credit Corp. in 2012.

Wiseman stopped making payments to the NBCC shortly before he filed the allegedly bogus insurance claim.

A judge eventually declared Wiseman bankrupt in a separate civil suit launched against him by the NBCC in 2016, which forfeited the remaining assets of his business to the Edmonton-based insolvency firm, MNP Ltd.

How Beverley McLachlin found her bliss: Where she came from and what she leaves behind
From a hardscrabble Alberta childhood, she went on to become a powerful force in shaping the rights of Canadians – and in defending the judiciary's role in the Charter age. Sean Fine talks to the recently retired Supreme Court chief justice, and weighs the impact of the legal architecture she helped set in place
The Globe and Mail
Sean Fine
January 12, 2018

She grew up in a log house without electricity or running water, at the end of a long, twisting road in the backcountry of southwestern Alberta.

In the mid-1950s, Beverley Gietz was 12, and living much as children did 50 years earlier.

An outhouse stood deep in the back of the yard. For light, her family had kerosene lamps. For baths, the youngest of her four siblings went first. A little hot water was added for the next, and the next, all the way up to the oldest, Beverley, and then her mother and father.

She knew how to ride a horse. Her home was where the foothills met the Rockies; for fun, she played in the mountains and read books. Grizzly bears, cougar, elk and deer roamed nearby. Her father, Ernest, was a rancher, a hunter, an owner of a small sawmill. Her mother, Eleanora, did the bookkeeping. Her parents were evangelical Lutherans. No drinking or dancing, no playing cards, no smoking.

These were the years in pioneer country that helped form the country's longest-serving Supreme Court chief justice – the judge who put her stamp on some of the most pressing legal and social questions of 21st-century Canada. Those early years bred in her that quality that defined her as a judge: a "fierce independence," in the words of Warren Winkler, who grew up in the area at the same time, and went on to become chief justice of Ontario.

She showed that independence early. The log house was so remote and the unpaved road so treacherous, that she took Grade 7 at home, by correspondence – and finished an entire academic year before December.

When rural electricity arrived soon after that, 13-year-old Beverley designed a big new wooden house, which her father then built from the timber he milled on his property. "Beverley's room seemed like a scene from the movie Heidi," her childhood friend Diana Reed, who still lives on a ranch in the area, recalled several years ago. "I remember being with her and looking out the window at the mountains and the stars."

Even so, Beverley Gietz was impatient to leave. She could have waited until Grade 9, when she would stay at a dormitory near the school in Pincher Creek , with others from the countryside. Instead, she chose to leave home for Grade 8, boarding with a family in town. She had a sense that she had a dream to follow.

Ultimately, her achievements were remarkable. She would go on to help shape Canadians' fundamental rights as much as any judge in the country's history, from the legalization of assisted dying, to a huge expansion of Indigenous rights, to a rebalancing of how police and the legal system treat people accused of crimes.

Along the way, her independence and that of the institution she led, and shaped, would put her on an unprecedented collision course with a sitting prime minister from the Conservative Party, whose strongest supporters were to be found in rural, religious areas like the one in which Ms. McLachlin had grown up.

The legal architecture she helped put in place, built in increments over decades, will not easily be torn down by future jurists.

And yet, Beverley McLachlin remains unknown, in human terms, to most Canadians. And an enigma, in legal terms, even to many in the legal community.

Her drive was unstoppable – a reaction, in no small part, to her mother's lost dreams.

Eleanora Gietz had wanted a university education and to write children's books, but then her own mother took sick and she had to nurse her rather than go to school. And then, she had a family of her own.

"Life overtook her," Chief Justice McLachlin said during a 50-minute interview in her Supreme Court office last month.

It is four days before her retirement. She is relaxed and open. At times she laughs loudly.

"I identified very early with her aspirations, and her disappointment. I think at some subconscious level, it made me very determined that that would not happen to me.
"And I had a very strong sense that it was important to, as Joseph Campbell would put it, follow your bliss. Not in any trivial sense, but in a sense of where life seemed to be leading you, what you felt you might have a vocation to do. I didn't know what it was, but I knew, as a teenager, I would try to find it."

She knew she would go to university – but didn't know how she would pay for it. Then she won "three or four" scholarships to the University of Alberta; she left home and obtained an undergraduate degree in philosophy. As if in a hurry to find where life was leading her, she studied law at the same time as she did her master's in philosophy. Her peers were in awe of her intellect and the way she carried herself.

"She had a presence," recalls Ellen Picard, one of a handful of women studying law at the University of Alberta at the same time as Ms. McLachlin. (Ms. Picard became a judge on the province's Court of Appeal, from which she has now retired.)

Those were pioneering times for women in law. "Some people viewed women as an oddity," Ms. McLachlin told the Allard School of Law History Project at the University of British Columbia last year. "There were a lot of sexist comments. I just learned to ignore them. That was the other person's problem. I refused to make myself a victim."

When she graduated in 1968, Ms. McLachlin won the law school's gold medal. For the next half-dozen years, she practised law, mainly civil litigation – first in Edmonton, then in the northeastern B.C. town of Fort St. John and, finally, in Vancouver.

Leaving her practice behind in 1974, she became a tenured professor at UBC, teaching the law of evidence, and co-writing several legal textbooks. In April, 1981, she left the academy to become a judge on the B.C. County Court, a provincially appointed body.

Neither of her parents witnessed the moment she joined the bench. Both died relatively young. Her mother, born in 1920, passed away in 1972; her father died in 1977, at 62.

She stayed at the County Court only through the summer. In September, the Liberal government of Pierre Trudeau appointed her to the B.C. Supreme Court, six months before the Canadian Charter of Rights and Freedoms took effect.

Over the next four years, the Progressive Conservative government of Brian Mulroney would appoint her to three different jobs. First was the B.C. Court of Appeal, the province's highest court, in 1985. Then, in 1988, back down she returned to the B.C. Supreme Court – now, as chief justice.

A few days later, her husband of 20 years, Roderick McLachlin, a logger and environmental consultant with a PhD in biology, died after a 10-month struggle with cancer of the mouth. Shortly afterward, Chief Justice McLachlin was scheduled to give a speech; she went ahead with it. Life was not going to overtake her.

And tragedy would not hold her back. Six months after Roderick's death, Mr. Mulroney called to offer her a spot on the Supreme Court of Canada.

"She was very strongly recommended to me by John Fraser," Mr. Mulroney told The Globe and Mail for this story. Mr. Fraser was the minister of fisheries. More importantly, he was the political minister from B.C. in the federal cabinet, influential in the appointment of judges. "John," Mr. Mulroney says, "was a guy whose opinions I respected a great deal."

Chief Justice McLachlin was in Australia with her son, Angus, when she got the call. He was just 12 years old – and told her to take the job. She left him in the care of her sister, Judy, in Vancouver for the remainder of the school year while she moved to Ottawa for her April start.

She was 45, and had found her bliss.

One summer soon after joining the Supreme Court, Beverley McLachlin travelled to England for a legal conference for Canadians at Cambridge University.

Frank McArdle, the conference founder, was a masculine, brainy type. He had once played hockey in his youth with the legendary Maurice (Rocket) Richard. (Mr. McArdle was on the junior Verdun Maple Leafs, and the Montreal Canadiens, the Rocket's team, called him up for an exhibition game of past, present and possible future players.) And like Chief Justice McLachlin, Mr. McArdle, a father of two boys, had an adventurous spirit, having reinvented himself at the age of 47 by heading to law school, after years working in public relations and advertising. They married in 1992.

"There's always another page to turn, and you turn it," she said once, quoting her friend and colleague Claire L'Heureux-Dubé.

Justice L'Heureux-Dubé's own husband of two decades, Arthur, had died by suicide while she was still a young judge in Quebec.

In the face of loss, life demands resilience.

Justice McLachlin's early performance on the Supreme Court, beginning in 1989, was an astonishing tour de force.

The court was brimming with the titans who had taken on the earliest challenges of interpreting the Charter of Rights and Freedoms: Chief Justice Brian Dickson, a liberal lion. Bertha Wilson, the first woman on the Supreme Court, and a feminist icon. (In the 17 rulings in which both took part, the two agreed just once.) John Sopinka, a renowned authority on criminal law.

In this group, Beverley McLachlin was not shy to express herself.

Prominent among her powerful, controversial early written judgments was R. v. Keegstra. The 1990 case involved a rural Alberta teacher, James Keegstra, who was charged with promoting hatred, after teaching that all Jews are evil, that anyone evil must be Jewish, and that the Jews had "created the Holocaust to gain sympathy."

The case presented a pivotal moment for the young Charter. Did the Charter prevent government from limiting basic rights, including that of free expression, in the interest of protecting vulnerable minorities?

Justice McLachlin, writing in dissent, said it that did, at least in this case. "If the guarantee of free expression is to be meaningful," she wrote, "it must protect expression which challenges even the very basic conceptions about our society."

But Chief Justice Dickson's vision of the Charter, which carved out room for government to protect minorities, triumphed over hers, by a count of 4 to 3.

Next, she brought down the wrath of feminist critics. In R. v. Seaboyer, in 1991, the court struck down a federal rape-shield law that had protected victims from questions from defence lawyers about past sexual conduct.

Justice McLachlin wrote that the shield law was too sweeping because it did not allow for the possibility that previous sexual conduct would be relevant in some cases – though not for sexist purposes, such as establishing the complainant's credibility or likelihood of consenting. "It exacts as a price the real risk that an innocent person may be convicted," she wrote.

But just a year later, feminists applauded her. When Laura Norberg of B.C. sued her doctor, Morris Wynrib, for giving her narcotic painkillers in return for sexual favours, it was Justice McLachlin's written reasons, joined by Justice L'Heureux-Dube, that a quarter-century later seem to have stood the test of time.

She stressed that the doctor had violated his fiduciary duty – a special responsibility that people in positions of authority or trust have toward the vulnerable. (The men on the court also sided with Ms. Norberg, but largely for other reasons.)

"It's the humanity in every case that is so important to me, and it always has been," she told The Globe last month.

By 1993, just four years into her tenure on the court, Justice McLachlin was its most prolific author of judgments, with 36 – fully 10 more than the court's second-most prolific author, Justice Sopinka.

She was also its second-most frequent dissenter (after Justice L'Heureux-Dubé). One dissent stood out, in a case that riveted the country. Sue Rodriguez, 42, of B.C., had amyotrophic lateral sclerosis (ALS), and she wanted the right to seek assistance to die. Under federal law at the time, anyone who helped her to end her life could be punished with up to 14 years in jail. The court narrowly rejected Ms. Rodriguez's claim, by a count of 5 to 4.

"I thought it would be a simple matter for the Parliament of Canada to delete assisting a suicide as a crime," retired Supreme Court justice John Major, who was in the majority in that case, said in an interview for this story. "But they didn't have the courage."

Justice McLachlin, however, did not think Ms. Rodriguez should have to wait: Neither Parliament's failure to take up the issue, nor the lack of widespread acceptance of assisted suicide elsewhere in the world, mattered. "What value is there in life without the choice to do what one wants with one's life?" she asked in that ruling, perhaps channelling writer-philosopher Joseph Campbell again. "One's life includes one's death."

After a few short years on the court, she had made it clear where she was headed: She was a classical liberal – embracing an essentially conservative view that protected individual freedoms, whether of speech or of control over one's death, against encroachments from the state. And conversely, on the small-l liberal side, she displayed a willingness to view legal claims from the vantage point of the vulnerable.

Above all, she had planted her flag in the Charter's Section 7: the right to life, liberty and security of the person. The state could limit those rights, the Charter says, but only in accordance with "the principles of fundamental justice."

Beverley McLachlin's written judgments on this section presaged enormous social change. Even seemingly timeless laws such as those criminalizing prostitution or living off its avails – pimping – or injecting illegal drugs, in some circumstances, would soon feel the force of the legal arguments she had put in motion.

Beverley McLachlin came from recent immigrants who had left behind a world of upheaval and injustice. Her paternal grandparents were ethnic Germans, farmers, living in the Pomeranian region of Central Europe (which had at times been part of Germany, at other times of Poland). During the First World War, the German army took over the family home to house troops. After the war, she says of her grandparents, "At one point they had a Jewish family living in their basement to be protected against some sort of pogrom that was going on."

So they left in 1927, bringing their offspring, of whom they had 13, and money to invest in land and education. "The whole atmosphere was such that, although they were prosperous, they did not see much future for their children."

The future chief justice came to law through religion. "There was a strong tradition of debate and study," she recalls. "You were always reading the Scriptures and talking about them. My father was kind of a scholar of this. And so, I grew up with lots of philosophizing and debate. I think that had an impact on my mind as I grew up."

Fittingly, her hometown was founded to protect the rule of law. The North-West Mounted Police, forerunner of the RCMP, set up in Pincher Creek in 1878 to breed the horses they needed to patrol the West. The town was incorporated in 1906. There were no cities nearby: The closest town was Lethbridge, 100 kilometres to the east. Calgary, where Mr. Harper would one day serve as MP, was 220 km to the north.

Not every isolated community engenders positive values. But Pincher Creek is not just any community. It has produced at least four chief justices of Canadian courts. William Ives, a cowhand as a child – who did not attend elementary school till he was 21 – was chief justice of the Alberta Supreme Court from 1942-44. Val Milvain was chief justice of the Alberta Supreme Court Trial Division from 1971-79. Warren Winkler served as chief justice of the Ontario Court of Appeal from 2007-13.

Pincher Creek and the surrounding area seem to have had what today is called "social cohesion" – that intangible quality of healthy communities that helps children grow into happy, productive adults. "There was no demarcation between young people and old people," Mr. Winkler said in an interview. "I grew up with grownups. I was included in everything. You got used to talking to people who were your elders but they treated you as an equal."

Privation and uncertainty bred resiliency. "Everybody went to jobs that were risky," he says. "There were miners, lumber people, cattle ranchers, oil workers. You went to work and it was dangerous and you might not come home."

A half-century after their Alberta childhoods, he and Chief Justice McLachlin would see each other at meetings of the Canadian Judicial Council, a disciplinary body of judges. She was the chair , he the vice-chair. Within seconds, they would be sharing stories of Pincher Creek, Mr. Winkler recalls, while the other judges groaned and said, "Here they go again."

As a new Supreme Court judge, Beverley McLachlin visited the office of her colleague Antonio Lamer. On the wall was a large painting of rolling farmland, by Robert McInnis.

"I think that's where I grew up," she said.

Mr. Lamer said he didn't know where it was set.

"I'd like to buy it," she said.

But she couldn't: It was leased from a gallery, and in any event, he wouldn't part with it. Soon after, Mr. Lamer became chief justice and moved the painting into his new office.

More than a decade after that, on Jan. 7, 2000, Liberal prime minister Jean Chrétien named Justice McLachlin to the top job on the bench; she was the first woman to hold the position. The McInnis painting of Pincher Creek was now in her office.

Her hometown invited her back early in her tenure as chief justice. It was naming a street after her, Bev McLachlin Drive. At the celebrations, a tall, handsome Indigenous man approached her with a gift: pearl earrings he had crafted himself. "Your parents were the most wonderful people, and I will never forget them," he told her.

He described coming to the Gietz sawmill as a boy, with his parents and several siblings. It was Ernest Gietz's birthday, and Eleanora Gietz invited the large family in for cake. His piece had the dime she'd baked into it for luck. Ms. McLachlin remembered the visit, and asked why he found it so meaningful.

"It was the first time I ever went into a white person's home," he replied.

Decades later, on Beverley McLachlin's watch, Indigenous peoples would be guaranteed a place at the table when government or corporations sought to develop lands that had been set aside under treaties. And even if those peoples had not signed a treaty, the court ruled in 2014, their ancestral lands belonged to them. "The doctrine of terra nullius [that no one owned the land prior to European assertion of sovereignty] never applied in Canada," the chief justice herself wrote, in Tsilhqot'in Nation v. British Columbia, in which a unanimous court granted title to an Indigenous group over a large swath of the B.C. Interior.

In the eyes of many Indigenous people, it was the biggest of all victories, because it gave First Nations enormous leverage in negotiations over proposed development of Indigenous lands.

"What they're doing is they're strengthening the negotiation hand of aboriginal people, who didn't really have a hand at all," Jean Teillet, a Vancouver lawyer who is the great-grandniece of Louis Riel, said in an interview for this story. "It's a little bit of a revolution going on in this country, I think."

The Charter of Rights represented a potentially massive change to Canada's political system. And led by Chief Justice Dickson, judges seized the moment: If the Constitution was supreme, he said, judges were its guardians.

Collisions between the Supreme Court and politicians began to build in intensity.

Early on, those on the left of the political spectrum were concerned that socially progressive legislation would come crashing down. But before long, it was conservatives who were worried. The federal criminal law on abortion fell. The Supreme Court forbade Canada from extraditing suspects abroad to face the death penalty. Gay marriage became a reality.

As elected legislators began taking a back seat to unelected justices, attacks on "activist judges" – from the Reform Party and its successors on the right – became commonplace. McGill University political scientist Christopher Manfredi shares the concern about the role of judges in the Charter era. "There are reasons," he told The Globe, "to ask whether courts have the capacity to make the kinds of policy decisions they're being asked to make."

Even within the court, Chief Justice McLachlin was at times seen as pushing the court's scrutiny of laws too far. In a 5-4 ruling in Sauve v. Canada, in 2002, she wrote the majority decision declaring it unconstitutional for the federal government – the Liberal government of Jean Chrétien, in that case – to have taken away the right to vote from federal prisoners. The dissenters, in a decision from Justice Charles Gonthier, all but accused her of plucking such a constitutional right from thin air.

To this day, Justice McLachlin sees it differently. "I don't think you necessarily lose your humanity or your rights just because you're in prison or committed a very serious offence," she told The Globe. "I understand for many people this is counterintuitive."

She was now the face of a court that would be increasingly called on to justify its role in defending the rights of marginalized groups. In the House of Commons in 2003, Opposition leader Stephen Harper accused the Supreme Court of having illegally rewritten the Charter eight years earlier – in the case of Egan v. Canada – to include sexual orientation as a prohibited ground of discrimination in the equality clause, Section 15. (The framers deliberately left it off the list of protected groups; but the court had long since decided that the list was open-ended.) "I would point out," Mr. Harper said, "that an amendment to the Constitution by the courts is not a power of the courts under our Constitution." He had brought the emotional U.S. debate on "originalism" to Canada.

Still, sometimes Mr. Harper and Chief Justice McLachlin agreed on constitutional issues. Before he was elected prime minister, Mr. Harper was instrumental in bringing a case all the way to the Supreme Court on the right of citizens to advertise before elections. A Liberal government had passed a law strictly limiting such third-party advertising. Representing a conservative group, the National Citizens Coalition, Mr. Harper argued that this was an unjustifiable limit on freedom of speech.

He lost, 6 to 3 – but Chief Justice McLachlin was on his side. "This denial of effective communication to citizens violates free expression where it warrants the greatest protection – the sphere of political discourse," she co-wrote in dissent, with Justice Major, in Harper v. Canada in 2004.

But the gulf between them remained.

Under her predecessor, Antonio Lamer, the court had sometimes broken into multiple factions, obscuring the meaning of decisions. But as Chief Justice McLachlin tangled with the fledgling Conservative government, she became a unifying force on the court.

"If you couldn't get five judges on the same decision, you then had a lack of clarity as to what the court was deciding," Ian Binnie, a judge on the court from 1998 to 2011, said in an interview for this story. "So,

without pushing people to a particular outcome, she would urge all of us to rethink our positions to at least have five of the nine judges saying the same thing."

Off the bench, too, she tried to hold the court together. During one fractious period within the court, she invited her colleagues to prepare a meal at her home, under the direction of the Supreme Court chef, Mr. Binnie recalled: "So we were all instructed to clean fish and peel vegetables, which brought people together on a personal level at a time when there were some professional differences that needed to be healed."

Mr. Winkler said he gained an insight into her subtle leadership style by observing her at Canadian Judicial Council meetings. "You get to the end of a meeting and you say, 'How did we get to this position?' And then you look back: She got you there. But she didn't come in and say, 'Here's what we're going to do.' You never thought she dictated or compelled the conclusion. It's like magic to see."

Thus, when three major cases arrived at the court on the right to life, liberty and security of the person – Chief Justice McLachlin's sweet spot – the court was ready to speak clearly and with one voice.

The first of those cases, in 2011, involved the Harper government's stated "war on drugs."

Since 2003, cocaine and heroin addicts had been injecting drugs under nursing supervision at Vancouver's Insite clinic. Now, however, the federal government wanted to close the clinic, arguing that it promoted drug use and addiction.

The judges balked. Chief Justice McLachlin, writing for a unanimous court, said that the federal approach was not in accordance with "the principles of fundamental justice," because it would increase the risk of death or disease to the vulnerable, an effect grossly disproportionate to any benefits such an approach might have. The clinic stayed open.

The second case, in 2013, involved prostitution laws (street soliciting, running a bawdy house, living off the avails) predating the Conservative government. Again, all nine judges stood together. Again, Chief Justice McLachlin penned the ruling. As in the Insite case, she wrote that the prostitution laws put the lives of vulnerable Canadians, in this case sex-trade workers, at risk. The court struck down the prostitution laws, thus allowing sex-trade workers to ply their trade legally, in dwellings or on the street. (A subsequent Conservative law criminalized those who purchase sex.)

The ruling had an added consequence, far beyond the case: It gave lower-court judges the right to overturn precedents in certain circumstances, even those set by the Supreme Court. Until then, only the Supreme Court could topple its previous rulings. But now, if a trial judge found new "social facts" – such as a new understanding of how certain laws add to the dangers of the sex trade – that judge could revisit what seemed to have been a settled constitutional matter. And higher courts would have to show deference to the trial judge's findings on how times had changed. Precedent is "not a straitjacket that condemns the law to stasis," Chief Justice McLachlin wrote.

This was the "living tree" on steroids, exactly what Mr. Harper opposed. But he had not been able to find the Canadian equivalent of U.S. Supreme Court Justice Antonin Scalia, a believer in a "frozen Constitution."

The third case, Carter v. Canada, in 2015, was a reprise of the 1993 assisted-dying case. And the prostitution ruling sealed it. A lower-court judge in Carter v. Canada had found as a fact that, in countries that allowed assisted dying, the vulnerable were protected. Under Chief Justice McLachlin's judgment in the prostitution case, the Supreme Court judges had little choice but to defer to this critical finding.

The government's central rationale for criminalizing assisted dying (protecting those vulnerable to being pressured to die) was thus shattered. The 9-to-0 Supreme Court ruling lifting the ban on assisted dying was authored not by the Chief Justice but by "the Court," giving it extra oomph.

Chief Justice McLachlin's vision was triumphant: Section 7 (the right to life, liberty and security of the person) now placed strict limits on what might be described as legislating morality. Individual rights would prevail over community standards. Bradley Miller, a conservative law professor later appointed to the Ontario Court of Appeal by the Harper government, said that governments had been deprived of the right to make their arguments on behalf of larger societal interests. "Justice and justification are to be considered from one side only," he wrote on a British constitutional blog before becoming a judge.

Even if only one person was wronged, a law could fall.

Federal Court of Appeal Justice Marc Nadon was an outspoken small-c conservative (though not a Scalia-like originalist). He was also semi-retired.

When Mr. Harper appointed him to the Supreme Court in 2013 – to replace Morris Fish of Quebec – a legal challenge began over whether he had the legal qualifications. In 2014, the court ruled that he did not. It was the court's first rejection of an appointee in its history.

That was just one case in a losing streak for the Harper government. In five major cases, the government found just a single vote – once – on the Supreme Court. Three involved tough-on-crime laws central to the government's political agenda. In the last of the five, the court turned thumbs down on the government's wish to make the Senate an elected body.

That Senate ruling seemed to be the last straw for Mr. Harper. Soon after, the Prime Minister's Office put out a news release saying that Chief Justice McLachlin had sought to interfere in a case before the court – the Nadon case. It said she had inappropriately called Justice Minister Peter MacKay, and had tried to call Mr. Harper, who would not take the call. "Neither the Prime Minister nor the Minister of Justice would ever call a sitting judge on a matter that is or may be before their court," the news release stated.

That same day, the Chief Justice had been giving a speech at the University of Moncton on women and the law. She did not learn of the PMO's statement till four the next morning, as she hurried to catch a

plane to return to Ottawa. "I obviously was shocked and dismayed," she recalled in the interview in her office. "I thought, 'This is not right. This is not true.' "

Back in Ottawa, she met with her executive legal officer, Owen Rees, and decided to speak out.

"I never felt fear. I didn't even feel anxiety, as I recall. I just felt this was wrong. I did not want it to tarnish the office of chief justice or the court. I had devoted my whole life, or a good part of it, to doing whatever I could to make the court a wonderful and hopefully respected institution. My concern was that somehow this might tarnish the image of the court."

She says she told Mr. Rees, " 'We're going to put out a statement and deny any wrongdoing' – which there was none – 'and just set out the facts.' That's what we did. We set out the dateline of when that call was – which, by the way, was several months, I believe, before the candidate in question's name ever came up. The call was a purely administrative one of the nature that chief justices make to the justice minister from time to time."

(As The Globe later reported, the PMO had created a list of six candidates for the Supreme Court, of which four, including Justice Nadon, were from the Federal Court's trial and appeal divisions. No Federal Court judge had ever filled one of the three places reserved for Quebec on the Supreme Court, because the law did not explicitly allow it. When Chief Justice McLachlin was shown the list, she contacted Minister MacKay to warn him of the legal roadblock. But the confidentiality of the process prevented her from publicly revealing these details.)

In his recent interview with The Globe, Mr. Mulroney said there was nothing unusual in a chief justice contacting the justice minister over an administrative issue. "Look, when I was prime minister, I would frequently sit down with the chief justice and hear his views on the operation of the federal courts generally in Canada. I would ask, for example, in respect of appointments, what he might think of A, B or C. This was Tony Lamer and Brian Dickson. I would have the chief justice for dinner at 24 Sussex when there were special dinners going on."

He added that Mr. Harper, in his view, had been deeply in the wrong. "The Supreme Court is the backbone of Canadian democracy," he said. "That is diminished when a person in authority like the prime minister attacks, publicly, the chief justice of the Supreme Court."

Mr. Harper did not respond to The Globe's attempt to contact him for this story.

In the backcountry near Pincher Creek, Dick Hardy, a modern-day cowboy who bought the planks for his first corral from the Gietz sawmill, was not impressed by the prime minister's actions.

"I was a Harper fan," the 75-year-old, who went to high school with the chief justice, said in an interview. "I had a great respect for his management, fiscally, of this country. But he was out of school on that one.

"But how gracefully did she handle that."

In her years on the court, Beverley McLachlin did not wear her heart on her sleeve. Cool, methodical logic was her domain.

"There's a certain effacement of who she is, even in her judicial writing," says David Sandomierski, one of her former law clerks. "She really inhabits the cloak of her office, which entails a concealing of her own person. I view her as an avatar for the court."

The closest she came to a passionate display, perhaps, was in a speech in 2015, in which she said that Canada – led by its first prime minister, John A. Macdonald – had committed cultural genocide against Indigenous peoples in its use of residential schools for assimilation. She called this the "most glaring blemish on the Canadian historic record." But even that, according to her, was a simple statement of fact that she did not think was controversial.

Wrote Joseph Campbell, explaining what it meant to follow one's bliss: "The heroic life is living the individual adventure."

Beverley McLachlin's personal adventure has been unstoppable. She emerged from her pre-electricity, horse-riding childhood to become a modernizing force in Canada, spending 17 years as chief justice – and 28 years in total on the Supreme Court – in the 35 years since the Charter of Rights took effect. And she more than pulled her weight: She wrote or co-wrote 172 of the court's roughly 1,000 reserved decisions while chief justice, about one in six – including many of the most important decisions, according to political science professor Peter McCormick of the University of Lethbridge.

Her legacy, covering virtually every area of the law – from strong protections of due process for suspected terrorists and criminals, to a new legal footing for Indigenous peoples, to the resounding independence of Canada's highest court, to the vibrant growth of the "living tree" of constitutional rights – is now part of the country's foundations.

As for what comes next, more adventure seems likely. She has written a mystery novel, Full Disclosure, to be published this spring. And she'll have a little more time to follow other pursuits as well.

"We both agree there's more to life than just sitting around," says Mr. McArdle, who is now 89. "I'm sure we'll find something interesting to us."

French authorities drop terrorism charges against Lebanese-Canadian professor Hassan Diab
Diab was accused in a 1980 terrorist attack on a Paris synagogue and has been imprisoned in France for three years. He was extradited to France in 2014 after the Supreme Court of Canada refused to hear his case.
Toronto Star
Melanie Marquis
The Canadian Press
January 12, 2018

OTTAWA—French authorities have dropped terrorism charges against a Lebanese-Canadian who was suspected of taking part in an attack in Paris in 1980 and have ordered his immediate release.

But Hassan Diab's legal ordeal may not be over just yet, with an appeal of the decision very likely and the fact he doesn't have travel documents to get home, his Canadian counsel said Friday.

That said, Diab's Ottawa-based lawyer, Donald Bayne, says supporters are "elated, relieved and thankful" at the news.

Bayne believes Diab, 64, is on a no-fly list, so it's unclear when he could return to Canada.
"He's been found to be, in effect, an innocent man in France who is not a French citizen who does not currently have Canadian travel documents and who is probably (or almost certainly) on a no-fly list," Bayne said in an interview.

"But he's in a much better position today than he was yesterday in a prison — but he's not at liberty, as a normal citizen would be, to hop on a plane and come home."

Diab was accused in the terrorist attack on a Paris synagogue and has been imprisoned in France for three years.

But French magistrates ruled Friday the evidence against Diab was not strong enough to warrant a referral to criminal court.

Bayne said he was thankful for the decision by French judges who used "their wisdom and courage to buck political and social pressure to make a completely just decision, something that we believe the courts in Canada failed to do at every level."

Bayne said he's not yet ready to declare victory, with Diab's French lawyers certain that prosecutors in France will appeal.

"France is so traumatized by terrorist attacks that their legal machinery for dealing with terrorism cases is very, very strict," Bayne said. "The government can show no sign of softness or weakness toward accused terrorists."

The RCMP arrested Diab in Quebec in November 2008 at the request of French authorities in connection with the attack, which killed four people.

He was extradited to France in 2014 after the Supreme Court of Canada refused to hear his case.

Diab, a sociology professor, has always denied his involvement.

His lawyers in France pointed to the evidence that showed Diab could not have been in France when the attack occurred, with many elements showing he was in Beirut at the time.

“The decision also notably underlines the numerous contradictions and misstatements contained in the intelligence which cast serious doubts about their reliability, as well as the fact that Dr. Diab’s handwriting, fingerprints, palm prints, physical description, and age do not match those of the suspect identified in 1980,” read a statement by an a committee that advocated for Diab’s release.

Bayne also thanked Global Affairs Canada and Foreign Affairs Minister Chrystia Freeland for their support.

The fact his extradition went ahead without a strong case against him demonstrates it’s time to correct the Extradition Act.

The lawyer urged Prime Minister Justin Trudeau and Justice Minister Jody Wilson-Raybould to act.

“How could Canada have extradited a Canadian to France when France never, never had a case against Dr. Diab fit to go to trial?” Bayne said.

“This Canadian was extradited on overwhelmingly unreliable evidence. Yet every Canadian court allowed this to happen.”

Public servants ask federal labour body to declare government broke the law
CBC News
The Canadian Press
January 12, 2018

OTTAWA -- The biggest union representing public servants in Canada is seeking damages after the federal government missed a deadline for implementing four collective agreements.

The move formalizes a complaint launched in October by the Public Service Alliance of Canada after the Liberal government openly admitted problems with its Phoenix pay system would mean it would miss a 150-day deadline to pay three years' worth of back pay and implement pay raises under the agreements.

The new contracts were ratified in June.

Failure to meet the deadline came even after PSAC gave the government an additional two months to make the changes.

In a statement released today, the union said it has asked the Federal Public Service Labour Relations Board to declare the government has violated its obligations under law.

PSAC said it was also calling on the board to order the government to provide a firm date for implementing the collective agreements, and to negotiate damages for civil servants covered by the contracts.

"If, after two months, these negotiations do not yield an agreement on damages, PSAC is asking the board to intervene," the union said in a statement on its website.

The bargaining agent didn't say how much it is seeking in damages. It's not clear how many government departments or agencies have failed to fully implement the contract changes or how many civil servants have not received back pay and pay increases.

The government had said in October that it was making implementation of the collective agreements a top priority, ahead of other Phoenix issues.

But Treasury Board President Scott Brison acknowledged the complexity of the contracts had further created slowdowns in the Phoenix pay system.

Over the past several months, Public Services and Procurement Canada, which oversees the troubled system, blamed the diversion of pay advisers to handling of contract implementation for an increasing backlog of problem pay files.

PSAC represents about 180,000 workers including federal employees in a number of departments, agencies and Crown corporations.

The labour relations board is scheduled to meet with government and union officials on Jan. 31

Phoenix call centre is taking calls but losing trust
iPolitics
Kathryn May
January 12, 2018

The overloaded Phoenix call centre may be taking calls again, but this week's spectacular crash is another blow to the waning trust of Canada's public servants that their pay woes will ever be over.

A growing number, who have already faced two years of Phoenix pay blunders, appear to have little confidence that reporting their overpayments by phone or online will actually be recorded properly by the Jan. 31 deadline.

Robyn Benson, president of the Public Service Alliance of Canada (PSAC), said the government could help restore some of the lost trust by giving public servants who received overpayments a blanket exemption so they only have to repay the amount of the overpayment they actually received.

"The only solution is for the government to offer a full exemption from repaying the gross pay for all employees who received an overpayment due to Phoenix," said Benson.

"It is incredibly frustrating to hear back from our members that they are unable to reach call centre staff to report their overpayments. We have told the government time after time to hire more staff to help employees solve their Phoenix issues."

The thousands of employees who were overpaid — or fear they may have been — in 2017 by the accident-prone pay system are racing to meet a Jan. 19 deadline to report their overpayments.

The volume reached an unprecedented peak of 12,000 calls on Wednesday, causing the overloaded system to drop most calls. The centre typically handles about 2,000 calls a day.

The volume took Public Services and Procurement Canada, by surprise. The federal paymaster quickly told departments to inform employees they can also use the Phoenix feedback form to report overpayments online.

The department was unable to say how many calls the centre has handled since, but the forms seem to have reduced the call volume that swamped the centre.

However, giving employees the option to file reports online or by phone doesn't seem to have eased concerns that the fickle system may still somehow foul up the processing. The pay centre will notify employees if Phoenix recorded its overpayment by Jan. 31.

This is just the latest source of frustration for those who have been overpaid by Phoenix since it was launched.

The government maintains that income tax laws compel employees to repay the gross amount (the amount that includes deductions made at source on the employee's behalf) rather than the net amount they actually received. That prompted an outcry. The complaints resonated with many MPs, who felt being forced to repay the gross amount was unfair.

As it stands, employees who receive overpayments can repay the net amount they received if the money is given back in the same tax year. Beyond that, they must repay the gross amount.

PSAC wanted a blanket exemption so public servants would only have to repay the net amount. Instead, the government gave employees a reprieve and allowed those who reported overpayments by the end of January to pay the net amount and have their tax slips adjusted.

Those who don't make the deadline will have to repay the gross amount. The government will delay collecting repayments from them until after Canada Revenue Agency has processed their tax returns and they have received refunds.

The department said these employees will receive amended 2017 tax slips that show their correct annual earnings, as well as any taxes on the overpayment, and they will be eligible for a refund of the tax withheld.

As well, those who received overpayments worth more than 10 per cent of their biweekly pay can put their repayments on hold and follow up with the government for a flexible repayment plan.

PSPC says it can't confirm how much money has been issued in overpayments or how much of the backlog — which, at last count in November, stood at about 619,000 cases — is made up of overpayments. The most common situations are employees moving to a new job and getting paid twice or continuing to get paid after they quit, retire or finish a contract.

Attempting Justice For Sexual Crime Victims
The Strand
Erin Calhoun
January 13, 2018

In 2017, more than 50 women have come forward with sexual allegations against Hollywood producer Harvey Weinstein. Actress Rose McGowan was temporarily suspended from Twitter after tweeting "fuck off!" to Ben Affleck who denied knowledge of Weinstein's patterns of sexual violence. Twitter claims to have disabled her account due to tweeting a private phone number, which angered her growing following of supporters. These events prompted the resurgence of the "#MeToo" social media campaign, which was originally founded in 2014 by Tarana Burke to raise awareness about sexual violence.

Soon after, Anthony Rapp accused actor Kevin Spacey of sexually assaulting him when Rapp was a minor. Next came the publication of a New York Times exposé, which brought to light . In a public statement, the comedian admitted to these allegations of sexual misconduct. Shortly thereafter, his upcoming film, I Love You Daddy, about an underage girl being seduced by an older man was dropped by its distributor. The list of Hollywood men accused of sexual misconduct continues to grow, including names such as Ed Westwick, James Toback, and many more.

The multiplicity of stories about powerful men caught in sexual assault allegations has been dominating the media as of late. The awareness and discussions surrounding these crimes are reaching new heights in the public sphere.

Despite this increase in media attention, rates of sexual assault are not decreasing. According to the Canadian centre for Policy Alternatives, sexual assault is one of the only crimes in Canada whose rates are not declining. Although recent discussions are raising awareness,, reporting sexual assault is still dangerous for women and their reports of sexual violence are not taken seriously.

In early 2015, Stanford student Brock Turner was convicted of sexual assault. Turner was sentenced to six months in prison with three years of probation. After three months, Turner was released and registered as a sex offender. This case went viral when the victim, known as "Emily Doe," read a victim impact statement during the sentencing phase of the trial. The statement was then published on Buzzfeed.

In early 2017, The Globe and Mail reporter Robyn Doolittle exposed the inefficiencies in the ways police officers handle sexual assault cases. The report uncovered that police dismiss 1 in 5 sexual assault claims as "baseless" or "unfounded," meaning that an officer does not believe that a criminal offence occurred. Any case that is deemed "unfounded" is not sent to Statistics Canada.

Doolittle's investigation highlighted the case of a Western University student who was raped after attending a party. The young woman's case was deemed "baseless" and closed by police. This case is not unique; more than 5,000 cases of sexual assault have also been dismissed as "unfounded" by Canadian law enforcement.

At the beginning of 2017, post-secondary institutions started amending policies to be in compliance with Bill 132: Ontario's Sexual Violence and Harassment Plan. The bill outlines that schools must put in place a policy for responding to sexual violence as well as incidents and complaints of harassment. UofT's past sexual violence and harassment policy was widely criticized for its unclear descriptions of procedures. In April of 2017, Tamsyn Riddle, sexual assault victim and an organizer of the UofT chapter of Silence is Violence, came forward with her story of reporting sexual assault to UofT. The school mishandled her case and inadequately investigated her complaint.

A new policy at UofT on sexual violence and harassment deals specifically with responding to incidents and providing support for victims. The policy is part of the university's attempts to strengthen awareness of sexual assault and violence on campus; it implements two years' worth of research and consultation with expert panels of students and faculty.

In the 2016 Annual Campus Police Report for UTSG, the most recent report available, the number of reported sexual assault crimes to the Campus Police rose from 2 in 2015 to 11. The increase in reports doesn't necessarily reflect an increase in crime. Instead, it may reflect students becoming more comfortable with reporting assaults. UofT created a Sexual Violence and Support Centre to respond to sexual violence on campus. The Annual Campus Police Report takes into account reports made to this centre. The support centre is present on all three UofT campuses and educates administration in dealing with sexual harassment and violence. Although Campus Police are also trained to investigate sexual misconduct and harassment, escalated cases are sent to the Toronto Police Service for investigation.

Historically, universities have been known to conceal sexual assault incidents occurring on campus. From "rape chants" at St. Mary's College to a rape committed by a member of the University of Ottawa hockey team, university policies for reporting sexual assault have proven to be ineffective. Most universities deal with sexual assault instances internally—very few of these cases lead to investigation by officials.

Dr. Sable of the University of Missouri-Columbia explains that the major reasons an individual may choose not to report assault are shame, guilt, and embarrassment of what happened; concerns about confidentiality, and fear of not being believed. Sexual assault is frequently imagined as occurring to cisgender women in heterosexual encounters. Those with experiences who do not fit this stereotype could face additional barriers to reporting an incident.

There is often a lack of empathy for women who report incidents of sexual assault. A tendency to blame the victim results in questions concerning attire, sobriety, and mental health.

Earlier in March of this year, Silence is Violence ran a campaign titled "Silence Fights Back" which featured posters around campus exposing the mishandling of sexual assault by the university. According

to Silence is Violence's Facebook page, the campaign is meant to "highlight the experiences of people impacted by violence and abuse on campus and their reflections on seeking out resources and supports from the University of Toronto." Within its first 24 hours, the campaign received more than 70 responses. 10,000 copies were printed and posted around campus. Although the posters complied with the university's size and placement policies, they were later removed because administration deemed them to be in violation of the Procedure on Distribution of Publications, Posters, and Banners. The university's pushback creates a culture of silence.

How are student unions involved with all of this? The University of Toronto Students' Union (UTSU) is one of many student unions in partnership with Our Turn, a student-led group that focuses on sexual violence and assault policies throughout Canadian universities. Our Turn rated the sexual violence and harassment policies of 14 Canadian universities after they were created or updated to reflect Bill 132. Nearly half of the universities studied received failing grades, with UofT's policy receiving a C-. The evaluation also exposed the problems students face when reporting an assault, which include: being barred from making a complaint to police or the university, the ability for university presidents to make unexplained exceptions to their sexual violence and harassment policies, and judges' orders to silence survivors. The UTSU claims to be improving their approach to sexual violence and harassment by taking student input into account. The UTSU also plans to join twenty other student unions, including UBC, McGill, Dalhousie, and the University of Ottawa to create an action plan that will improve prevention of sexual violence, support survivors, and advocate for change.

Coverage of sexual violence in the media—such as Lauren McKeon's Toronto Life story recounting her rape and the aforementioned cases of women reporting their experiences of sexual assault—shows that journalism has the ability to catalyze change. Shannon Giannitsopoulou, co-founder of Femifesto (a feminist organization that works to shift rape culture and consent), helped create a guide for writing about sexual assault. The guide was created in consultation with survivors of sexual assault. Giannitsopoulou explains that sexual violence often happens "in the grey areas," and responsible reporting takes this into account.

Since the publication of "Unfounded" by Doolittle in The Globe and Mail, OPP officers that investigate sexual assault have become required to undergo extensive training and accept feedback from local victim support groups. The OPP will also review approximately 4,000 cases that were originally deemed "unfounded." Several of the investigated cases have also been reopened, resulting in the arrest of one of the attackers.

Silence is Violence continues to run campaigns that foster discussion and raise awareness of gender-based discrimination. The organization also provides education and training on the subject with guest speakers on campuses.

Through responsible reporting on sexual violence and an increase in media attention, policies and views regarding sexual violence are starting to change.

Supreme Court case could lead to First Nations role in law-making

Mikisew First Nation in northern Alberta wants First Nations to have a say in laws concerning treaty rights

CBC News
The Canadian Press
January 14, 2018

The Supreme Court of Canada is to begin hearings Monday in an appeal that could force lawmakers across the country to give First Nations a role in drafting legislation that affects treaty rights.

"This case is tremendously significant whichever way it comes out," said Dwight Newman, a law professor at the University of Saskatchewan.

It could "fundamentally transform how law is made in Canada," he said.

The court is to hear a challenge by the Mikisew Cree First Nation in northern Alberta. It seeks a judicial review of changes made under the previous Harper government to the Fisheries Act, the Species At Risk Act, the Navigable Waters Protection Act and the Canadian Environmental Assessment Act.

The First Nation argues that because the changes were likely to affect its treaty rights, the government had a constitutional duty to consult before making them.

Mikisew's lawyer says giving First Nations a say will lead to better legislation

Cases on the Crown's duty to consult appear regularly, but they usually concern decisions made by regulatory bodies. This one seeks to extend that duty to law-making.

"Rather than being consultation about a particular (regulatory) decision, it's a consultation about making the rules," said lawyer Robert Janes, who will represent the Mikisew.

Janes argues that First Nations are often kept from discussing their real issues before regulatory boards.

"The place to deal with larger issues that First Nations often want to deal with are when the statutes are being designed. If you don't deal with that in the design, the (regulator) doesn't have the tools to deal with the problem when it comes up."

Legislation creating Alberta's energy regulator, for example, specifically blocks the agency from considering treaty rights, which are the root of most Indigenous concerns with energy development in the province.

Ensuring First Nations have a voice when laws are drafted will lead to better legislation, argues Janes.

Not necessarily, says the government.

Ottawa argues allowing the appeal would be an 'intrusion'

"At some point, the need to consult in this manner may overwhelm and affect the ability to govern," it says in written arguments filed with the Supreme Court.

Ottawa argues that allowing the appeal would be a far-reaching intrusion by one branch of government into the work of another and that it is "not the courts' role to impose restrictions or fetters on the law-making process of Parliament."

There's nothing that prevents governments from consulting First Nations when laws are drafted, federal lawyers say. But they argue that forcing them to give Indigenous representatives a seat at the table diminishes Parliament, which is supposed to be the most powerful body in the land.

It would also put more value on some rights than others, giving treaty rights preference over charter rights.

The appeal is being closely watched. Five provincial attorneys general and seven Indigenous groups have filed as interveners.

Newman said some provinces, such as Saskatchewan, already consult First Nations in drafting relevant legislation.

Whichever way the Supreme Court decides, it will be "amongst the most significant duty-to-consult cases that have been decided," he said.

"Altering the parliamentary process itself contains dangers. It's a delicately balanced process that's been developed over hundreds of years and I don't know if we can predict all of the effects of putting in additional judicially developed requirements."

Janes said one effect might be reconciliation.

"If you're going to talk about reconciliation ... it doesn't make much sense to say we're just going to let one side make the rules and we're only going to have a conversation afterwards."

Time for Parliament to legislate control over Canada's military criminal justice system
Hill Times
Joshua Juneau And Michel Drapeau
January 15, 2018

•The interim report on the court martial comprehensive review does not instil confidence that the military justice system is working, and this should bring tremendous concern, and a sense of urgency, to Parliament that significant reform is required.

•It is the duty of our Parliament and the minister of justice to be vigilant and not allow our military to operate in a vacuum. Former French prime minister Georges Clemenceau once famously quipped: 'War

is too important a matter to be left to the military.' Perhaps there is a conventional wisdom to this statement, and military justice, accordingly, is also to important a matter to be left to the military.

OTTAWA—The cornerstone of Canada's constitutional democracy is the separation of government powers. As the artisans of law and with a complete oversight duty over the executive, the legislature arguably wields the greatest power. If there is public demand for a policy shift, it is the legislature that exercises control over the executive to ensure that the public interest is maintained. This includes control over all government departments, including the Canadian Armed Forces.

Despite its oversight duty, Canada's legislature has arguably not made a meaningful contribution to the development of military law since 1967, resulting in the unification of Canada's Army, Navy, and Air Force. In this way—save for legislative reform in 1997 as a result of the findings of the Commission of Inquiry into the Deployment of the Canadian Airborne Regiment to Somalia—this current Parliament is an absentee landlord, currently more concerned with legalizing marijuana than in reforming an ancient justice system that so often fails our men and women in uniform.

And the time for the legislature to exercise control over the military has never been more urgent. Last week, an interim report on the court martial comprehensive review was made public, and demonstrates that there is a strong and uniform lack of confidence in the military justice system. In interviewing those in Command roles, senior officers advocate for significant reform to address shortfalls of the military justice system, including civilianization of the prosecution services and the judiciary. These commanders give clear examples where military lawyers have undermined their command function.

Canada's minister of justice is also 'absent in office' on the military justice file. Yet, Sec. 4 of the Department of Justice Act gives the minister responsibility as superintendent over "all matters connected with the administration of justice in Canada," including the military justice system. The Minister of Justice, Jody Wilson-Raybould, is also the official adviser to the governor general—Canada's commander in chief—and is the legal member for the Queen's Privy Council.

Not only is the minister passive and uninvolved in military affairs, her legislation goes out of its way to exclude application over the military. It is almost as if there were a line of demarcation between laws intended for civil society and laws enacted for the military. The corollary to this is that the military is being granted a sort of independence of decision and actions within a widening sphere of competence. To the informed observer, the lines between legislative and military affairs is sharp and clear as if both sides must abstain from transgression.

The need for civilian oversight of our military has never been clearer.

The Summary Trial

Among advanced democracies, Canada's military is the last bastion of the ancient summary trial. The ancient summary trials system in Canada is frozen in time and largely unchanged in 328 years.

Nearly 800 military members in Canada face summary trial each year. These disciplinary proceedings, which are heard by that soldier's commanding officer, could lead to a sentence with "true penal

consequences" such as incarceration, demotion, a large fine, or a reprimand. A summary trial conviction may also result in a criminal record.

Amazingly, however, there is no right to legal counsel at a summary trial even if an accused is being tried on Canadian soil, during peace time; nor is there a transcript of proceedings or a right of appeal. Moreover, the commanding officer hearing the summary trial has no legal training.

The summary trial disciplinary procedure is also devoid of any rules of evidence, meaning there is no protection for an accused being compelled to be a witness against himself, there is no protection against self-incrimination, no right to spousal privilege, and adverse inferences may be drawn from the accused's silence, and hearsay evidence may be taken and fully relied upon.

No other Canadian faces such a one-sided penal justice process. The summary trial process, as practised in Canada, has been all but abolished among all our NATO allies. Canada's system is still used in Pakistan, Sri Lanka, India, Bangladesh, and Nepal.

Clinical depression led to judge being forced to resign from Supreme Court of Canada
The Straight
Charlie Smith
January 14th, 2018

By the late 1980s, there was a growing body of knowledge about mental illness.

That's because as far back as the late 1970s, then First Lady Roslyn Carter was devoting enormous attention educating the public about this issue.

In the early 1980s, many governments were well aware of the need to strengthen mental-health services.

But that didn't prevent a Supreme Court of Canada judge from being forced to resign in 1988 because he was suffering from clinical depression.

The circumstances of Gerald Le Dain's departure from Canada's highest court was revealed in a documentary that aired this morning on CBC Radio's The Sunday Edition.

Le Dain's daughter, Caroline Burgess, called her father's treatment "cruel" and "unconscionable".

"There was never an apology," Burgess said in the documentary. "The way things were left doesn't sit right with me and it doesn't sit right with my siblings."

Burgess also declared that she wished that this never happened.

Le Dain recovered from his illness and died nearly 20 years later in 2007.

"There wasn't an enlightened kind of sense that this is treatable," Burgess maintained.

According to The Sunday Edition documentary, then chief justice Brian Dickson "pressured" Le Dain to step down less than two weeks after he was diagnosed.

Burgess revealed that she asked Pierre Trudeau, then in retirement, if he could intervene because he had appointed Le Dain to the bench.

"Trudeau said to me 'I also appointed Brian Dickson,' " she recalled.

Claire L'Heureux-Dubé was a Supreme Court of Canada justice when Le Dain became ill.

She said that she and another former justice, Bertha Wilson, opposed the decision to push Le Dain to quit while he was ill.

L'Heureux-Dubé also that Le Dain had "an exceptional mind" and "should have been given the time to get back healthy".

The Supreme Court of Canada website simply states that Le Dain "retired" after four years on the bench and makes no mention of him being forcibly removed due to mental illness.

Le Dain is best known to Canadians as the chair of a commission into the nonmedical use of drugs. In 1972 it called for the repeal of criminal sanctions for possession of marijuana.

The Le Dain Commission also recommended that people be allowed to grow cannabis for personal use.

Letters: Don't turn judges into 'politicians in robes'
The Vancouver Sun
January 14, 2018

Re: Electing judges would make them accountable to the public, Letters, Jan. 8.

Recent letter-writers have advocated for the election of judges as the solution to perceived light sentences or, with the benefit of hindsight, incorrect decisions on child custody and access.

Nothing would take us further from the pursuit of justice than the election of judges. Describing them as nothing more than “politicians in robes,” retired U.S. Supreme Court justice Sandra Day O’Connor has lent her prestige to the effort to abolish the scourge of elected judges in many U.S. states. Legal scholars have noted that virtually no other country in the world elects judges. The potential for conflict of interest, bias, favouritism and corruption by elected judges form part of the legal history of the U.S. How unseemly it is for sitting and prospective jurists to be engaged in campaigning, fundraising, and, sadly, giving stump speeches in which they sometimes denigrate their opponents with scurrilous accusations.

The remedy for perceived deficiencies in any judicial decision is the appellate courts; we don't need "politicians in robes" to dispense "justice" in Canada. Canada should never venture down the path to an elected judiciary.

Lee Rankin, Burnaby

Quand la Cour suprême congédie un juge malade
Il y a 30 ans, un juge du plus haut tribunal du pays a été forcé de démissionner alors qu'il était dépressif
Droit Inc
Jean-François Parent
15 janvier 2018

Un récent documentaire de la CBC révèle que le départ précipité du juge Gérald Le Dain, en 1988, était en fait un congédiement forcé et injustifié. Pour lequel la famille attend toujours des excuses.

Cliniquement dépressif, Gérald Le Dain n'a pu se rendre à la rentré judiciaire de l'automne 1988, relate la radio de la CBC dans un reportage radio diffusé en fin de semaine dernière.

Il a été nommé à la Cour suprême en 1984 par Pierre-Elliott Trudeau.
Mais plutôt que de lui accorder un congé pour soigner sa dépression, on lui a montré la porte.

Sa femme, Cynthia Le Dain, raconte être allée demander un temps de répit pour son mari au juge en chef Brian Dickson, en septembre 1988.

Elle dit avoir craint que son mari ne sombre dans la dépression. Mais plutôt que de lui témoigner de la compassion, Brian Dickson aurait montré la porte à Gerald Le Dain, selon les témoignages recueillis par la CBC.

L'ex-juge Claire L'Heureux-Dubé se rappelle avoir été choquée par le traitement réservé à son collègue, avec qui elle a siégé pendant quatre ans. Elle a confié à la CBC qu'en 1988, tous les juges avaient énormément de travail et de pression, en raison d'une pléthore de dossiers concernant la toute nouvelle Charte des droits et liberté, adoptée en 1982.

C'est également une période charnière au Canada, où la Cour suprême doit gérer plusieurs dossiers explosifs : l'accord du Lac Meech, la Loi 101…

Claire L'Heureux-Dubé se rappelle que l'approche rigoureuse du juge Le Dain pouvait ralentir les choses. Elle et sa collègue sur le banc, Bertha Wilson, ont été « choquées » de la façon dont Gerald Le Dain a été traité. « Nous jugions la chose injuste. Qu'un juge ne puisse plus rendre de décision est un problème. Mais c'est secondaire, selon moi. Le juge Le Dain, dont le raisonnement juridique était si puissant, aurait dû avoir un temps de convalescence et nous revenir en santé », explique l'ex-juge à la CBC.
Caroline Burgess, la fille du juge Le Dain, estime que son renvoi forcé a précipité la maladie de son père. Gerald Le Dain est décédé en 2007.

Dans sa biographie écrite par son conseiller juridique Robert J. Sharpe en 2003, le juge en chef de l'époque, Brian Dickson, confie avoir estimé que le pronostic concernant une éventuelle convalescence du juge Le Dain était mauvais. La Cour suprême, où les dossiers s'accumulaient, « ne pouvaient se permettre d'attendre » qu'il revienne en santé.

L'ex-juge Le Dain a pratiqué le droit au défunt cabinet Walker, Martineau, Chauvin, Walker & Allison, puis au cabinet Riel, Le Dain, Bissonnette Vermette & Ryan, qui allait devenir Dunton Rainville.

Il a été doyen de la fac d'Osgoode Hall, à Toronto, et a enseigné à McGill.
De 1969 à 1973, il a présidé la Commission d'enquête sur l'usage des drogues à des fins non médicales.

David Butt, qui a travaillé avec lui à la Cour suprême, soutient que le traitement réservé à Gerald Le Dain était « inhumain ».

Sa fille, Caroline Burgess, croit que son père a été traité de façon « cruelle et déraisonnable ». Et pour ça, il n'y a « jamais eu d'excuses ».

Un nouveau rôle dans la rédaction des lois pour les Autochtones ?
Un appel en Cour suprême pourrait « changer fondamentalement la façon dont les lois sont faites au Canada »
Radio-Canada
15 janvier 2018

La Cour suprême du Canada commencera à entendre un appel, lundi, qui pourrait forcer les gouvernements du pays à donner un rôle aux Premières Nations dans la rédaction des lois qui toucheraient leurs droits issus de traités.

Dwight Newman, professeur de droit à l'Université de la Saskatchewan, souligne qu'il s'agit d'une cause « énormément importante, peu importe ce qui arrive ». Cet appel pourrait « changer fondamentalement la façon dont les lois sont faites au Canada », explique-t-il.

Le plus haut tribunal du pays entendra la contestation judiciaire de la Première Nation crie de Mikisew, qui habite le nord de l'Alberta. Cette communauté demande à la Cour suprême d'étudier les changements apportés par l'ancien gouvernement conservateur de Stephen Harper à plusieurs lois.

La Loi sur les pêches, la Loi sur les espèces en péril, la Loi sur la protection de la navigation et la Loi canadienne sur l'évaluation environnementale seront examinées.

La Première Nation argue qu'en raison des impacts de ces modifications sur ses droits issus de traités, le gouvernement avait le devoir constitutionnel de la consulter avant de passer à l'acte.

Des causes sur le devoir de la Couronne à consulter les Autochtones ont régulièrement été présentées devant les tribunaux, mais elles concernent généralement les décisions prises par des organismes de

réglementation. Celle-ci suppose que les législateurs devraient consulter les Autochtones en rédigeant leurs textes de loi.

Consulter avant d'établir les règles

« Plutôt qu'il y ait une consultation sur une décision réglementaire particulière, ce serait une consultation pour établir les règles », a expliqué l'avocat Robert Janes, qui représente la Première Nation Mikisew.

Me Janes plaide que les Premières Nations sont souvent confinées à un rôle de discussion de leurs problèmes devant les organismes de réglementation. « Le moment pour discuter des enjeux plus larges que les Premières Nations veulent soulever est lorsque les statuts sont élaborés. Si on ne traite pas de cela lors de l'élaboration, le (régulateur) n'a pas les outils pour gérer le problème lorsqu'il survient », a-t-il soutenu.

Par exemple, la loi fondatrice de l'organisme de réglementation de l'énergie en Alberta l'empêche de considérer les droits issus de traités, qui contiennent les revendications traditionnelles des Autochtones sur le développement dans la province.

Il faut s'assurer que la voix des Premières Nations est entendue lorsque les lois sont écrites pour les améliorer, a martelé Me Janes.

« Surcharger et affecter la capacité à gouverner »
Le gouvernement voit toutefois les choses autrement. « À un certain point, la nécessité de consulter de cette manière pourrait surcharger et affecter la capacité à gouverner », a-t-il écrit dans son plaidoyer déposé en Cour suprême.

Ottawa estime que l'autorisation de cet appel empiéterait considérablement sur une branche du gouvernement et qu'il « n'appartient pas aux tribunaux d'imposer des restrictions ou des entraves sur le processus législatif du Parlement ».

Rien n'empêche les gouvernements de consulter les Premières Nations lorsque les lois sont conçues, soulignent les avocats du gouvernement fédéral. Mais selon eux, forcer les législateurs à donner une place aux représentants autochtones lors de l'élaboration des lois diminue l'importance du Parlement, qui est censé être l'institution la plus puissante au pays.

Selon le gouvernement fédéral, cette décision pourrait donner plus de valeur à certains droits, en plaçant les droits issus des traités devant les droits garantis par la Charte.

La cause est suivie de près au pays. Cinq ministres de la Justice des provinces et onze groupes autochtones se sont inscrits à titre d'intervenants.

Impacts considérables de la décision

Dwight Newman indique que certaines provinces, dont la Saskatchewan, consultent déjà les Premières Nations en écrivant les lois qui les affectent. Peu importe ce que la Cour suprême statuera, ce sera « parmi les causes les plus importantes sur le devoir de consulter », selon le spécialiste.

« La transformation du processus parlementaire elle-même renferme des dangers. C'est un processus délicat et équilibré qui s'est développé pendant des centaines d'années et je ne sais pas si on peut prédire les effets d'imposer des exigences judiciaires », a-t-il analysé.

Me Janes croit que l'un des effets pourrait être la réconciliation. « Si on parle de réconciliation... ça n'a pas beaucoup de sens de dire qu'on va juste laisser une partie établir les règles et qu'on aura une conversation par après », a-t-il conclu.