Bacon murder trial: Gangsters-turned-witnesses lead to delays
Vancouver Sun
Kim Bolan
September 12, 2017

A steady stream of gangsters-turned-witnesses in the Jonathan Bacon murder investigation have led to several delays in the case getting to trial, a B.C. Supreme Court judge says.

Justice Allan Betton said new witnesses close to the murder plot only agreed to testify after initial trial dates had been set for accused killers Jason McBride, Jujhar Khun-Khun and Michael Jones.

That meant police and prosecutors had to check out information provided by the witnesses, which led to delays in the proceedings.

In June, Betton dismissed a defence motion to stay the charges against the trio over the fact that it took more than four years after they were charged in February 2013 for their Kelowna trial to begin.

Betton said at the time that he would provide detailed written reasons for his ruling at a later date.

Those reasons were released Sept. 8.

In July 2016, the Supreme Court of Canada issued a ruling known as Jordan that said criminal trials at the supreme court level should be completed within 30 months unless there are "exceptional circumstances."

Betton noted that the ongoing trial is not scheduled to be completed until January 2018 — more than 58 months after McBride, Khun-Khun and Jones were charged with killing Bacon and attempting to murder four others with him at the time.

He said under the strict Jordan principle, the delays in the Kelowna trial would be unconstitutional.

But he said the Supreme Court of Canada included in Jordan a "transitional exceptional circumstance" for cases that were underway when the ruling was issued.

"Where the charges in question were brought prior to the release of Jordan, a transitional exceptional circumstance may apply where the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed," Betton said.

"When the transitional exceptional circumstance is considered, I am satisfied that the delay is justified and thus the application of the accused must be dismissed."

Betton laid out some of the challenges police encountered as they investigated the Aug. 15, 2011 execution of Bacon, then a leader in the Red Scorpion gang.

Bacon was in a vehicle with Hells Angel Larry Amero, Independent Soldier James Riach, as well as two women, Lyndsey Black and Leah Hadden-Watts, when masked gunmen opened fire outside a Kelowna hotel.

Betton said a gangster named Manjinder Hairan gave three statements to police in 2011 and 2012 "detailing his role in the shooting, as well as that of the three applicants and a number of Mr. Hairan's associates. "

Hairan was shot to death in January 2013, leaving the Crown to try to get his statements admitted as evidence at the trial.

That strategy changed when others close to Hairan and the accused men agreed to become cooperating witnesses, Betton noted.

A witness called only AZ began cooperating in 2014 while he was in jail on an unrelated matter, Betton said.

In 2015, two other former associates who Betton called LO and MN also gave police statements about the murder and signed agreements to testify.

Disclosure to the defence related to the new witnesses was often delayed until police could investigate their claims.

"Unavoidable disclosure and third party records issues related to those witnesses were the primary drivers of the adjournments of the two previous trial dates and thus ultimately the delay in this case," Betton said. "The emergence of the witnesses and the challenges and issues related to disclosure of information connected to those witnesses were at least unavoidable if not also unforeseeable."

He said both Crown prosecutors and defence lawyers in the case had worked diligently to move the proceedings along over the years.

Caution urged on national security bill
Dale Smith
Law Times
September 12, 2017

The government has tabled a massive omnibus bill to overhaul the country's national security regime, which will be debated this fall.

Lawyers say they have concerns about how the bill addresses issues such as collection of personal information, information sharing with other governments and how to help clients who find themselves on the no-fly list.

"If you've got a client who is a target of the service and the service is doing their job properly, you'll just never know about it, nor will the target," says Anil Kapoor of Kapoor Barristers in Toronto. "A lot of this stuff is going to happen under the radar. The question is whether that architecture is sound."

Nader Hasan, a partner at Stockwoods LLP in Toronto, says the bill is an improvement on the existing regime put in place by the previous federal Conservative government, known as Bill C-51. Hasan says that even with the changes, the current bill requires improvement.

Part of the proposed legislation addresses the Passenger Protect Program, otherwise informally known as the no-fly list.

Kapoor says that one of the "chief deficiencies" of the legislation is questions about how clients impacted by being on the list can pursue litigation to have themselves removed.

"[W]hether or not your client can come off of that list is impaired by the fact that there can be a closed process, where the government relies upon intelligence information to justify your client being on the list that your client never gets to see," he says.

Kapoor, who is a special advocate under the security certificate regime, says there have been cases under the regime that were found to have been improperly issued.

"A lot of that has been the result of the hard work of special advocates," says Kapoor. "Remarkably, there's no provision for special advocates," he adds.

Hasan agrees that the lack of special advocates to challenge the no-fly list is a lost opportunity for the government.

"Arguably, the main reason why the Supreme Court has held that the security certificate regime is not unconstitutional is the presence of the special advocate regime, and advocates and civil liberties groups have been calling for there to be a special advocates program with this no-fly list for some time now," says Hasan.

"It's a bit disappointing that the government has not seen fit to include this in its amendments."

Kapoor says it's unfair that a person's liberty and their ability to travel can be restricted without them having a say in it.

"Surely there should be some sort of allocation for their participatory rights by having a special advocate there to level the playing field," he says.

Kapoor says the lack of special advocates makes no sense and will have to work its way back up to the Supreme Court of Canada.

Paul Champ of Champ and Associates in Ottawa says that there are added provisions in the bill that are designed to help eliminate false positives in the system, such as children who are routinely flagged.

"They're going to create some kind of system where individuals who are regularly stopped based on a false positive can get an identifier number from the minister of Public Safety so that they don't have those problems," says Champ, but he adds that it is merely a cosmetic change.

“Instead of meaningfully addressing the overall problem of the reliability or credibility of the listing regime, they’ve just tweaked it a bit to say don’t worry about children,” says Champ.

Hasan adds that no-fly lists don’t make sense given that the government already has the power to lay a criminal charge, seek a terrorist peace bond or make preventative arrest, and that having a list simply because the Americans do does not suffice. Champ agrees that there is insufficient information to justify the need for such a list.

“There is a lack of information about how pervasive this is,” says Champ. “It’s very difficult for people to assess in any way why we even have a regime like this in place . . .”

Other changes in the bill include scrapping the investigative hearings powers that were never used since their creation in 2001, and the creation of a new intelligence and national security oversight body that will be able to look across departments rather continue to have their increasingly co-ordinated activities be subjected to siloed oversight.

Unifor cautions workplace surveillance is violation
Business Insider
Newswire
September 12th 2017

Canada's largest union in the rail sector says that Bill C-49's amendments to the Canada Transportation Act constitute a landmark privacy violation and will not improve safety.

"Recording workers on the job is not a safety tool, it is a surveillance tool," said Jerry Dias, Unifor National President. "Managerial digital surveillance in the transportation industry is a dangerous precedent that will eventually spread to other sectors. This cannot become the government standard."

Bill C-49, An Act to amend the Canada Transportation Act and other Acts respecting transportation and to make related and consequential amendments to other Acts, proposes to require all railway operators install and utilize Locomotive Voice and Video Recorders (LVVRs). Unifor says the government has provided little evidence to demonstrate how LVVRs will be an improvement over the "black box" data recorders already installed on trains.

"Our members work onboard so they have a unique and personal investment in railway safety, but federal legislation must not furnish employers with surveillance powers outside the scope of public safety," said Bruce Snow, Unifor Rail Director. "Surveillance is an invasive and unnecessary distraction for rail workers that could lead to increased stress and reduced performance."

The Standing Committee on Transport, Infrastructure and Communities begins hearings today in Ottawa on the bill. Unifor representatives met with senior Ministry of Transport officials on September 5.

Unifor is Canada's largest union in the private sector, representing more than 315,000 workers in every major area of the economy. The union advocates for all working people and their rights, fights for equality and social justice in Canada and abroad, and strives to create progressive change for a better future.

Phoenix payroll system: Timeline of the government's problems

Danny Bradbury
IT World Canada
September 12, 2017

Read more: http://www.itworldcanada.com/article/phoenix-payroll-system-timeline-of-the-governments-problems/396407#ixzz4sZT4Gcj4

It was one of the biggest IT boondoggles in Canadian government history, and it's still going. The Phoenix payroll system was part of a federal government investment in consolidating and modernizing government processes. Following a failed implementation, tens of thousands of government employees were left out of work, and the Liberal and Conservative governments were pointing the finger at each other.

It's been a long, hard journey for Public Services and Procurement (PSPC), which set up the system with IBM Corp. and has been facing criticism ever since. Here's how it all went down.

2009

The Conservative government creates a plan to update existing 40-year-old payroll system. Part of the plan involves moving all payroll-related work to a new centre in Miramichi.

2011

The government awards the contract to update the service to IBM, which has proposed a PeopleSoft-based replacement payroll system.

March 2014

The Government takes over responsibility for Phoenix training design and execution from IBM, allegedly because it wanted to adopt a 'train the trainer' approach rather than follow IBM's recommended system.

April 2015

Stephan Harmer awards the contract for the construction of the Public Service Pay Centre in Miramichi, promising 500 jobs. It must serve the entire government's payroll transactions by December.

May 2015

IBM recommends delaying the planned rollout of the Phoenix system, which was due to start at the end of that year due to critical problems with the system.

June 2015

Payroll staff at Miramichi, working in two temporary locations while they await construction of the new facility, say that they cannot keep up with complaints from people not getting paid.

They are handling 72,000 payroll files at this time and will have to handle 184,000 by October. “It’s just a matter of them learning their job and taking the time to process it,” says local MP Tilly O’Neil Gordon.

January 2016

Documents later obtained by the CBC show that senior officials knew in January about a flaw in Phoenix that allowed widespread access to employees’ personnel records. Up to 70,000 public servants had access to the personal details of 300,000 employees. Information about the flaw was purged from a Privacy Impact Assessment document, although the flaw persisted until at least April, the CBC said.

February 2016

The Canadian government lays off approximately 2,700 payroll clerks as it takes the Phoenix payroll system live across 34 government departments, serving 120,000 people. This is the first in a two-part rollout.

March 2016

March 9 is the first payday under the new system.

April 2016

The Public Service Alliance of Canada (PSAC) reports that thousands of its members are not getting paid under the new system. Government workers report of having to dip into their RRSPs to meet the gap. Spokespeople for PSPC say that they have received 300 formal complaints so far.

The government rolls out the second stage of the system, across 67 departments serving 170,000 employees, despite protests from public service unions. PSAC asks the government to switch back to the old system until it fixes the problems.

May 2016

240,000 employees are scheduled to be paid via Phoenix on May 4. Complaints emerge across the country of workers not being paid. Public Services and Procurement Canada blames other departments for not inputting paperwork properly.

June 2016

PSPC Minister Judy Foote calls the situation ‘unacceptable’ and says the department is hiring 100 employees at a temporary pay centre in Gatineau to help solve the problem.

PSAC argues that the government is breaking the law by not paying workers, and then promptly takes it to court.

July 2016

80,000 public sector workers have been affected by payment problems, and PSPC deputy minister Marie says that the backlog could cost $20m to fix, adding that they will not all be resolved before October. Reports emerge of some former public sector workers who cannot stop the government paying them under the new system. Prime Minister Trudeau calls the problem ‘unacceptable’ but says that it is inherited.

The government hires more workers in Miramichi, and its operations and estimates committee holds an emergency meeting to address reports of more people not being paid.

Lemay informs workers of two separate privacy breaches that occurred under the Phoenix system, one in 2015, and one in 2016.

August 2016

Foote revises a previous estimate of the cost to fix Phoenix, now pegging it at $25 million, but reaffirms a deadline of October 31 to address all technical issues.

September 2016

Marie Lemay again revises the cost of fixing the system, now estimating up to $50m. $6m of that will go to IBM for extra work on the project. There is still a backlog of 67,500 people with payment problems in the Canadian payroll system., but she promises to resolve them all by Oct 31.

IBM puts the blame for Phoenix at the Conservatives’ door, arguing that it took over responsibility for training and execution in March 2014.

October 2016

The government misses its self-imposed deadline for resolving its backlog of all outstanding payroll-related issues by Oct 31. 22,000 of the original 82,000 are unresolved.

November 2016

November 1 was the original date for military and RCMP to switch over to Phoenix (now postponed).

December 2016

Unions suspend court action against the government over Phoenix in exchange for a consent order that promises more information about the problems plaguing the system and information about steps to resolve employee pay issues.

As part of the deal, the two parties will reform the Union Management Consultations Committee, originally created in 2011 during the design stage for Phoenix. This will be a platform for the government and unions to work together on solving the problem.

April 2017

Foote goes on leave for family-related reasons. Natural resources minister Jim Carr steps in to oversee Phoenix-related issues. He will also be part of a cabinet committee to fix the payments process.

The government admits it will have to forego $140 million in savings originally anticipated over the next two years from the system. It already had to forego $70 million in 2016. It also announced that it would allow departments to rehire laid-off payroll clerks to help fix the Phoenix problem.

In the meantime, April is tax filing time, when T4 slips are due. The federal government says that employees can seek up to $200 in reimbursements for tax advisory services relating to their 2016 or 2017 income taxes.

It could take up to two years to fix Phoenix, the government added.

May 2017

Liberals commit $142m in extra funding to help solve the outstanding Phoenix systems, effectively redirecting the money that it had previously allocated to payroll savings back into the system. The money will be used to solve capacity problems, including hiring new staff to fix the issue. This is an addition to the $50m spent in 2016. With three years of unrealized savings, this means $402 in additional costs for the project.

August 2017

Foot resigns to be replaced by Carla Qualtrough, amid worries that the payroll department's capacity problems are still ongoing. The Public Service Pay Centre expects to conduct 80,000 payroll transactions a month. Its target is to handle no more than that. As of August, it was processing 237,000 transactions beyond its normal workload, which was an increase over July's 228,000 figure. This was largely due to settling several collective bargaining arrangements, it says.

The government's target is to process 95 per cent of its payroll transactions within service standards. As of August 23, it processed 49 per cent of transactions within those standards.

Feds recruit retirees to help fix Phoenix
Stefan Keyes
CTV Ottawa
September 13, 2017

Several retired public servants who spoke with CTV News say they are disgusted with a "desperate" notice they received in their mailboxes recently.
Along with a regular newsletter from their former employer, is a notice trying to gage their "interest" in coming back to work.

The Government of Canada header is accompanied by the words "Call for Interest" with the subtitle "Making a difference for your colleagues."

It then goes on to say “Public Services and Procurement Canada is looking for current and former public servants who are hard-working, passionate and want to resolve public service pay problems.”
In so many words, it boils down to help us fix Phoenix.

It’s being considered bait to hook retirees familiar with government departments and pay systems. But some say, the net has been cast too wide with reports of people as old as 85 being targeted.
“It probably could have been -- or maybe should have been -- more targeted,” admits union vice-president Chris Aylward. “But we had no control over that and it sounds like it went out to some sort of retiree mailing list."

"We certainly are in favour of the letters going out because we know we need to get these people back," says Aylward.

He adds some of the incentives are as follows:
Lump sum payments
Job Classification Review
Double-pay for overtime

A spokesperson for Public Services and Procurement Canada only points to the website when asked about outstanding cases.

It lists 237,000 in the backlog as of August 23, 2017. The Pay Centre also reports 80,000 cases came in last month while only 71,000 cases were able to be processed.

Prime Minister Justin Trudeau, still pointing fingers at the previous Harper government, says “it is unacceptable in any circumstance, especially federal government workers not being paid; that's why we’re working so hard to fix this issue.”

Ontario Court of Appeal Releases Decision in Elections Case
CNW
September 13th 2017

TORONTO, Sept. 13, 2017 /CNW/ - The Ontario Court of Appeal released its decision today on the conviction appeal by Dean Del Mastro, who was found guilty of offences under the Canada Elections Act in 2014. The Court upheld the conviction.

In October 2014, Mr. Del Mastro was found guilty of personally paying an election expense, and thereby wilfully exceeding his contribution limit, contrary to sections 405(1), 497(3)(f.13) and 500(5). He was also found guilty of wilfully incurring election expenses in excess of the campaign expense limit, contrary to sections 443(1), 497(3)(p) and 500(5) and of providing an electoral campaign return containing a false or misleading material statement in omitting to report a campaign contribution and election expense, contrary to sections 463(1)(a), 497(3)(v) and 500(5).

Mr. Del Mastro has 60 days to decide whether he will seek leave to appeal in the Supreme Court of Canada.

The Public Prosecution Service of Canada is responsible for prosecuting offences under federal jurisdiction in a manner that is free of any improper influence and that respects the public interest. The PPSC is also responsible for providing prosecution-related advice to law enforcement agencies across Canada.

Judges to preside over bail hearings at two courthouses

Provincial court pilot project at Toronto's College Park and the Ottawa courthouse aims to speed court process, in wake of Supreme Court of Canada decision that set timelines on criminal trials.

Jacques Gallant
Toronto Star
September 13th, 2017

A provincial court pilot project that has judges presiding over bail hearings at two of Ontario's busiest courthouses has lawyers once again questioning the role of justices of the peace.

In an effort to speed the court process, the Ontario Court of Justice announced last week that judges would take over bail hearings at College Park in Toronto as well as the Ottawa courthouse.

The move comes as governments and courts continue to grapple with the effects of a 2016 Supreme Court of Canada decision that set strict timelines to bring criminal cases to trial.

The pilot project, expected to last 18 to 24 months, "is exploring whether the introduction of judges' criminal trial experience at the earliest stage of the criminal court process could reduce time to final disposition," said court spokesperson Kate Andrew.

"All judges at the Ottawa and College Park courthouses will participate in the bail project and will be scheduled to preside in bail court as well as in trials, judicial pre-trials and all other regular judicial responsibilities."

Unlike someone looking to become a judge, a person does not need a legal background to qualify for the role of justice of the peace. Aside from presiding in bail court, JPs, who earn significantly less than judges, sign off on search warrants and preside over brief court appearances and matters involving provincial offences.

JPs will continue to handle bail hearings in courthouses other than College Park and Ottawa, Andrew said.

The court's pilot project has prompted lawyers to question why JPs preside over bail in the first place, pointing out that it's a critical step in the court process in which a person's liberty is at stake when they have not yet been convicted of a crime.

Federal government says it does not practise solitary confinement
Patrick White
Globe and mail
September 14, 2017

The federal government is making the case that it no longer practises solitary confinement in its prisons on account of a series of recent changes to the way it isolates prisoners.

During the second day of a four-day hearing, a lawyer for the Attorney-General of Canada stated that administrative segregation – long considered bureaucratic jargon for solitary confinement – has undergone such a radical overhaul of late that it no longer resembles the United Nations definition of the controversial incarceration method.

The argument illustrates just one of the challenges that has faced the Canadian Civil Liberties Association since it launched its constitutional challenge of administrative segregation back in January, 2015: Their case rests upon the constantly shifting sands of federal correctional policy.

Since the CCLA challenge was filed, Correctional Service Canada has overhauled its rules governing inmate segregation twice and introduced an array of new procedures.

Just last month, the Correctional Service implemented new rules that provide segregated inmates with two hours, plus time for a shower, to spend out of their cells every day, up from one hour previously.

It also declared that isolated inmates must have access to hygiene, spiritual services, daily visits from medical staff and non-electronic personal items, such as photographs and phone cards.

Taken together, the new provisions "constitute the kind of thing that takes administrative segregation out of the definition of solitary confinement," government lawyer Peter Southey said on Wednesday, citing the UN definition of solitary confinement as the isolation of "prisoners for up to 22 hours a day or more without meaningful human contact."

Mr. Southey mounted a spirited defence of administrative segregation throughout the afternoon session of the hearing. He declared it an exceptional and Charter-compliant practice necessary to uphold the safety and security of federal prisons.

"I don't think I need to persuade you that prisons are dangerous and difficult places," he told Chief Justice Frank Marrocco.

"There are gangs, there are underground economies, there is an inmate code of conduct that requires violent responses to certain behaviours. All of this combines to make an extraordinarily dynamic and infinitely problematic environment for the Correctional Service to carry out its duty to make everyone safe."

L’avocat d’Accurso plaide Jordan !
Radio-Canada
13 septembre 2017
Il plaide aujourd'hui, au palais de justice de Joliette, une requête en arrêt des procédures pour délais déraisonnables...

Plus de cinq ans après son arrestation, l'homme d'affaires Tony Accurso n'a toujours pas subi de procès pour son implication alléguée dans le stratagème de fraude municipale à Mascouche.

Son avocat, Marc Labelle, estime qu'aucune circonstance exceptionnelle ne justifie que les procédures judiciaires contre son client s'étirent au-delà du double de la limite permise par la Cour suprême en vertu de l'arrêt Jordan.

Le procès de l'entrepreneur est prévu à partir du 8 janvier prochain pour une durée de six semaines.

Le processus judiciaire devrait donc durer près de six ans, alors que l'arrêt Jordan a fixé un plafond de 30 mois aux procédures devant la Cour supérieure.

Cet écart est d'autant plus marqué que M. Accurso a renoncé à son enquête préliminaire, une étape qui aurait pu ajouter plusieurs mois supplémentaires.

De son côté, la poursuite justifie la longueur des procédures par la complexité du dossier et le fait qu'elle devait initialement traiter le dossier de M. Accurso conjointement avec celui de plusieurs coaccusés.

Le juge Daniel Payette entend les arguments des deux parties mercredi.

Le tribunal devra faire un examen rigoureux afin de déterminer quels délais sont attribuables à l'accusé et lesquels sont de la responsabilité du ministère public.

Tony Accurso a été arrêté par l'Unité permanente anticorruption avec 14 autres personnes en avril 2012, dans le cadre de l'opération Gravier qui visait le démantèlement d'un réseau allégué de partage de contrats municipaux à Mascouche.

Il fait face à quatre chefs d'accusation, dont fraude envers la Ville, complot pour commettre un acte de corruption municipale et corruption du défunt maire de Mascouche, Richard Marcotte, qui figurait aussi au banc des accusés.

Tony Accurso est jugé séparément et plaide son innocence.

Il doit subir un autre procès cet automne relativement aux malversations municipales alléguées à Laval.

Total amount of legal fees not necessarily covered by solicitor-client privilege rules Quebec appeal court

Lawyer's Daily/Law in Quebec
September 13, 2017

The total amount of professional billings paid to lawyers working on a mandate for public bodies is not necessarily automatically protected by solicitor-client privilege ruled the Quebec Court of Appeal.

In what is described as a precedent-setting ruling, the Quebec appeal court decision provides much-needed guidance and strikes a delicate balance between professional secrecy and public access to documents, according to legal experts.

"The importance of this lies with the distinction the Quebec appeal court makes between professional secrecy and public access to documents regarding legal fees paid by public bodies to lawyers," said Pierre Trudel, a former director of Université de Montréal's Public Law Research Centre. "The decision provides helpful guidance over what should remain protected by professional secrecy and what should be accessible to ensure public access to documents."

But Bernard Pageau, who successfully plead the case, is under no illusions. Even if a leave to appeal to the Supreme Court of Canada is not filed or if the decision is not overturned, Pageau expects the ruling to upend longstanding practices by Quebec public bodies and the provincial Access to Information Commission gradually and begrudgingly.

"If it is a final decision, it will take some time before public bodies react and implement the changes," said Pageau, the senior director of legal affairs at Québecor Média inc. "There may be public bodies that erroneously interpret the ruling or who will refuse (to grant access to documents) and we will end up having to bring the matter before the Quebec Access to Information Commission. But having a hearing before the Commission takes up to a year. That is a denial of democracy which prevents a citizen from exercising his democratic rights."

In a unanimous decision, the Quebec appeal court held that legal billings are prime facie protected by professional secrecy because it generally contains a description of accomplished tasks, services rendered and often advice given but the total amount of legal fees paid to a lawyer working on a mandate for public bodies, such as municipalities or school commissions, are not automatically covered by solicitor-client privilege.

In a bid to reconcile the fundamental importance of privilege attached to the solicitor-client relationship with the principle of public access to documents, Trudel points out that Quebec appeal court Justice Paul Vézina introduced a two-step test. The first part of the test involves determining the "scope of the secrecy, that is whether the information is covered by solicitor-client privilege," said Justice Vézina in a 19-page ruling in Kalogerakis c. Commission scolaire des Patriotes, 2017 QCCA 1253. Justices Robert Mainville and Denis Jacques (ad hoc) concurred with the August 22nd decision.

If it is, then the second part of the test comes into play: "whether or not this is one of the rare cases where it is justified to dismiss and allow the disclosure of information that is otherwise inaccessible," added Justice Vézina in a decision that overturned the judicial review by Quebec Superior Court Justice Suzanne

Courchesne and restored a decision by Court of Quebec Justice Diane Quenneville in Kalogerakis c. Commission scolaire des Patriotes, 2014 QCCQ 4167.

“With this decision, citizens and taxpayers will have more access to the total amount of legal fees disbursed by public bodies,” said Pageau. “There will be exceptions. It will always depend on whether disclosing the total amount will disclose confidential information. But now the burden of proof rests with public bodies to prove that.”

The case dates back to 2010 when a journalist working for the tabloid Journal de Montréal sought to find out the amount that a Montreal suburb paid lawyers in a suit launched by a citizen. The newspaper also wanted to know how much four Quebec school commissions paid in legal fees in a class action suit that was filed against them. In both cases the Quebec Access to Information Commission refused to provide the information, holding that the amount of legal billings is information protected by solicitor-client privilege as per section 9 of the Canadian Charter of Rights and Freedoms. The Commission relied, as it has for more than a decade, on the decision Commission des services juridiques c. Gagnier, [2004] CAl 568 – a ruling that held that legal billings are automatically protected by professional secrecy. “Since 2004, we could obtain nothing,” said Pageau. “It was systematic. As soon as we made a request for an access to information document asking how much in legal fees was spent in a case, they would simply respond we cannot because it was covered by solicitor-client privilege.”

The City of Terrebonne, a Montreal bedroom community, and the four school commissions argued that disclosing legal billings would reveal the financial means it has to defend itself and could compromise its ability to reach an out-of-court settlements.

Justice Vézina dismissed the arguments as speculative and unconvincing. He said that disclosing the total amount of legal billings does not infringe solicitor-client privilege in these cases because it does not reveal the services or advice provided by lawyers.

Just as importantly, Justice Vézina held that the objective of the province’s Act respecting Access to documents held by public bodies and the Protection of personal information is to spur “informed debate” and that cities and elected officials are accountable to voters.

“Municipalities have public funds to manage, and it is in the public’s interest to know what kind of resources a municipality devotes to legal fees,” noted Trudel. “That can be an indicator of how a municipality is managed. That is of public interest.”

Legal counsel for both the City of Terrebonne and the school commissions did not return calls.

Cannabis ticketing regime could hurt those who plead guilty
Cristin Schmitz
Lawyer's Daily
September 13, 2017

Canadians should be aware of the potential negative repercussions if they choose to plead guilty to marijuana offences via the new cannabis ticketing regime proposed by the federal government, lawyers told MPs on Tuesday.

The Barreau du Québec, the Criminal Lawyers' Association (CLA), and the Saskatchewan Ministry of Justice all pointed out to the Commons Health Committee studying Bill C-45 this week that the legislation doesn't expressly state that a guilty plea via cannabis ticket results in a criminal conviction, nor does the bill mention potential negative consequences.

"It's ... unclear what effect a conviction under the ticketing system will have on [a person's] travel, particularly to the U.S., [on] police clearance sheets and employment, or whether it will be considered a prior drug offence for other offences," Defence Counsel Association of Ottawa president Anne London-Weinstein noted on behalf of the CLA. "Canadians who choose to plead guilty by way of sending off a ticket in the mail should be aware of the potential collateral consequences which may arise."

Under the proposed Cannabis Act, cannabis possession, production, distribution and sale outside specified legal parameters would remain illegal, and subject to criminal penalties ranging from ticketing up to a maximum penalty of 14 years' imprisonment. Peace officers would have the discretion, in certain situations, to ticket an accused rather charging him or her. Paying the ticket will be a conviction that creates a "judicial record."

Representatives of the Barreau recommended that the nature of the "judicial record" should be defined in statute, or at least clarified. Questions that need answers include: When is the judicial record created? Who is responsible for it? Who has access to it? And what will it be used for?

The Barreau also recommended that Parliament add a penalty regime for offences in relation to the classification and misuse of such judicial records.

Saskatchewan's Ministry of Justice urged that the tickets issued under the new regime must set out the import and possible consequences of pleading guilty. A cannabis ticket "is a criminal matter," the province stressed in its written submission.

"We appreciate the effort at increasing justice efficiencies through the use of a ticket, but because of that format, is an individual being led to believe that their payment of the fine is the end of the matter? Do they appreciate that they would then have a criminal conviction that could affect their ability to cross a border, for example? The ticket itself must make this very clear."

Saskatchewan recommended that ss. 51(3), 52 and 53 of Bill C-45 be amended to expressly state that a cannabis conviction is a criminal conviction.

The province also pushed back against the bill's proposed requirement in s. 52(b) that provinces keep judicial records involving ticketable cannabis offences separate and apart from other judicial records.

“As the offence is a criminal one, we don’t see the need for this requirement,” Saskatchewan’s Ministry of Justice said. “Should we have to create a separate record-keeping system for just these offences, not only will Saskatchewan have to redesign our system at great costs, it will take considerable time to do so.”

The Barreau said that overall the Quebec legal regulator is satisfied with the framework proposed by Bill C-45. Saskatchewan and the CLA also acknowledged the legislation’s “laudable” objectives, which includes protecting public health and safety by establishing strict product quality, and reducing the burden which marijuana offences currently place on the criminal justice system.

London-Weinstein said the bill’s elimination of many of the stigmatizing aspects of marijuana use is positive, yet the proposed legislation still draws too heavily on the criminal law to enforce marijuana regulation. “In my view, it would be preferable to avoid reliance on the criminal law and criminal sanctions as a method of ensuring compliance with what should be a largely regulatory piece of legislation for what should be a legal product,” she opined.

Moreover, the bill’s proposed continuation of severe criminal sanctions will continue the heavy burden cannabis prosecutions place on the criminal justice system,” she predicted. She noted enforcement of marijuana laws has been responsible for the overwhelming majority (75 per cent) of all reported drug crimes.

London-Weinstein also recommended that Parliament amend Bill C-45 (or create regulations) to give police legislative guidance on how to determine whether a person will be ticketed, or prosecuted under the Criminal Code or the Controlled Drug and Substances Act (CDSA).

Failure to do so will result in an uneven exercise of discretion — a problem which has resulted in Indigenous persons being overrepresented in the criminal justice system, she warned.

Moreover, “we want the law to be consistently known in order that it can be consistently followed, she added. “If a purpose of potential criminal sanction is to deter deviation from the Act, in other words to take away the black market, to eliminate organized crime, and to discourage people from acting outside of the Act, a ticketing option, where it's not known in advance to the public whether you're going to be prosecuted under the Criminal Code criminally or whether you're going to get a ticket, means that the law is not going to be certain to people, the outcome is not going to be certain — and that vagueness, or the uncertainty of the outcome, undermines the stated purpose of the ticketing provision and the use of the criminal law.”

London-Weinstein cited police use of discretion under the Youth Criminal Justice Act as an example where, in her experience, individual officers have diverged widely in the extent to which they decide whether or not to divert a young person to alternative measures to prosecution.

Like the CLA, the Barreau recommended minors should not be criminalized for behaviour permitted to adults. Bill C-45 permits adults to legally possess up to 30 grams of cannabis, while minors face sanction under the Youth Criminal Justice Act (YCJA) if they have more than 5 grams. Yet the YCJA itself stipulates that a youth justice court must not impose greater punishment than what would be imposed on an adult offender in similar circumstances.

“To ensure consistency, we believe it would be preferable to prohibit the possession of 30 grams or less of cannabis by young people by means of a penal [regulatory] rather than criminal offence,” advised the Barreau, represented by bâtonnier Paul-Matthieu Grondin and Luc Hervé Thibaudeau and Pascal Levesque.

Responding to a question from NDP health critic Don Davies, who noted thousands of Canadians will be walking around with prior convictions for cannabis possession after that recreational use becomes legal next July, London-Weinstein agreed it would be interests of all Canadians to make pardons for those previous convictions more readily available.

Believe in justice
Toronto Sun
Ed Prutschi
September 14, 2017

Hashtags rarely make good laws but there is an increasing outcry in media, both social and traditional, to adopt the activist call #BelieveTheVictim. Proponents of this approach cite high-profile examples of alleged failures in the criminal justice system such as the acquittals of Jian Ghomeshi and three Toronto police officers charged in the sexual assault of a parking enforcement officer, or the appellate court’s reversal of a trial-level conviction in the Mandi Gray case.

The perception that Canadian courts are incapable of fairly hearing sexual assault cases has grown so entrenched that at least one lawyer has publicly proclaimed that she would rarely advise a woman to report such a case to police. The solution, we are told, is the creation of specialized sexual assault courts staffed by judges and crown attorneys with specific expertise to address charges laid by equally specialized police officers. But what is rarely explicitly articulated is the problem these solutions are designed to address. The problem, when viewed through the #BelieveTheVictim lens, is too many acquittals.

Phrased that way, concerns begins to emerge. Criminal courts exist not to reaffirm the claims of complainants nor to reach some acceptable quota of convictions. The foundational principles upon which every criminal trial rests are the presumption of innocence and the crown’s burden to prove its case beyond a reasonable doubt. Every accused enters a trial legally innocent of the charge leveled against him or her. That innocent status does not change unless and until the evidence proves guilt against the admittedly high standard of beyond a reasonable doubt.

Our system has evolved to eradicate trials based on outdated misogynistic myths about prior sexual history or delayed reporting. Several jurisdictions are now experimenting with providing complainants with free legal advice to help them prepare for the ordeal of being a courtroom witness. The rules regarding consent and the ramifications of intoxication have become more progressive and enlightened. But calls for change cannot be permitted to strike at the core of a criminal trial.

Every functional criminal legal system starts from the premise best articulated by Sir William Blackstone in 1765: “Better that ten guilty persons escape than one innocent suffer.” This fundamental compromise applies to every criminal charge be it the murder of a co-worker, a theft from an employer, or the sexual assault of a spouse. Calls to treat sexual assault cases differently are calls to upset this fundamental

balance. It would be easy to tinker with the system to ensure that fewer guilty persons escape but the unavoidable consequence of this rebalancing is the certainty that more innocents will suffer.

Nurses, doctors, rape crisis counsellors, and activists are welcome – even encouraged – to believe the victim. But police officers, crown attorneys and judges can have no such luxury. For them, a “victim” is more appropriately a “complainant” until the evidence proves otherwise.

In workplaces, discipline hearings, civil courts, and social media, it may be fine to apply a reduced standard of proof. Go ahead and fire the office party misogynist. Successfully sue assaultive creeps for civil damages. But when you seek the awesome power of the State to deny the liberty of an accused, you must play by the rules as they have always been.

Put simply, believing in justice requires that we not commence our trials believing victims. We believe in the presumption of innocence. We believe in the burden of proof beyond a reasonable doubt. Only after we have satisfied those two core pillars of any fair and just legal system do we believe in victims.

Justice for the rich
Prince George Citizen
Daphne Bramham
September 13, 2017

From gowned judges and "learned friends" to the highly ritualized proceedings, Canada's courtrooms can be intimidating places at the best of times.

But most people are there at the worst of times, especially if the reason they are there is to sort out custody and access to their children.

In a perfect world, lawyers are their navigators. But increasingly, even middle-class Canadians are in court without them because the costs are beyond their reach.

To get an idea of how expensive it can be, consider this comment from a self-represented Canadian in the most recent report of the National Self-Represented Litigants: "If you're young and have the funds to pay for a lawyer, consider going to law school instead. It will probably cost the same and you'll get a degree out of it."

Do-it-yourself lawyering is not only expensive and stressful (even for those who have English or French as a first language), it can lead to terrible decisions.

The high-profile case of J.P. v. British Columbia is one of those, says lawyer Morgan Camley. Had her client - the father in a custody battle - had legal representation in the lower courts, she contends the case that began in 2011 likely would not have dragged on for 252 days at trial. It also, she says, would not likely have resulted late last month in the Court of Appeal ordering a retrial.

"This is not a typical case of warring parents," says Camley. "In my view, it's about the failure of the system to make adequate provisions for people. It's an access-to-justice case."

She got involved at the appeal stage after reading the evidence and, specifically, reading the judge's heavy reliance on a so-called expert witness whose stated credentials had not been earned, but purchased from diploma mills.

A lawyer would almost certainly have checked the expert's credentials. But even if the fake degrees hadn't been discovered and the expert denied the chance to testify, Camley says a lawyer would have argued for the judge to give more weight to the testimony of psychologists who had interviewed the children about the father's alleged sexual abuse and less on the expert put forward by the mother's lawyer who never had any contact with them.

To be fair, self-represented litigants put judges in a difficult position. They are forced to take a more active role -- explaining terms and processes to the DIYers and essentially coaching them along -- while at the same time trying to remain objective arbitrators of the facts put before them.

It slows the justice system's usual ebb and flow.

A survey was done in 2013 of 100 B.C. judges and 30 court officials by B.C. Supreme Court Justice Vicky Gray. The overwhelming conclusion? Self-represented litigants were filing large volumes of disorganized and irrelevant information.

"I understand that people unfamiliar with a court process would think: 'I don't know what to tell the judge, so I'll just tell them everything,'" Gray told the CBC in 2015. "So, the role as a judge can seem like looking for a needle in a haystack. ... It's costing everybody time and money."

In 2015, 41 per cent of family cases in B.C. Provincial Court involved at least one self-represented individual. In the Court of Appeal that year, 57 per cent of family matters involved self-represented litigants, compared to 27 per cent of civil matters overall.

In a recent blog post on the Access to Justice B.C. website, Chief Justice Robert Bauman noted those statistics.

"Across Canada, legal aid programs cover only a small portion of the legal problems families face, and even then legal aid is available only to those individuals and families of extremely modest income levels," he wrote.

The B.C. government cut legal aid spending by 40 per cent between 2002 and 2005. Funding for family cases dropped by 60 per cent. Those cuts have never been restored.

In April, West Coast LEAF and the B.C. Public Interest Advocacy Centre filed a constitutional challenge on behalf of the Single Mothers' Alliance. They argued that without access to publicly funded lawyers, women and children in abusive situations are being denied their Charter-guaranteed rights to equality, life and security.

Last month, a group of legal service advocates sent its Justice Reform for B.C. report to Attorney-General David Eby, suggesting how to address "the massive gap between those who can afford to access the justice system and those who are left out."

Their recommendations include re-establishing legal aid clinics, paying for in-house lawyers for frontline social service agencies, and flat fee charges for legal services.

Fifteen years ago, Canada's Chief Justice Beverley McLachlin said that if lower-income Canadians can't access legal services, the justice system erodes along with people's confidence in it.

Having failed to heed all the warnings, we're now seeing the consequences. Children are among those paying the highest price.

Justin Trudeau: Look for the union label
Since the Liberals won the election, Trudeau has taken care to reward Canada's big unions for their support
Macleans
Paul Wells
September 14, 2017

It's a love-in:
Canada's unions are welcoming the federal government's plan to close tax loopholes for very high-income earners, saying it's an important first step toward bringing more fairness to Canada's tax system.

"Today's tax rules make it possible for someone earning $300,000 to save more on their taxes than the average Canadian worker makes in a year, and that is fundamentally unfair," said CLC President Hassan Yussuff.

So the Canadian Labour Congress has Bill Morneau's back as he embarks on his widely criticized project to reduce the tax advantages of incorporation. The patrician corporate-head-office finance minister is chuffed at the help from his union brothers and sisters:

Meanwhile, Unifor and the United Auto Workers have been working with Chrystia Freeland on NAFTA. It's only a modest exaggeration to say Unifor's Jerry Dias has at times been easy to mistake as a Canadian government spokesman in news interviews on the fringes of the NAFTA renegotiations.

These groups go way back with the Trudeau Liberals. In 2015 a group called Engage Canada, backed in part by Unifor, made big ad buys to soften up Conservative support in what everyone thought were the pre-electoral months. Harper called an early election—or rather, an early start to the campaign for the fixed election date—partly, it's been conjectured, because he didn't want those Engage Canada ads to go un-rebutted by his own messaging. It didn't do him much good in the end.

Big Labour's message at the time, infuriating to the NDP, was that members should vote strategically to defeat Harper, rather than support the traditionally union-aligned NDP.

(Full disclosure: I'm a member of Unifor Local 87-M, which has members in most large Toronto-based news organizations. My eternal wish is that my union would stay out of electoral politics.)

Since they won the election, the Trudeau Liberals have taken care to reward Canada's big unions for their support. Terrance Oakey, whose union-busting organization Merit Canada used to have all kinds of

friends in government during the Harper years, has of course noticed, and decried, the new pro-union attitude in Justin Trudeau's Ottawa. Not that it's been hard to miss.

It's pretty easy to see the game here. Partly it's no game: a lot of Liberals simply continue to see organized labour as a powerful partner in improving life for ordinary Canadians. But partly it's strategic, too: labour support can translate into votes, and it can help give the general impression that a government Stands Up For The Little Guy.

Of course, the days when a union could reliably deliver its members' votes, if it ever existed, are long gone. But the CLC claims 3.3 million members; even if only one in 20 listens to the union's message, that's a handy bump at election time.

The Harper Conservatives had a fun decade stealing the labour vote right out from under union leaders. These are sweeping generalizations, and there are all kinds of exceptions, but the labour vote is often blue-collar; it often has large families and a high-school or college education; it's a stakeholder electorate that's likely to own homes and worry about neighbourhood safety. This was the core of the Harper coalition. Until it wasn't. (In about 2008, someone in the Harper PMO sent me a story from the Sarnia Observer, about Harper getting a standing ovation at a graduation ceremony for people in the skilled trades. "Ten years ago these people would have been cheering for Chrétien," the PMO person wrote. One question I ask myself these days during elections is, Who's going to get Sarnians in the skilled trades on their feet?)

There is, finally, the matter of Donald Trump, who got elected bigly with the votes of many millions of Americans who are, or were once, union members, and who came to believe a hereditary Manhattan plutocrat could give them their hope and dignity back. In Justin Trudeau's entourage, a lot of people have a lot of time for the notion that this happened because the Democratic Party took its eye off the working-class ball, and they are bound and determined not to make the same mistake. This determination was the pith and substance of the speech Trudeau delivered in the improbably swanky precincts of a black-tie dinner in Hamburg. It's why so far, in the early going, a lot of Liberals like the emerging battle over tax changes as much as the Conservatives want to bring it to them.

Conservatives lose when they are the party of fat cats. They win when they capture the working-class vote.

Andrew Scheer's Labour Day message this year did not mention organized labour, a plainly conscious decision that did not leave the Conservative leader disarmed: he saluted instead "the millions of Canadians who work tirelessly to strengthen our economy, while still finding time to give back to their communities when the workday is done. The moms and dads, grandparents, friends and neighbours who manage to coach their children's sports teams, arrange carpools, and volunteer their time for those in need."

Trudeau's Labour Day message could hardly have been more different: a celebration, specifically, of the "discipline and dedication of organized labour" that mentioned "the union-based apprenticeship training program," "targeted amendments to the Canada Labour Code," and "the International Labour Organization's Convention 98." The PM's long statement heads into the home stretch with: "Organized labour has a strong partner in the Government of Canada."

None of this is a guarantee of Liberal success. The Conservatives have shown in the past that they are often able to win union members' votes despite the best efforts of union leaders. A revitalized NDP, which I suppose is one possible outcome from the party's current leadership race, could succeed in calling that party's traditional labour constituency home.

But it's increasingly clear that Trudeau is the most overtly union-friendly prime minister since his father; that he has top-priority strategic reasons for pursuing the romance; and that the bosses of the big unions, at least, are eager to play ball.

Justice ministers push feds for answers on support for pot legalization
THE CANADIAN PRESS
September 15, 2017

VANCOUVER — Canada's justice ministers are asking for clarity and support as they scramble to organize and police an entirely new marijuana industry in fewer than 10 months.

British Columbia Solicitor General Mike Farnworth said he hopes this week's meeting between federal Justice Minister Jody Wilson-Raybould and her provincial and territorial counterparts will provide more answers about how the Canadian government intends to make good on its plans to legalize pot by summer 2018.

"Obviously, I think the July time frame is a challenge," he said. "But right now that's the timeline, that's the time frame that we're working towards."

The justice ministers began two days of meetings in Vancouver on Thursday. Besides pot, the agenda includes discussions around how the justice system deals with people who don't disclose their HIV status to their sexual partners and the fallout from a Supreme Court of Canada decision that puts a time limit on how long it takes to prosecute a criminal charges.

Manitoba Justice Minister Heather Stefanson said in a statement that her government wants more clarity on how the Canadian government intends to support provinces in implementing The Cannabis Act.

Stefanson stressed the importance of developing proper policy to address road safety and enforcement, regardless of the regulatory regime.

"Our primary concern regarding the legalization of marijuana is the health and safety of Manitobans," she said. "The federal government must recognize that rushing into something of this magnitude presents tremendous risks."

Ontario Justice Minister Yasir Naqvi described the deadline as tight but added that his province is working diligently to be ready by July 1, 2018.

Ontario became the first province to make public its plans for legalized cannabis last week, unveiling the outline of a regulatory system that restricts sales to stores operated by its own liquor board.

"The timeline is fast approaching and we have not been wasting our time, fully recognizing that a lot of work has to be done," Naqvi said.

He added that Ontario developed its plan following extensive consultations and that other provinces and territories will have to find their own way.

The federal government has come under fire for what appears to be a hands-off approach to regulating the sale and policing of marijuana once it becomes legal.

Brian Patterson, head of the public safety group Ontario Safety League, said he is shocked by the federal government's commitment to an unrealistic deadline that is politically motivated and will put Canadians at risk.

The group released a position paper earlier this month titled "Too Far, Too Fast," urging the government to slow down and consult more extensively with police forces, health agencies and provincial governments.

"Before you open the pool you better check the chlorine levels and know what's going on. And we're just opening the pools because it's Canada Day," Patterson said.

"Spitballing in the dark seems to be the method being used to stick to that date."

Patterson also criticized the absence of scientific evidence to back some of the federal government's positions, such as allowing 18 year olds to smoke when health professionals have said exposure to marijuana can negatively impact developing brains in people as old as 25.

Prime Minister Justin Trudeau has said repeatedly it is important to act quickly to get marijuana out of the hands of youth, who he says have easier access to weed than beer.

Youth health experts urged a House of Commons health committee earlier this week to develop extensive prevention and public-education campaigns focusing on the harmful effect of marijuana, warning that stronger regulations alone will be ineffective in deterring kids from smoking pot.

Representatives from several law enforcement agencies warned the federal government that there was zero chance police would be ready in time to enforce new laws for legalized pot.

Canada's justice ministers advocate modernizing criminal code to reduce court delays
Ministers meeting in Vancouver also discuss legal marijuana and sex partners who fail to disclose HIV status
The Canadian Press
September 15, 2017

Quebec's justice minister is telling her provincial and federal counterparts to be "bold" when it comes to slashing court delays before even more criminal cases are thrown out.

Stephanie Vallee said Friday she and other ministers are pushing the federal government to modernize the criminal code to address the backlog in the court system.

Canada's justice ministers are meeting over two days in Vancouver.

Discussions have so far focused on eliminating preliminary inquiries and streamlining case management, she said.

"We need to do more than just cosmetic changes," she said in an interview Friday.

Quebec has borne much of the fallout from the Supreme Court of Canada's Jordan decision, which imposed strict time limits on criminal prosecutions and has resulted in numerous serious cases being tossed over court delays.

More than a thousand so-called Jordan applications are working their way through the province's court system, including cases of alleged murder and sexual assault, Vallee said.

Quebec is also still waiting on the federal government to appoint eight Superior Court judges, though Vallee said she is encouraged to hear the process is underway.

The province has invested $135 million for more judges, prosecutors and court staff to deal with the backlog, she added.

Besides court delays, other agenda items for the two-day meeting included pot legalization and how the justice system deals with people who don't disclose their HIV status to sexual partners.

Vallee said the rush to have regulations in place ahead of the federal government's July 1 deadline to legalize marijuana is getting in the way of the province getting work done on passing other laws.

"It's asking for us to do a lot within a very short period of time," Vallee said. "We also had a legislative agenda that's been pushed because of this. We had no choice."

Quebec's public consultations wrapped up two days ago and Vallee says she expects her government to unveil its regulatory framework for marijuana in the coming months.

Last week, Ontario became the first province to go public with its plans for legalized cannabis, announcing its intention to restrict sales to stores operated by the provincial liquor board.

The justice ministers' meeting is scheduled to wrap Friday.

Canadian Human Rights Tribunal to revisit Air Canada retirement age issue
The Canadian Press
September 15, 2017
TORONTO — The Canadian Human Rights Tribunal will be revisiting the issue of whether Air Canada was wrong to force some pilots to retire at age 60.

A decision publicly released on Friday says the tribunal will hold another hearing to determine whether the airline had the right to force 45 pilots to retire at an age it deemed to be the industry standard.

The decision says the case originally had 97 complainants, but 52 of them will not have their retirement age scrutinized by the tribunal.

The issue of retirement age for Air Canada pilots has come up both at the tribunal and in federal court numerous times in the past decade.

Two cases with different complainants, but similar arguments, were ruled upon by the tribunal, reviewed in federal court, then ultimately dismissed by the Federal Court of Appeal.

The tribunal says the 52 pilots whose retirement dates were covered by the previous cases will not be included in the new hearing, but says it will hear arguments from the remaining 45 whose retirement dates fall outside of the timeline covered by the other cases.

A lawyer representing the majority of the pilots expects the new tribunal hearing will get underway in early 2018.

Raymond Hall said he welcomed the latest development in the highly complex case.

“We’ve been at it for 12 years,” he said Friday in an interview. “It’s no small thing.”

The new tribunal hearing will unfold against the complicated backdrop of both the two past cases as well as changes in federal law.

In 2011, as part of an omnibus bill, the then Conservative government passed a law forbidding federally regulated companies such as Air Canada to enforce a mandatory retirement age on its employees. The law went into effect in December 2012.

Prior to that legislation, the issue of retirement age at Air Canada had been hotly contested on at least two occasions at the tribunal.

The first case, named the Vilven/Kelly matter after its two plaintiffs, challenged Air Canada’s imposition of a mandatory retirement age of 60 for pilots forced to stop working between 2003 and 2005.

Despite an initially favourable ruling from the tribunal, the case was challenged in federal court and ultimately quashed by the Court of Appeal.

The second case, dubbed Thwaites/Adamson, involved 70 plaintiffs who retired between 2005 and 2009.

That, too, received contradictory rulings from the tribunal and federal courts before ultimately being dismissed by the Court of Appeal.

In both cases, Hall sought leave to bring the cases before the Supreme Court of Canada, but that leave was denied.

The third and most recent group of complainants, referred to as Bailie et al, had retirement dates ranging from June 2004 to February 2012.

Air Canada and the Air Canada Pilots Association, which represents the thousands of people who man aircraft for the country's largest airline, had filed a motion to dismiss the Bailey complaint.

Their primary rationale, according to the decision, was the fact that the issues at hand had been rehashed before in the two previous cases.

Adjudicator David Thomas wrote in the decision that this held true for the 52 pilots who had retired before 2010, but that the 45 who retired after that date had not yet had a chance to air their grievances.

While describing the possibility as improbable, he conceded that there may have been changes in the industry during those years that would make the forced retirement discriminatory on the basis of age.

"While I am sympathetic to the respondents' arguments that it is 'highly improbable' that a meaningful change to the material facts affecting the normal age of retirement occurred during the short period after Dec. 31, 2009 until the last Bailie complainant reached the age of 60 in February of 2012, I have not been provided with satisfactory information that there were no changes in the industry," he wrote. "…it is not the role of the tribunal to speculate whether certain evidence may or may not exist. The tribunal has no investigatory powers and has no material evidence before it for the younger complainants. It is the right and the obligation of the parties to present that evidence to the tribunal in a quasi-judicial forum."

Four more sentences in largest immigration fraud case in B.C.'s history
The Voice on-line
Rattan Mall
September 15, 2017

THE Canada Border Services Agency (CBSA) and the Canada Revenue Agency (CRA) Criminal Investigations sections on Friday announced an additional sentence related to the New Can Consultants Ltd. and Wellong International Investments Ltd. immigration fraud case.

On September 12, Zheng Wen Ye was sentenced to pay a total of $94,532 in fines and a conditional sentence of two years less a day after pleading guilty to charges under the Immigration and Refugee Protection Act (IRPA) and the Income Tax Act. These charges are the result of a joint effort between the CBSA and the CRA. As an unlicensed immigration consultant working for New Can Consultants Ltd. and Wellong International Investments Ltd., Ye was involved in passport fraud and misrepresentation offences. Ye also failed to report income of $225,113 between 2007 and 2011, thereby evading $42,719 in federal income tax payable.

In addition to the sentence announced this week, three additional cases concluded this summer.

On August 29, Tian "Gary" Chen was sentenced to a conditional sentence of six months less a day and 40 hours of community service for counselling misrepresentation under the IRPA in New Westminster Provincial Court. Chen was an unlicensed consultant with New Can Consultants Ltd. and was responsible for providing false addresses and phone numbers to clients so they could maintain the appearance of residency in Canada while living outside of the country.

On August 10, Xiao Ben "Ben" Chu, another unlicensed consultant working for New Can Consultants Ltd., Wellong International Investments Ltd. and ABS Consulting Ltd., was sentenced to a 12-month

conditional sentence order in Vancouver Provincial Court for counselling misrepresentation under the IRPA. The multiple conditions imposed in Chu's conditional sentence order included house arrest, curfew and 40 hours of community service. Chu counselled clients to misrepresent facts, namely residency histories on their immigration applications.

On July 6, Che Fang pleaded guilty to misrepresentation under the IRPA in Vancouver Provincial Court. Fang was sentenced to a fine of $50,000. Fang hired New Can Consultants Ltd. to help him apply for permanent resident status. As part of the immigration fraud services that the company offered, Fang became an "employee" of New Can Consultants Ltd. and received pay cheques and annual T4's. However, in reality he paid his own salary to create the appearance that he was working for the company.

To date, eight people have been sentenced for their role in the single largest immigration fraud case in British Columbia.

Harald M. Wuigk, Assistant Director, Criminal Investigations Section, CBSA, said: "These investigations and successful sentences demonstrate the Canada Border Services Agency's commitment to prosecuting individuals who abuse our immigration system. We continue to investigate any case of alleged offences under the Immigration and Refugee Protection Act and are dedicated to upholding the integrity of our immigration system."

Elvis Dutra, Assistant Director, Criminal Investigations, CRA, said: "The CRA works closely with other law enforcement agencies and departments, including the CBSA, to help maintain the integrity of the tax system. Tax evasion costs all of us. This sentence is a reflection of the valuable work done by our staff to ensure that, without exception, all Canadians abide by the same tax laws."

Charter rights are ignored in military justice system
Chronicle Herald
Tim Dunne
September 15, 2017

THE CHARTER makes no exceptions for Canada's armed forces and our military personnel do not lose their rights as they take the Oath of Allegiance. But military personnel tried by summary trials are subjected to a modern version of medieval justice. They are denied the most basic and important rights the Charter guarantees to all Canadians.

Summary trials assess Canadian Armed Forces members accused of minor wrongdoing more informally and expeditiously than the alternative, the court martial, which deals with more serious infractions. The summary trial is the principal method through which Canadian military personnel are tried.

The procedure can deal with almost every infraction under the National Defence Act (NDA), other than the most serious offences, and can also address other Canadian statutes, such as the Criminal Code, the Environmental Act and the Controlled Drugs and Substances Act.

The summary trial became entrenched in English military law with the passage of the Mutiny Act in 1689 and, according to Ottawa-based lawyer and advocate for the rights of military members, Michel Drapeau, has not changed since. In those early days, military discipline was more easily dispensed. Those early

military leaders only needed the wooden horse, the whip and the noose, which later gave way to the more ceremonial, but no less fatal, firing squad.

The process is arbitrary and medieval and needs to be brought into the 21st century to reflect contemporary Canadian values of human rights and freedoms.

Presiding Officer

The summary trial's presiding officer is usually the accused's commanding officer or someone delegated to act on the commander's behalf. This officer sits as judge, jury, prosecutor and defence. He or she personally decides the accused's guilt or innocence and imposes a sentence on the spot.

The hierarchical and heavily regulated nature of a Canadian military unit requires COs to know everyone under their command, including the accused and witnesses. Furthermore, it is inconceivable that he or she would not know all the details of the circumstances relating to the alleged offences before the trial begins.

To qualify, presiding officers need only attend a two-day certification course. By contrast, Nova Scotia's lawyers must attend law school for three years, article for an additional year and pass specific exams to be admitted to the bar. They can apply for admission to the bench after 10 years in the legal profession. On appointment, they have a two-week introductory course. There are also annual conferences and online resources to maintain their professional knowledge.

This calls into question the CO's ability to competently and impartially preside over trials and effectively apply mandatory legal concepts, perhaps leading to sentences that fall below the Canadian standard for guilt beyond a reasonable doubt and possibly result in a criminal record.

A CO's possible preconceptions about the accused present significant concerns for procedural fairness. His/her prior contact with the accused and witnesses may introduce biases into the process.

The Assisting Officer

The Judge Advocate General's 389-page manual for summary trials, Military Justice at the Summary Trial Level, prohibits legal representation for the accused:

"Although legal advice of a general nature will be available to an accused or an assisting officer through the (Director of Defence Counsel Services) there is no right to be represented by legal counsel at a summary trial. Instead, the accused will be assisted throughout the summary trial process by an assisting officer who is specifically appointed by the Commanding Officer for that purpose."

Assisting officers normally have neither legal training nor experience with the summary trial process. Usually, they are officers of the accused's unit appointed under the authority of the presiding officer. Additionally, they are not held to the stipulations of client-solicitor privilege as would a lawyer, which further exposes the accused to increased vulnerability before the military "justice" system.

In his 2003 report on the 1998 revisions to the NDA, Justice Antonio Lamer questions the competence of the assisting officer within the summary trial system. "Based on my discussions with (Canadian Forces)

members and submissions that I have received, this seems to be a widespread belief that assisting officers still do not have proper training and expertise to assist the accused."

The JAG report on the effectiveness of military justice for 2007-2008 also reports "concerns over assisting officer training are consistently raised."

The Summary Trial

Summary trials make up more than 80 per cent of service disciplinary tribunals convened each year under the NDA, while courts martial are used to try the remaining disciplinary cases.

Over the past 15 years, there have been more than 23,400 summary trials. That's an average of 1,560 annually. Only about five per cent of accused are acquitted.

The summary trial process allows for significant penalties to be imposed against those found guilty. They include a reprimand, confinement, extra work, fines up to 60 per cent of monthly basic pay, reduction in rank and incarceration for up to 30 days with the possibility of a criminal record.

Presiding officers are not required to maintain an official transcript of the proceedings. The trial summary sheet records only the sentence and punishments. While an accused can request a review of a sentence, there is no provision for appeal.

There is no requirement to apply the rules of evidence that apply in a civilian courtroom and that help an accused receive a fair trial.

The accused can be compelled to testify against himself or herself; the constitutional right to protection against self-incrimination does not apply. Spousal privilege is disallowed; adverse inferences can be drawn from the silences of the accused and hearsay and opinion can be admitted as "evidence."

The accused is granted some basic rights, such as the opportunity to question witnesses and present evidence. But statements can also be obtained by the presiding officer in written form, by phone or fax, limiting the accused's ability to challenge that "testimony."

The accused cannot make Charter arguments that might result in a stay of proceedings or dismissal of the case. And the level of disclosure provided to the accused at the summary trial does not meet the standard of Canadian jurisprudence.

More troubling is the possibility of a civilian criminal record for a relatively minor offence that often does not exist as an infraction in the Canadian civilian community. A criminal record can have a life-altering, lifetime impact by obstructing the ability to find work and to travel.

But the most serious deficiency is that, even with the possibility of detention and a criminal record, accused personnel are not permitted legal representation.

Problems with summary trials

Simply stated, summary trials lack the most basic procedural safeguards of the Canadian justice system, including the right to be represented by counsel and rules regarding the admissibility of questionable evidence.

The possibility that up to 30 days detention may result from such a flawed process likely represents a breach of the Charter, which guarantees the right to life, liberty and security of the person except in accordance with the principles of fundamental justice.

A respected Nova Scotia judge told me, “I would have to think long and hard to deprive someone of liberty for 30 days.”

The inadequate protections of the summary trial system and concerns about the training and experience of both presiding officers and assisting officers challenge the idea that individuals receive a fair assessment of their guilt and increases the likelihood that accused individuals may be found guilty when such a finding is unjustified.

This puts Canada at variance with the conclusions and recommendations of the United Nations Human Rights Council’s Special Rapporteur on the independence of judges and lawyers of June 10, 2011, to which Canada is a signatory.

As Michel Drapeau sadly pointed out at the 30th annual conference of the International Society of the Reform of Criminal Law in San Francisco, on July 13, although many western democracies and our allies have abandoned this medieval form of “justice,” Canada’s summary trial process puts us in the company of Pakistan, Sri Lanka, India, Bangladesh and Nepal.

Therefore, the structure of summary trials is in stark contrast to all civilian statutory equivalents and may be contrary to an accused’s rights under the Canadian Charter of Rights and Freedoms.

Having the ability to detain someone without the benefit of a fair and transparent trial process violates the principles of fundamental justice and due process requirements of section 11 of the Charter, and represents a denial of liberty, contrary to section seven of the Charter.

The Supreme Court of Canada (SCC) has ruled that section 11 of the Charter applies to courts martial.

While the government has the constitutional authority to create a military justice system that operates in parallel to the regular court system, the Supreme Court also emphasized that the Charter of Rights and Freedoms applies to military tribunals convened under the NDA, including the Charter’s section 11, which provides criminal due process rights to individuals “charged with an offence.”

Without an appeal process for summary trials, the accused cannot refer the matter to an appeal court or the Supreme Court, pre-empting that court from addressing the constitutionality of the summary trial procedure. Current jurisprudence strongly suggests that the Charter, including the procedural rights in sections seven (the right to life, liberty and security of the person) and 11 (the rights of the accused), should also apply to the summary trial procedure.

The Supreme Court recognizes that section 11 of the Charter applies to the legal process in which a judge analyzes evidence and legal argument, if that process is of a "public nature" or if that procedure has "true penal consequences."

Separately, the court recognized that military tribunals have the power to incarcerate persons they find guilty. As the summary trial process and courts martial share the same objectives and both can subject individuals to potential imprisonment, then the court's logic should also apply to summary trials.

Basic fairness requires systems that impose significant penalties on individuals to provide comparable procedural protections. The Supreme Court stated in Suresh v. Canada, "the greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the Charter."

Conclusion and recommendations

Canadian summary trials deny our military personnel the civil liberties available to all other Canadian residents. Allowing members of the armed forces to be tried, deprived of their liberty and stigmatized for offences without a right to legal counsel is a clear infringement of basic justice, a violation of due process, a desecration of fairness and a disregard for Canadian values.

The National Defence Act should be amended to reflect 21st century Canadian values.

• Detention should be removed from the list of sentences that may be imposed for a summary trial, as should confinement to ships or barracks. This would allow the election of either a court martial if the offence is serious enough to justify imprisonment, or a summary trial if the matter is of unit discipline.

• If detention were removed as a possible punishment, assisting officers would have a viable role, but only if they receive comprehensive training and education to be better prepared to represent individuals accused of offences.

• Under no circumstances should an accused be tried by her/his superior officer or any other officer who may have had notable contact with the accused prior to the trial.

Military tribunals, when they exist, should be an integral part of the general Canadian justice system and operate in accord with human rights standards, including respect for the right to a fair trial and due process guarantees set out in the UN International Covenant on Civil and Political Rights, to which Canada has been a signatory since 1976.

"The Canadian military's summary trial process fails to meet minimum standards for procedural fairness," the British Columbia Civil Liberties Association notes in its 2011 report, Fairness for Canada's Soldiers. That report opens with the stark observation, "Canadian soldiers are entitled to the rights and freedoms they fight to uphold."

The United Kingdom established a Summary Appeal Court in 2000, after The European Court of Human Rights realized that summary trials were non-compliant with European human rights legislation. Like the Canadian Charter of Rights and Freedoms, the European Convention with the Protection of Human Rights and Fundamental Freedom (1950) emphasizes that nobody shall be deprived of his/her liberty

except after conviction by a competent court; and, similar to section 11 of the Canadian Charter, Article 6 of the convention guarantees the right to a fair trial by an independent and impartial tribunal.

In their recent online book, Behind the Times: Modernization of Canadian Military Criminal Justice, retired Justice Gilles Létourneau and retired Col. Michel Drapeau explain the British equivalent to the summary trial process.

The armed services of the United Kingdom use a process named “minor administrative action” (MAA), a disciplinary system for minor infractions apart from military criminal systems. A service member who is a few minutes late for duty or provides poor performance in a routine task, the usual errors associated with young service members, are handled formally by a presiding officer, one to several ranks above the “offender” with a minor punishment, such as reduced shore leave or extra guard duty. MAAs are not recorded on an individual’s service record but are recorded within the unit.

Junior commanders deal with the lowest level of misconduct. This has resulted in halving the number of summary dealings in the army, empowering junior leaders and improving discipline without resorting a more formal tribunal.

The Canadian summary trial system has continued unaddressed for far too long, suggesting that several agencies of the federal government, including the Canadian Human Rights Commission, the Standing Committee on National Defence and the Department of Justice, have been asleep at the switch.

Our military personnel are paying the price.

Tim Dunne is a retired Canadian military public affairs officer with 37 years’ service in Canada, the United States, Europe, the Middle East and Africa.

Former Canadian justice minister to look into possible crimes against humanity in Venezuela
CBC News International
Levon Sevunts
September 15, 2017

A veteran Canadian politician and human rights campaigner has been appointed to a panel of international experts that will examine evidence collected on possible crimes against humanity committed in Venezuela, Foreign Affairs Minister Chrystia Freeland announced Friday.

Professor Irwin Cotler, a former Liberal justice minister and attorney general of Canada, will be part of a team of international human rights experts being assembled to work with the former chief prosecutor of the International Criminal Court (ICC) Luis Moreno Ocampo, Freeland said.

Ocampo has been appointed special adviser on crimes against humanity by Secretary General of the Organization of American States (OAS), Luis Almagro.

“I am so pleased to support the appointment of my friend and former colleague Professor Cotler to this investigative panel and welcome his global experience with regard to human rights and the rule of law, which will be invaluable to the credibility and quality of this investigative process,” Freeland said.

“This initiative represents a critical contribution by the OAS to uphold justice and human rights for the people of Venezuela.”

The OAS initiative comes following reports of human rights abuses during months of civil unrest that began in April after Venezuela’s Supreme Court, dominated by supporters of President Nicolas Maduro, ruled to strip the opposition-dominated parliament of its powers, accusing lawmakers of “contempt” after allegations of irregularities by three opposition lawmakers during the 2015 elections.

The ruling, which was denounced as a coup by the opposition, was later reversed but massive street protests against Maduro government continued.

According to a report issued by the Office of the United Nations High Commissioner for Human Rights on Aug. 30, at least 124 people had died in the unrest as of July 31.

The security forces were reportedly responsible for 46 and pro-government armed groups, known as armed colectivos, for 27. Responsibility for the remaining 51 deaths has not yet been determined, the report concluded.

“The generalized and systematic use of excessive force during demonstrations and the arbitrary detention of protestors and perceived political opponents indicate that these were not the illegal or rogue acts of isolated officials,” the report says.

The panel will compile and evaluate information, and, if warranted, will submit its findings to the ICC, Freeland said.

No timeline for a fix as several high-profile court cases may be tossed
The Canadian Press
Kenny Mason
September 16, 2017

Federal, provincial and territorial justice ministers have wrapped up two days of meetings in Vancouver with a renewed commitment to tackle unacceptable delays in the court system. And there is a high-profile BC case that is being complicated by current court rules.

Ottawa has been scrambling to deal with the fallout of a ruling by the Supreme Court of Canada known as the Jordan decision that saw hundreds of cases being tossed out because of lengthy delays. The cases included murder trials, sexual assaults, child luring — all of which were stayed by judges because the defendant’s constitutional right to a timely trial was infringed.

The decision imposed, instead, strict time limits but throwing out serious cases has been a concern for critics. Take for example, the case involving Jamie Bacon who won’t be back on trial until March of 2018.

Federal Attorney General Jody Wilson-Raybould says possible areas of reform include doing away with some mandatory minimum sentences, eliminating preliminary inquiries and reclassifying some criminal

offences. “I’m hopeful that we can have a package in the near future. This is a priority for me and it’s a priority for our government.”

Wilson-Raybould is promising changes but couldn’t go into detail about when a solution may be reached. “We are going to proceed as quickly as we can, recognizing the call from the Supreme Court of Canada to take substantive action to address delays.”

She feels what’s needed is the court system meets the highest standards of equity and fairness.

The Jordan decision, as it’s now known, was issued on July 8th, 2016, when the high court ruled the drug convictions in BC of Barrett Richard Jordan must be set aside due to unreasonable delay.

In a 5-4 ruling, the court said the old means of determining whether proceedings had taken too long were inadequate. Under the new framework, unreasonable delay was to be presumed if proceedings topped 18 months in provincial court or 30 months in superior court.

If proposed tax rules are about fairness, federal civil servants should be next
Globe and Mail
Frederick Vettese
September 17, 2017

The Liberal government's proposed changes to the tax rules are raising a lot of flak from physicians and other high-paid professionals. By taking away income splitting with one's spouse and children, the government says it is trying to promote fairness among all taxpayers.

If you're not directly benefiting from income splitting, the proposed changes probably sound reasonable. The only question is whether the tax revenue is worth the potential political fallout. I understand the change might generate $250-million in extra tax revenue but when compared to a budget deficit of $28-billion, that doesn't sound like a lot.

If the federal government really wants to make a dent in the deficit and promote fairness, they should consider what can be done in their own backyard. There are nearly half a million active and retired civil servants who participate in the federal Public Service Pension Plan (PSPP for short). If any program is in need of an overhaul, it is the PSPP.

I contend that the PSPP should be converted from a defined-benefit pension plan to a target-benefit plan. The basic difference is that employer contributions to a target-benefit plan are fixed, which means the benefits themselves can be variable. In a defined-benefit plan, the amount of benefit is unconditionally guaranteed, which is possible only if contribution rates are variable. It is this guarantee that costs so much. If a target-benefit plan were adopted, the government's true cost of providing pension benefits could be reduced by as much as $2.5-billion a year, a savings that dwarfs the impact of eliminating income splitting.

Two questions should come to mind. First, is such a change fair? It will come as no surprise that the federal PSPP is generous relative to private-sector plans but what few people realize is that it is also significantly better than most public-sector plans. Plans such as the monolithic Ontario Teachers' Pension Plan require plan members to shoulder half the risk. If a deficit develops, the payments to fund it are

borne equally by employees and employers. With the federal PSPP, the deficits are the sole responsibility of the government, which, of course, means the taxpayers.

Another way the federal PSPP distinguishes itself is its unlimited and unconditional protection of pensions against inflation. In most public-sector plans these days, inflation protection is capped. Moreover, inflation-related increases are no longer guaranteed as they depend on the funded level of the plan. As for private-sector plans, providing any inflation protection at all has become a rarity.

As a result, the average career civil servant who is retiring today after 35 years of service is walking away with a pension entitlement that is worth over $1.2-million. This might be justified if employees had been accepting lower salaries in exchange but studies show this is not the case. Cash compensation amongst the rank and file in the federal civil service is comparable with the private sector, if not on the high side. So, yes, I think most people who are not in the PSPP would agree that the change to a target-benefit plans is fair.

The second question is whether a target-benefit plan jeopardizes the retirement security of federal public-sector workers. To answer this, let's assume the current PSPP is replaced with a target-benefit plan that requires employee and employer contributions totalling 20 per cent of pay, which is the current service cost under the current federal PSPP.

A total contribution level of 20 per cent is practically unheard of in the private sector. Within a defined-contribution plan, it is not even legal, since contributions are capped under the Income Tax Act at 18 per cent of pay. Even so, a 20-per-cent plan is potentially less generous than what federal civil servants have now, but it is still very substantial. If such a plan imperils workers' retirement security, then virtually no one is safe.

If a 20-per-cent target-benefit plan earns a return that is 4.1 per cent above the inflation rate, plan members should still expect to get the same retirement benefit and inflation protection as they have now under the PSPP. Even if the long-term investment return is less, the basic amount of pension benefit is unlikely to be in jeopardy, though ancillary benefits such as inflation protection and early retirement subsidies (another plan feature that is fast becoming archaic) would be at risk. If readers think this residual risk is unacceptable, they should note that their Canada Pension Plan works in exactly the same way.

The federal PSPP is a dinosaur amongst pension plans, even in the rarified realm of public-sector plans. It is sustainable only as long as the pension promise is being underwritten by all taxpayers. The enormity of the guarantee would otherwise be a non-starter. Even politicians would grudgingly have to agree with this assessment if one is to judge by their actions in private life. To my knowledge, no cabinet minister ever came from (or went to) a private-sector company that sponsored a pension plan that is comparable to the federal PSPP.

I can see how my proposed change could be construed as an attack on public-sector employees but that would be the wrong conclusion. Outside of the federal civil service, most public-sector plans provide a more reasonable level of benefit and cost sharing. Most such plans have been gradually and responsibly trimming their promises in response to the modern-day reality of lower interest rates and lower expected returns.

As an aside, readers might wonder why the conversion of the PSPP has not already happened if it is so clearly called for. In ancient Roman times, the emperors looked to the Praetorian guards for their personal protection. To ensure their loyalty, the emperor granted the Praetorians special privileges, including a shorter period of mandatory service and higher total compensation than what the "market" required. It seems not much has changed in 2,000 years.

Frederick Vettese is the chief actuary at Morneau Shepell. His views do not necessarily reflect the views of the firm

Lawyers unhappy with CBA over tax stance
Law Times
Dale Smith
September 18, 2017

The Canadian Bar Association's decision to join with other small business groups in protesting the federal government's planned changes to private incorporation tax rules has some lawyers revoking their membership in protest, saying that it's not something they should be fighting against.

"I don't feel like I was adequately consulted before they took this position," says Chris Rudnicki, partner with Rusonik O'Connor Robbins Ross Gorham & Angelini LLP in Toronto.

Rudnicki says he has a considered opinion on the issue of the proposed changes, and he was taken aback that his association would have taken a position without getting feedback.

"Lawyers are a tremendously privileged section of our society," he says.

"We make some of the highest incomes of any profession, especially the kinds of lawyers who tend to be in charge of our national organizations like the CBA."

The proposed changes announced by the federal government in July affect Canadian Controlled Private Corporations and are intended to: end the practice of "income sprinkling," where dividends are paid to adult children or other family members at a significant tax advantage; address passive income by removing the tax advantage for using a private corporation for investment purposes; and clamp down on transforming dividend income into capital gains, which are more lightly taxed.

The stated intention from the government is to restore the neutrality between saving inside of a corporation and outside of one.

"The idea of ensuring that our system works, that we don't create tax advantages for the wealthiest, is important," federal Finance Minister Bill Morneau told reporters from the cabinet retreat in St. John's on Sept. 12.

Morneau says that as they hear feedback during the consultation period, they will consider how to best implement what they consider to be important measures.

Rudnicki says that as a third-year lawyer, he doesn't make nearly that much, but he still feels that lawyers need to use their privileged position to speak out in favour of redistribution and ensuring that those who make more pay their fair share.

"That's why I decided to cancel my membership," says Rudnicki. "[I]f you're going to take a position that is entirely contrary to the spirit of public service that lawyers should have, then I'm done with you as an organization."

Rudnicki says he has heard from other lawyers who support his position and that some progressive organizations such as the Law Union of Ontario have been critical of the CBA for taking the position.

He adds that for criminal lawyers like him, legal aid subsidized by the government helps practices like his.

The CBA says it took the position because it is part of the Coalition for Small Business Tax Fairness.

"We joined because the changes that were proposed have a negative impact on the ability of all independent businesses, professionals and other small businesses to survive during challenging economic times," says Ray Adlington, vice president of the CBA.

He says he feels the changes will negatively impact the ability of small businesses to finance growth, innovation and job creation, as well as increase the compliance costs for those businesses.

He adds that he doesn't feel the 75-day consultation period, largely over the summer, is adequate for such a large change to tax policy.

Adlington says he hasn't heard any negative feedback to date on the CBA's involvement in the Small Business Coalition, but he admits he hasn't asked.

This isn't the first time the CBA has found itself offside with its members. In 2014, it planned to act as an intervener in the Supreme Court of Canada case Chevron Corp. v. Yaiguage 2015 SCC 42, but it ended up dropping its plans after a swath of resignations.

"Whenever there's any sort of issue that comes up, there's always going to be in any association people that are for and against — that's just the way it goes," says Adlington.

"I don't think this one is going to be as divisive as the Chevron situation was."

The CBA later told Law Times that it had received positive response from members for joining the coalition and that 90 per cent of feedback from members have expressed their opposition to the government's proposed changes.

They also stated that hundreds of members have sent letters to their MPs against the measures.

Other lawyers who represent small business interests aren't buying the position of the Small Business Coalition — or the Canadian Federation of Independent Business — which has spearheaded the initiative.

Grant Buchan-Terrell, a small business lawyer with gbtlaw in Oakville, Ont., says that the professional incorporation rules for lawyers make most of these proposed changes a moot point.

“Lawyers, as a group — which is what I thought the CBA was supposed to represent — can’t use most of the sprinkling and retained earning provisions that are subject to the proposed tax changes, so I find their position curious,” says Buchan-Terrell.

He says that, for the past 10 years, he has done the corporate aspect of tax plans, which are legitimate and legal, that create family trusts for the purposes of income sprinkling and convert dividends to capital gains, but he notes that he is not a tax-planning lawyer and tends to act on the instruction of a Certified Professional Accountant or tax-planning lawyers.

“I’ve made maybe up to 20 per cent of my gross billings in a given year from the commercial law aspects of these very plans,” says Buchan-Terrell.

“It’s not a moral issue, but as a citizen and a business lawyer who understands this, the rhetoric and misrepresentations that are going on against [the proposed changes] are just nonsense.”

Buchan-Terrell says many private corporations and family trusts that have set up with the help of a CPA or tax lawyer have never been used because the person simply doesn’t make enough money to see any benefit from them.

He says that while the nominal level to see any tax benefit would be $150,000 per year, practically speaking, a person would need to make $500,000 per year to make it worthwhile.

“If you can ever get a true quote from somebody in the legal or accounting profession, they will admit that of course [these rules are] a loophole, and it was never intended to use family trusts in this way,” says Buchan-Terrell.

He says that, while he doesn’t plan on cancelling his CBA membership, he nevertheless questions the value of the organization outside of those members who are looking to improve their resumé in advance of a judicial appointment application.

Eugene Meehan, partner with Supreme Advocacy LLP in Ottawa, who was national president of the CBA in 2000, says that every representative organization carries a deep need to consult internally before taking public positions, and he wonders whether this was done with the proposed tax changes.

“This association is mandated to be a non-political body representing lawyers in Canada,” Meehan says. “Engaging in politics is by definition not its job.”