The Court after McLachlin
CBA National
Doug Beazley
September 19th 2017

It is difficult to imagine a Supreme Court of Canada without Beverley McLachlin. For 17 years, she was the court's rudder, steadying it in choppy legal waters. So what happens after she's gone?

Appointed to the court by Prime Minister Brian Mulroney as a puisne justice in 1989 and elevated to the top job 11 years later, Beverley McLachlin is the longest-serving chief justice in the court's history. She led it through a period of consolidation and refinement of Charter law following the "dawn period" under Chief Justices Brian Dickson and Antonio Lamer.

The early years of Supreme Court interpretations of Charter law were action-packed, marked by many split decisions and an activist tone. McLachlin herself – appointed to the bench just a year before Justice Dickson's retirement – described her approach to Charter law as one of "subtle interpretations" of the broad directions set during the Dickson and Lamer eras. She proved herself adept at stick-handling unanimous decisions on fraught subjects, from physician-assisted dying to maximum trial lengths – a talent that was nurtured during her long tenure on the court.

"Right now we've got a fairly young court, with a critical mass of judges with just five or six years on the court," says Carissima Mathen, a University of Ottawa associate professor specializing in constitutional law. "[McLachlin] came to the role with significant institutional memory. She's the last one on the bench to have sat with Justice Dickson, the first Chief Justice under the Charter. Most of the other judges have not yet accumulated that level of experience."

Few would disagree that she was a stabilizing influence, bringing a degree of consensus to the Court that made its rulings easier for governments to understand (or at least harder to ignore). She will leave the bench effective Dec. 15.

No one knows yet how the post-McLachlin court will function – whether it will be more activist or less, whether it will maintain its recent habit of collegiality or deliver more split decisions. But everyone agrees that the next 10 years will see the court deliver game-changing decisions in several areas of law:

Indigenous Canadians and duty to consult

File this one under "unfinished business". The problem of reconciling the rights of Aboriginal communities with governments' responsibility to set policy has landed on the Supreme Court's agenda many times already. It's poised to do so again, likely over controversial resource projects opposed by some Indigenous communities.

The court tried to settle the question of how far governments must go in accommodating Indigenous concerns with the principle of duty to consult (DTC), a refinement of the broad rights set out in section 35 of the Canadian Charter of Rights and Freedoms. DTC commits governments to consulting with Indigenous communities in cases where a Crown decision could adversely affect asserted or established Aboriginal or treaty rights. Two rulings from 2004 – Haida Nation v. British Columbia and Taku River Tlingit First Nation v. British Columbia – set the boundaries of DTC: that it's a Crown obligation, that it applies to asserted Aboriginal rights as well as established ones, and that it's not a blanket veto.

DTC is a "good faith" principle; it's meant to give governments the leeway they need to do their jobs – but it only works if both sides buy in. If that doesn't happen – if, for example, governments leave it up to private corporations to conduct DTC talks on their own (which has happened often) – then the principle can break down. (DTC is a constitutional duty of governments; it can't be delegated completely to the private sector.)

"Good faith fails, and I think we're going to see more instances where the court has to confront that," says Emmett Macfarlane, a political science professor at the University of Waterloo who studies the impact of Supreme Court decisions on government policy.

"We're going to see fewer articulations of broad principles and more cases of the court saying yes or no to a particular interpretation of the law."

If the court opts to refine the DTC principle, it will have to somehow reconcile it with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The Trudeau government formally adopted UNDRIP in May 2016; a year later, it formally withdrew the Harper government's objections to portions of it that require governments to obtain the "free, prior and informed consent" of Indigenous communities to developments and new laws that affect them. To date, the Supreme Court has not embraced the concept of an Aboriginal veto on such decisions – but the argument is a long way from over.

"The McLachlin court left governments room to manoeuvre," says University of Ottawa law professor Sébastien Grammond. "(DTC) emerged in 2004 because the court realized that simply recognizing rights to hunt and fish was not adequate. I think the court will acknowledge DTC needs refinement, and UNDRIP probably will be the trigger for that."

And since Indigenous communities are hardly united on the benefits and risks of resource projects, you can expect to see the court ruling on conflicts between individual First Nations. "You have to expect legal conflicts between Indigenous groups themselves, arising from consultations involving multiple parties," says Mathen.

The separation of powers: Who's in charge?

This is familiar ground for the court; conflicts between the federal and provincial government over constitutional spheres of influence are as old as the nation. Court-watchers see the division of powers erupting on its agenda in a couple of ways.

The B.C. government is on a collision course with Ottawa over the Kinder Morgan pipeline since declaring it would join the legal battle against the project. The feds have the power to force the project through over Victoria's objections by using the Constitution's power of federal undertakings – provided it can argue the project is in the interests of Canada as a whole. Such an action on Ottawa's part would almost certainly end up before the Supreme Court.

"It's a sledgehammer," says U of Ottawa professor of constitutional law Errol Mendes. "Ottawa can use the undertaking provision to override provincial law. I think, however, that the federal government doesn't want to go that route."

One fight the federal government likely can't avoid is connected to its climate change strategy. The Saskatchewan government has threatened to take the feds to court over its plan to impose a price on carbon emissions; natural resources fall in the provincial sphere and governments can't tax each other under the Constitution.

"The federal government would claim its broad authority to protect the environment under the peace-order-and-good-government principle in the Constitution's preamble," says Mendes. "I tend to agree with the federal government that, when push comes to shove, the law is on their side. But that would still be a major decision coming from the [Supreme Court]."

Your rights, their rights

Charter rights aren't static; sometimes they conflict and when they do the court has to draw a line. Expect conflicts between religious freedom and equality rights to continue testing where that line is in the post-McLachlin period.

Trinity Western University, a private Christian university based in B.C., imposes a "covenant" on students that forbids, among other things, sexual intimacy that "violates the sacredness of marriage between a man and a woman." Arguing the covenant discriminates against LGBTQ students, the Ontario and B.C. law societies declined to accredit Trinity Western's planned law school. Those cases are going before the court. [The CBA has been granted intervenor status.]

"As the courts continue to deal with matters of 'reasonable accommodation' of religious expression, we'll see more cases of religious freedom butting up against equality rights," says Macfarlane. "Maybe an Indigenous religious ceremony coming into conflict with municipal bylaws."

Accentuating the positive

The Charter of Rights and Freedoms is largely a list of "negative" guarantees – protecting Canadians from threats to personal freedom (discrimination, arbitrary arrest, cruel and unusual punishment) without offering much in the way of "positive" rights, such as the right to a living wage or housing. Since it was introduced in 1982, there have been attempts to broaden the Charter's scope to embrace more positive rights.

The court dipped a toe in these waters in 2002, in the case of Gosselin v. Quebec. It was a class action brought on behalf of 75,000 people against the Quebec government over its decision to make full welfare benefits for people under the age of 30 contingent on participation in a "workfare" or employment training program. The plaintiffs argued that decision violated both their section 15 equality rights and their section 7 right to "life, liberty and security of the person".

The court ruled that Quebec's policy violated neither the Charter nor the Quebec Charter of Rights and Freedoms. McLachlin wrote the majority decision; in dismissing the claim that Quebec had violated section 7, she did not close the door entirely to a "positive rights" interpretation of the section.

Justice Louise Arbour delivered a dissenting opinion asserting that the Charter can and should be used as a tool to fight poverty and social injustice – that there should be no distinction in law between civil liberties and social and economic rights.

"Justice Arbour's fierce dissenting position makes a decision on positive rights more likely," says Mendes. "Ontario is running pilot projects on guaranteed basic income. So what if it can be shown that the idea works? Suddenly there's going to be pressure on governments to follow suit."

In everything the court does, personalities matter. The question of positive rights is a good example of an area of law that could see movement if the post-McLachlin court turns out over time to be more activist and less inclined to a default position of unanimity, says Mathen.

"It will be interesting to see, in her absence, whether particular jurists will want to develop their own philosophical approach to the legal questions coming before the court – whether they'll feel freer to dissent now."

Doug Beazley is a journalist based in Ottawa

Trudeau needs to deliver on his access-to-information promises
Globe and Mail
Shawn McCarthy
September 18th 2017

Shawn McCarthy is president of the Canadian Committee for World Press Freedom and a reporter for The Globe and Mail.

When the Trudeau government released its long-awaited bill (C-58) to reform the 34-year-old Access to Information Act on a sunny Friday afternoon before Parliament's summer recess, it gave itself a check mark in the promise-kept column.

C-58 represents an improvement over the current system. And the Liberals suggest it is a first step, with promises of more sweeping reforms some time later. But why wait?

Anyone taking the time to review C-58 before Parliament resumes Sept. 18 will find the Liberals come up short on election promises made on Access to Information (ATI) reform in 2015. As the Centre for Law and Democracy noted in a review of C-58, the proposed legislation "is far more conspicuous for what it fails to do."

Let's look at those promises, starting with one the bill seems to have delivered – enhanced powers for the Information Commissioner.

Bill C-58 gives the commissioner the overdue power to order government departments to disclose information. However, it does not limit the government's ability to deem information it wants kept secret as a "cabinet confidence."

Under the existing ATI law neither the commissioner nor the Federal Court has the right to verify whether a cabinet confidence determination is justified. Here, Bill C-58 maintains the status quo; that should change.

C-58 would ensure the commissioner has the power to examine records the government claims are subject to solicitor-client privilege (Section 23).

This was urgently needed after a Supreme Court of Canada ruled last year that solicitor-client privilege could only be abrogated where legislation explicitly allowed it.

The Liberals promised that the ATI law would be amended to apply to the Prime Minister's Office and offices of ministers. In C-58, the Prime Minister's Office and the offices of ministers remain off limits to information requests made under the Act.

However, in what the B.C. Freedom of Information and Privacy Association calls a "bizarre slight of hand," the PMO and ministers' offices will be required to release such things as travel expenses or contracts. The government claims that by adding that disclosure requirement, it has kept the election promise, even though Canadians won't be able to ask for information from the PMO or ministers' offices as they can in several provinces.

The government promised in 2015 to eliminate all ATI fees except the nominal $5 application fee. That promise was delivered before C-58 was tabled.

The Liberals also vowed to amend the ATI law to make government "open by default." But C-58 would give government departments the right to ignore information requests that they deem to be "frivolous or vexatious." That exemption is being imposed without warning or justification, and is a power that should not be held by a government department that could benefit by wide interpretation in its own interest. It should be removed from the bill.

Finally, the Liberals promised a review of the act every five years. C-58 delivers here. However, five-year reviews often fall between the cracks in some statutes while others such as the Bank Act are reviewed and amended every five years without fail because they will otherwise sunset. The ATI Act should have the same sunset status.

It was sadly predictable that once in power, the Liberals would find reasons to water down their commitments and withhold the types of information that they had promised to make available to the public.

In Prime Minister Justin Trudeau's mandate letters to Treasury Board President Scott Brison and Minister of Democratic Institutions Karina Gould, he said it is "time to shine more light on government to ensure it remains focused on the people it serves."

Bill C-58 leaves too much in the shadows. Canadians deserve a bill that meets the aspirational language of the 2015 campaign and those mandate letters.

New bail policy coming for Crowns
Cultural shift needed
Law Times
Alex Robinson
September 18, 2017

While new bail policies are on the horizon for Ontario’s Crown attorneys, criminal defence lawyers say the bail process needs an entire cultural shift.

At an opening of the courts ceremony in downtown Toronto in early September, Attorney General Yasir Naqvi told judges and prominent members of the bar that his ministry will soon unveil a new set of bail policies and procedures for Crown attorneys.

“In the coming weeks, the Ministry of the Attorney General will be releasing our new Crown policy on bail, which will set out with clarity Ontario’s renewed approach to bail in the post-Antic world,” he said at the ceremony.

In December, the government enlisted the help of former chief justice Brian Lennox, former deputy attorney general Murray Segal and deputy Crown attorney Lori Montague to develop the new bail guidelines.

They were expected to consider a number of issues, including the use of sureties and bail conditions, as well as a specialized response to domestic abuse cases.

Criminal defence lawyers say they hope the new guidelines will focus on a culture shift at all stages of release they say is needed in order to address the true problems of the bail system.

“In terms of any new guidelines concerning bail, I think the real issue is what will it take for the police, the Crown and the courts to adhere to the ladder approach in our bail release laws,” says criminal defence lawyer Dan Stein.

“An undertaking without sureties — given to either a police officer or a justice — is supposed to be the default position when granting release. Any other form of release, as well as strict conditions, are meant to be exceptions to the rule.”

He adds that, instead, there are countless bail hearings that should not be held at all and that the default ends up being releases granted with strict conditions and sureties.

Criminal defence lawyer Sean Robichaud says the most significant issue affecting the province’s bail courts is the “gross misalignment” of the law and practice. He says that despite the fact that hearings are supposed to be done in an expeditious manner, with a presumption of release in most instances, bail courts are often bogged down by prosecutors seeking severe conditions.

“In my view, this is driven by Crown policies that are inflexible and create overly cautious approaches by prosecutors who are often felt constrained in their discretion,” he says.

“This, in turn, has a significant ripple effect in delay through the criminal justice system.”

Robichaud says he is hopeful that any new bail policies for Crowns will recognize that a “significant recalibration in perspective” is required.

He adds that whatever the changes are, “they must be profound in order to salvage the misapplication of law and massive delay issues they are causing.”

Naqvi told Law Times the ministry is looking at how it can have fewer people in remand, especially when it comes to low risk and vulnerable individuals.

“It’s a departure from how the Crown policies [are] laid out today,” he says.

Criminal defence lawyer Jessyca Greenwood says the government's current bail policies have not helped reduce the overrepresented numbers of mentally ill and indigenous people in remand facilities.

"It is my hope that with changes to the bail system, persons who are vulnerable and unwell can get the help they need by being connected to community resources and stable housing rather than deteriorating in jail," she says.

She adds that she hopes the policies with respect to straightforward and non-violent breaches of bail will be revisited with a less punitive approach.

In June, the Supreme Court of Canada released its decision in R. v. Antic, which clarified the correct approach to bail.

While the ministry was already reviewing its bail policies at the time Antic came out, Naqvi said the Supreme Court of Canada sent an unequivocal message to the government and courts, similar to the way it did in last year's decision in R. v. Jordan.

"It might not set out prescribed timelines like Jordan, but in many ways it is a similarly critical wakeup call," he said. "And just like Jordan, tackling this challenge will require all of us working together to make some tough decisions."

While the Antic decision and bail were the focus of Naqvi's remarks at the ceremony, Jordan was still top of mind as courts and governments continue to tackle delays.

The Jordan decision capped court delays at 18 months in provincial court and 30 months in superior courts, with some exceptions. This forced governments and courts into action to try to head off criminal charges being stayed.

Ontario Superior Court Chief Justice Heather Smith said that a year ago the courts had just begun to address the effect of Jordan but that this year they are feeling it in "full effect."

Despite a number of court initiatives to improve the timely disposition of criminal matters, Smith said that the "challenges created by Jordan remain very real."

She said the province's appointment of more judges to the Ontario Court of Justice and hiring of new Crowns will mean new indictments will come to the Superior Court more quickly.

"The great efforts of our dedicated judges have held the line in criminal cases until now," she said.

"But nothing short of a very immediate increase to the judicial complement of the Superior Court will allow this court to maintain control of its very heavy and highly complex criminal caseload."

She noted that in the federal budget for 2017, the government announced funding to appoint 28 new Superior Court judges for all of Canada and she is hoping that Ontario will get a proportionate number of those new judges.

While a lot of attention has been put on how the criminal courts have been affected by Jordan, Court of Appeal Chief Justice George Strathy said it is important to ensure that civil and family matters have not been eclipsed by the needs of the criminal justice system.

Lawyers who work in the civil courts have complained that delays in civil matters have been getting worse as resources have been shifted to criminal matters.

“I think we need to take also a hard look at the effectiveness of [the] civil justice system in the ways it provides timely and efficient access to justice,” Strathy said at the ceremony. “The diversion of judicial resources — a necessary diversion due to Jordan — has unfortunately created even more strain on the civil docket. We must renew our efforts to improve access to civil justice.”

Strathy said the province also cannot afford to wait to move forward with expanding the Unified Family Court in Ontario, which has been a long-awaited reform.

Naqvi says changes to the bail system were also part of a wider look at tackling delays in the entire criminal justice system.

He says bail hearings are taking longer and more people are being denied bail.

“From an administration of justice perspective, all the advice that I have received is you have to look at the beginning of the process and one of the significant places we find a big challenge is the churn that takes place in and around bail,” he says.

Public Services brings in May-Cuconato as a Phoenix ‘fixer’
Public Services and Procurement brings in Danielle May-Cuconato, a seasoned veteran and former Liberal staffer, to help fix the Phoenix pay system before the next election.
Hill Times
Emily Haws
September 20th 2017

Public Service and Procurement Canada has hired veteran bureaucrat and former Hill staffer Danielle May-Cuconato to help fix the problem-plagued Phoenix pay system. She was named the assistant deputy minister of the government department’s new Pay Stabilization Project on Sept.7, the department confirmed. Ms. May-Cuconato, a seasoned bureaucrat and former Liberal Hill staffer, is regarded as someone who can connect the bureaucratic and political worlds in order to get the public service pay system problems resolved before the next

federal election in 2019. Ms. May-Cuconato was formerly the secretary general of the Canadian Radio-Television and Telecommunications Commission (CRTC).

“Ms. May-Cuconato is an accomplished government of Canada executive who possesses a strong record of achieving results and has over 10 years of experience in human resources and workplace management,” Jean-François Létourneau, PSPC spokesperson, said in a statement.

Ms. May-Cuconato will be working under Les Linklater, associate deputy minister for Public Services and Procurement Canada, said Mr. Létourneau, and will take part in the new integrated team looking to fix the Phoenix-related pay issues.

The problem-plagued Phoenix pay system for Canada’s federal public servants was rolled out in February 2016, but many public service employees have either been overpaid, underpaid, or not paid at all. The Public Service Pay Centre online dashboard indicated it received 80,000 “transactions,” or complaints between July 26 and Aug. 23, 2017, but only processed 71,000 complaints. Phoenix was supposed to save the government $70-million annually. But so far the Liberals have invested $400-million to fix it. Public Services and Procurement is still dealing with 237,000 transactions above the normal workload as of Aug. 23. One employee may have more than one transaction, however. Data obtained by Radio Canada about a month ago stated nearly half of all public servants paid by Phoenix experienced pay issues.

Mr. Létourneau said Ms. May-Cuconato will be working with other ADMs, including Alex Lakroni (in charge of accounting, banking, and compensation), and associate ADM Marc Lemieux. PSPC did not specifically confirm the Pay Stabilization Project is related to Phoenix, but Debi Daviau, president of the Professional Institute of the Public Service of Canada (PIPSC), which represents 57,000 scientists and professionals at the federal, provincial, and territorial levels, said, “I’m sure that’s what it is; there isn’t any other pay project ongoing currently.”

Ms. May-Cuconato also served as the vice-president of corporate services and the chief financial officer at the Canada School of the Public Service in 2013. She has also held several positions at the Department of Canadian Heritage. She served as chief of staff to the former deputy prime minister and cabinet minister Sheila Copps. David Zussman, a professor at the University of Ottawa who led prime minister Jean Chrétien’s transition into government in 1993 and is the author of Off and Running: The Prospects and Pitfalls of Government Transitions in Canada, has known Ms. May-Cuconato for approximately 20 years. He said he believes Ms. May-Cuconato is well equipped to help fix the Phoenix system. “I think she works extremely well with a team, and, but [just] as important, she’s going to work well with the minister’s office because she understands that world extremely well,” he said. “Given that there’s a new minister in place, I think that that’s probably going to be a very good thing for Minister Qualtrough.”

Rookie Liberal MP Carla Qualtrough (Delta, B.C.) was named the minister of Public Services and Procurement in the cabinet shuffle in August, and is taking on one of the more difficult portfolios, which also includes defence procurement. "The PM is very confident in Minister Qualtrough's abilities as she is already demonstrating an exceptional capacity to deliver on what Canadians expect on her new portfolio," said PMO press secretary Eleanore Catenaro, after The Hill Times asked why Ms. Qualtrough was picked for the job.

Prof. Zussman said the government is going to have to find solutions to Phoenix quickly.
"I don't think the government will want to face the electorate with this problem two years from now," he said. "[She's] extremely hard-working and extremely focused."
Former Liberal MP Don Boudria, who knew Ms. May-Cuconato back in the Chrétien years, said she is hardworking and is a good pick for the post.
"If something needs to be done, ask Danielle and it'll get done," he said. "If that's what they want her to do—get Phoenix repaired—I can guarantee you, it will be by the time she's finished with it … if she can't fix it, I don't think it can be fixed."

The Hill Times requested an interview with Ms. May-Cuconato, but PSPC said she was unavailable. The Hill Times reached out to the CRTC and PSPC, but was told no one was available for comment. But Ms. Daviau said progress is slow and the continual replacement of staff is frustrating. She said she expects the Phoenix pay issues to continue for another two years. "I would hope that by bringing in somebody who specializes in this particular initiative, maybe they'll do a better job of planning and organizing," she said. "To date, changing players has not been helpful, it just means we have to do a number of conversations with new players."
PIPSC most recently called for the government to double the number of information technology professionals to help fix bugs within the Phoenix system. There are 30 government programmers currently working on the system along with about 30 IBM contractors, but PIPSC wants 40 more to solve the roughly 1,000 system bugs. "[The government] has decided to follow through on [this recommendation], so we have jointly issued a call for government IT resources to augment the people that they've already brought over," Ms. Daviau said. "That would put the total to 60 or 70 internal resources working away at fixing the Phoenix software."

"It's really designed to rebuild internal capacity for the ongoing maintenance of Phoenix so that we don't end up handcuffed to another fiasco with IBM going forward," Ms. Daviau said, noting the union continues to meet regularly with senior leaders from PSPC, the Treasury Board, and the Canada Revenue Agency.

Meanwhile, CTV Ottawa recently reported that the federal government has sent out letters to retired public servants asking them to return to the workforce to contribute "to the implementation of recently signed collective agreements through data entry in our systems" and is offering bonuses, double pay for overtime and lump sum payments.

Les procureurs du DPCP de plus en plus absents
Droit Inc.
Delphine Jung
19 septembre, 2017

Leur taux d'absentéisme est supérieur à celui de l'ensemble du secteur public au Canada.

Pour l'année 2015-2016, 16,5% des procureurs du DPCP ont signifié un arrêt de travail de plus de cinq jours.

Il s'agit d'un bond d'environ 4 points par rapport à l'exercice 2013-2014.

Droit-inc s'est procuré, en vertu de la loi d'accès à l'information, le nombre de procureurs du Directeur des poursuites criminelles et pénales ayant signifié un arrêt de travail de plus de cinq jours, ventilé par année, et ce depuis 2012.

Ces données ne sont compilées en revanche que depuis le 1er avril 2013.

Ainsi, pour l'exercice 2013-2014, sur les 491 procureurs employés au DPCP, 61 ont signifié un arrêt de travail de plus de cinq jours, soit 12,4 %. Un chiffre qui a bondi l'année suivante en passant à 17%.

Pour 2015-2016, le taux d'absentéisme est de 16,5%. L'exercice 2016-2017 n'est en revanche pas encore terminé, mais déjà, le taux d'absentéisme s'élève à presque 14%.

Est-ce un taux plus élevé que dans des professions similaires?

Le taux d'absentéisme mesuré sur une semaine par Statistiques Canada en 2011 est de 11,5 % dans le secteur public au Canada. Ces pourcentages prennent en compte à la fois les absences pour maladie ou incapacité, mais aussi les obligations personnelles ou familiales. Les congés maternité ont en revanche été exclus.

Il est cependant difficile de comparer le taux d'absentéisme entre les professions, estime Angelo Soares, professeur au Département d'Organisation et ressources humaines de l'École des Sciences de la Gestion à l'Université du Québec à Montréal. « Il faudrait trouver un échantillon similaire, avec autant de femmes que d'hommes, avec le même âge, etc. Sinon, c'est comme comparer des pommes et des oranges », dit-il.

Pas de lien entre absence et travail?

Jean-Pascal Boucher, porte-parole du DPCP indique que les raisons qui poussent les procureurs à poser un arrêt de travail ne sont « pas toujours reliées au travail en lui-même. Cela inclut aussi les retraits préventifs de grossesse ou encore les opérations ».

Si le lien entre conditions de travail des procureurs et taux d'absentéisme n'est pas possible à faire d'après les données communiquées*, le sujet intéresse de près l'Association des procureurs au DCPC.

« On voit de plus en plus de congés maladie et on se demande si ce n'est pas lié à l'emploi », explique Jean Campeau, le président de l'Association.

L'Association des procureurs prépare présentement une étude sur le sujet.

« Elle a pour but de nous différencier des autres avocats, savoir si nous sommes plus à risque, à quel point côtoyer des victimes peut avoir des effets sur notre santé mentale, savoir si travailler avec le ministère de la Justice est un facteur de stress… », poursuit Me Campeau.

Il compte apporter les éléments recueillis dans les négociations de 2019.

Des formations pas assez suivies

Le DPCP de son côté assure que tout est mis en place pour assurer le bien-être des employés. « Le DPCP considère que la santé et le bien-être sont primordiaux et à cet égard, les employés peuvent disposer d'un programme de formation dispensé par le Centre des services partagés du Québec, dit Jean-Pascal Boucher. Le DPCP a également maintenu le programme d'accès à l'accompagnement psychologique offert pour les dossiers les plus difficiles. »

Me Campeau acquiesce : « il y a une ouverture au DPCP concernant les programmes d'aide ». Mais il pointe un autre problème, celui de l'information. « On constate qu'il y a une forme de résistance de la part des procureurs à aller vers des formations. Les outils sont présents, mais l'utilisation qui en est faite, c'est autre chose… », conclut-il.

(*) Droit-inc a demandé les causes des arrêts de travail de plus de cinq jours, mais le DPCP a répondu qu'il ne détenait aucun document répondant au libellé de cette demande « puisque ces données ne sont pas comptabilisées » par l'organisme.

'Saskatchewan's turn' for SCC judge some say after nominations close for western vacancy
Lawyer's Daily
Cristin Schmitz
September 21, 2017

Share Print Tweet Email
Saskatchewan is overdue to be represented on the Supreme Court as it's been 55 years since its last appointment to the top court, say lawyers from the prairie province.

Nominations closed Sept. 15 for the western seat that opens up when British Columbia's Beverley McLachlin retires in Dec., and applications were expected from B.C., the Prairies and the north.

Some, however, think that Ottawa should be looking first to Saskatchewan's benches, which boast some highly regarded jurists with national profiles in the legal world.

"The Saskatchewan Government believes Saskatchewan jurists should be considered for the Supreme Court of Canada," Saskatchewan government spokesperson Noel Busse told The Lawyer's Daily. "There has not been a Saskatchewan judge on the court for 44 years, when Justice Emmett Hall retired in 1973. By contrast, Alberta has had four judges on the court since that time, Manitoba has had two judges, and British Columbia has had two judges."

Saskatchewan has some prime candidates, including Saskatchewan Court of Appeal Justice Georgina Jackson, 65, a fluently bilingual and prolific judge well-versed in many areas, including Indigenous and constitutional law. Chief Justice of Saskatchewan Robert (Bob) Richards, 64, a former Supreme Court litigator and director of constitutional law with Saskatchewan's Department of Justice, has strong academic credentials and is also highly regarded in judicial circles inside and outside his province.

"I think certainly it should be Saskatchewan's turn — it has been a notably long time," commented litigator Nicholas Cann of Regina's McKercher LLP, speaking on his own behalf, and not as vice-president of the Canadian Bar Association's Saskatchewan branch.

"We do have jurists of [Supreme Court] calibre for sure," he said. "And I would certainly hope that they have applied."

Saskatchewan's Provincial Court is another bench with some legal stars. Two jurists with strong academic and professional track records are bilingual ex-Dalhousie law professor and former B.C. Child and Youth Representative Mary Ellen Turpel-Lafond, 54, who in 1998 became the first Indigenous woman appointed to a provincial bench in Canada, and Sanjeev Anand, a former dean of the University of Saskatchewan's College of Law, who is now the Provincial Court's Administrative Judge in Saskatoon.

If any of these Saskatchewan judges did apply for the top court, their applications are now being considered by the Independent Advisory Board for Supreme Court of Canada Appointments, alongside other possible candidates, such as bilingual judges Elizabeth Bennett and Anne MacKenzie of the British Columbia Court of Appeal. The non-partisan advisory board will winnow down the applications it has received to a handful to pass on for a final decision by Prime Minister Justin Trudeau.

The Supreme Court's last two western vacancies, in 2015 and 2006, were filled respectively by Alberta's Russell Brown and Manitoba's Marshall Rothstein.

“I believe it is our turn, but it can only be our turn if we have the right person,” litigator Maurice Laprairie of Regina’s MLT Aikins told The Lawyer’s Daily. “[We do have] the right person and the time is now,” said the former president of Saskatchewan’s Law Society and of the Federation of Law Societies of Canada.

Laprairie, a law partner of both Chief Justice Richards and Justice Jackson before they joined the bench, said both are exceptional judges.

Chief Justice Richards, who grew up on a ranch (as did Chief Justice McLachlin), is “a real academic, but he never lets it show,” Laprairie remarked. “He treats everybody with real respect — from the self-represented [litigant] to the top-notch Bay Street lawyers that appear in his court. And he has a great sense of humour. He has done a wonderful job on our court and he has a stellar reputation. [When he was a litigator he did] many, many appearances in the Supreme Court, and every level of court — appellate and trial. He has a wonderful mind and incredible disposition.”

Similarly, Justice Jackson “is highly qualified too — highly,” Laprairie said. “She has been a very prolific writer in many, many cases. She is a good writer and a strong academic. I have nothing but good things to say about her.”

A former partner with MacPherson, Leslie and Tyerman — known as Saskatchewan’s judicial incubator — Justice Jackson was appointed straight from the bar to the Court of Appeal in 1991.

She both speaks and writes French, a crucial ability, as the Liberal government renewed its vow last June to appoint to the Supreme Court “only” those jurists who can understand appeals in both French and English, without translation.

The former Crown and Master of Titles and Executive Director of the Property Registration Branch with the Saskatchewan Department of Justice is very active in judicial and legal education, both in Canada and internationally. Jackson writes and lectures extensively on judicial ethics, including having written the judicial ethics training program for new judges in Morocco and giving an annual lecture to Germany’s Academy for Judges. As the president, and longtime director, of the Canadian Institute for the Administration of Justice, she has spearheaded major national conferences on access to civil justice and Indigenous justice. After her graduation from the University of Saskatchewan, Justice Jackson practiced corporate commercial law.

Chief Justice Richards, who was appointed straight to the Court of Appeal in 2004, holds a master of laws from Harvard and is called to the bars of both Saskatchewan and Ontario. He has been studying French, but is not known to be fluent.

After graduating from the University of Saskatchewan's law school, the chief justice clerked at the Supreme Court of Canada and later argued more than 45 cases there, including leading cases on aboriginal rights, labour law, human rights, environmental law and the constitution.

Judge Turpel-Lafond holds a doctorate in law from Harvard and a master's degree in international law from Cambridge University, as well as nine honorary doctorates, including from Simon Fraser, McGill and Osgoode Hall Law School (her alma mater). The judge has published dozens of academic articles, many on Indigenous law and issues. As an officer of the B.C. Legislature, she published some 20 reports investigating the deaths and injuries of children in provincial care, as well as many reviews and special reports recommending reforms to the child welfare system and on topical issues such as cyberbullying.

(There is, however, a question about Judge TurpelLafond's eligibility for the top court. She was appointed to the provincial court just seven or eight years after she joined the Nova Scotia bar. The Supreme Court Act stipulates a jurist must have 10 years at the bar, or to be a superior court judge — which suggests Judge Turpel-Lafond would first have to be appointed to a superior court before she could join the Supreme Court.)

Judge Anand graduated with a Law Degree from Osgoode Hall Law School in 1993. He earned a Master of Laws degree from the University of Alberta and a Doctor of Philosophy degree in Law from Osgoode Hall Law School. He started his career as a Legal Aid staff lawyer, and then worked as a Crown in Edmonton and was counsel in the Criminal Appeals Division of the Alberta Department of Justice.

In 1999, he became an assistant professor at the College of Law at the University of Saskatchewan, and then a professor at the University of Alberta's Faculty of Law. For 10 years, he taught and researched such areas as criminal law, sentencing, and youth justice law. He became dean of the College of Law for the University of Saskatchewan in 2011, before joining the bench in 2014.

Case of woman accused in Canadian Tire attack like moving a mountain of defiance:
Rehab Dughmosh, who is accused of attacking customers and staff at a Canadian Tire, was defiant in court Wednesday.
Toronto Star
Rosie DiManno
September 21, 2017

She's not insane. She's intractable.

A psychiatric assessment has found her perfectly mentally fit to stand trial.

Our laws are not her laws. Her law is sharia law.

She worships at the altar of Islamic State.

And what this woman is alleged to have done — attack customers and staff at a Canadian Tire outlet last June 3, with a golf club and a large knife and a bow — she vows to attempt again.

Speaking through an Arabic interpreter in Scarborough court on Wednesday morning — though occasionally in the proceeding she also spoke English, quite competently — Rehab Dughmosh made this declaration: “Tell her I will always be a supporter of the Islamic State until the last day of my life. If you allow me to go out and leave I will do exactly what I tried to do last time and failed.”

Getting the 32-year-old woman to engage with the court has been like moving a mountain of stubbornness and defiance.

On two previous occasions, the Syrian-Canadian — and by the way, she wants her Canadian citizenship revoked — has refused to participate in what is now common video-link hearings from her current place of residence, the Vanier Centre for Women in Milton, Ont. Third time ’round, Justice Kimberley Crosbie reluctantly authorized security personnel to bring Dughmosh into the video room at the jail, by whatever means necessary. Thus a “retraction team” somehow got her in front of the camera, face bare. That was in early September.

Wednesday, the woman walked into the dock, in person, flanked by four court officers. She was clad in a tunic green tracksuit and hijab pulled across her face, revealing only the eyes.

First words out of her mouth, via interpreter: “I want to stay seated.”

It is routine for defendants, whilst in the box, to stand when they are being addressed, certainly when they are being formally indicted.

Last time I witnessed anyone refusing to stand in court, even for a judge’s entrance, was at a Toronto proceeding involving a member of Canada’s notorious Khadr clan. In that instance, mother and sister of the defendant — not Omar, one of his brothers — remained insolently stapled to their seat, presumably to demonstrate their contempt for Canadian courts.

There is no law but one law and fie on your Canadian institutions.

Well, inside this Canadian institution, Dughmosh was facing 21 charges, including four counts of attempted murder, with 14 of them related to terror and laid by the RCMP following the original Toronto police investigation of the Canadian Tire incident at Cedarbrae Mall, which resulted in a clutch of plain old criminal charges — assault, assault with a weapon, threatening death etc.

On Monday, the registrar read out the 14 terrorism-related charges — apparently the original criminal offences have been folded in — in the formal indictment procedure, charges laid under

Section 83.18 (1) of the Criminal Code. To wit: Every one who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years."

But before we got that far, Crosbie, overweening in her patience and decorum, wanted to make absolutely certain that the defendant understood what was happening in the aftermath of the psychiatric assessment report received by the court several weeks ago. "As a result of that report, I have no reason to believe that you are not fit to stand trial. We need to determine what the next step is. You told me (at an earlier proceeding) you wished to plead guilty."

Dughmosh: "No. I am not guilty."

Alrighty then.

Crosbie explained the three options available to the defendant: To have a trial, in Ontario Court, under another judge; to opt for trial before a judge at the Superior Court of Justice; or to go for Door No. 3 — Superior Court, with a judge and jury.

Dughmosh: Nope, none of the above. "Not even one."

Continuing: "All you non-believers. I do not believe what you believe. Tell her I am still a supporter of the Islamic State and I am not guilty and I don't want to go to bail court."

More patience from Crosbie. "This is not bail court.''

Dughmosh: "OK. So I decide and I determine and I don't have to be here."

Crosbie: "If you do not make a choice, I will deem that you would wish to be tried before a judge and jury."

Dughmosh: "I don't want anyone. Stop the court!"

Dughmosh has repeatedly rejected representation by a lawyer and expressed no wish for a preliminary hearing in the matter. Federal Crown Bradley Reitz told Crosbie he wanted to go straight to trial. And that's what is going to happen.

It is too easy, too glib, to posit that individuals who believe as Dughmosh apparently does — in militant jihad, in the apostasy of secular laws — are screwy in the head rather than genuinely Islamist inspired. But Dughmosh, according to her psychiatric assessment, isn't a loon, at least in so far as she understands her predicament and the legal process. She was committed enough, police alleged when they laid the first charges, to have gone overseas with the objective of

joining Islamic State, or ISIS or Daesh, or whatever we're calling it these days in hypercorrect company, in Syria but was intercepted in Turkey and sent back to Canada.

She does have issues, though.

"They have sent me to the hospital to assess if I have a mental problem," Dughmosh complained to Crosbie. "And if I did have mental problems then I would not continue with the court. And from the beginning in jail they would offer me the medication and they still bring me to court. Can you explain?"

Crosbie laid down the law, gently. "Whether or not there is any mental issue, when people are told to attend court, they must attend court. That happens two ways: One is on your own volition. Or what happened the last time you appeared on video, by officers bringing you up by force."

Dughmosh was apparently still stewing about her treatment in that episode. "I do not forgive them for taking off my head dress . . . they should have taken me in a more humane way."

Rather rich coming from someone alleged to have attacked strangers with a knife, a bow and a golf club whilst shouting: "Allahu akbar!" (God is great.)

She will next be in court, in downtown Toronto, on October 11.

"Going forward, it's obviously preferable if you go to court on your own free will," said Crosbie. "You do not have a choice about that. You must attend court and are required to do so."

Dughmosh, from beneath her veil of sagacity: "Then that doesn't mean it's real freedom."

IBM contract cost for failure-plagued Phoenix payroll system jumped to total $185M
'IBM basically has an open bag of money to help themselves,' procurement expert says
CBC News
Julie Ireton,
September 21, 2017

The massive 1,700-page IBM Phoenix contract obtained by CBC News provides new insight into the federal pay system failures, with dozens of amendments to the deal and costs that jump by tens of millions of dollars at a time.

This somewhat mysterious, all-encompassing Phoenix contract took almost a year for CBC News to receive under Access to Information laws.

Since Phoenix launched in February 2016, the system has not worked properly, and today more than 1,000 software glitches remain.

Single bid for contract

IBM Canada was the only company to bid on the government's pay modernization project known as Phoenix. It was hired in June 2011 to do a huge job: define, implement, operate and maintain Phoenix, a job set to continue until at least 2019.

The company was told to use "off-the-shelf" software called PeopleSoft to create a new pay system for more than 100 departments and agencies and account for dozens of collective agreements.

Under the contract a "seamless integration" was expected between the old payroll system and the new. But for the past 18 months, thousands of public servants have been underpaid, overpaid or not paid at all. Those problems are far from over.

Original bid price unknown

The IBM contract started at $5.7 million for the first stage of the deal, but after 39 amendments over the past six years, the deal is worth $185 million.

But the government will not reveal IBM's original bid price.

Public Services and Procurement Canada said in a statement to CBC that "releasing their bid could harm IBM's competitive position and prejudice future negotiations with the Crown."

Without knowing the original cap on the cost of IBM's role in Phoenix, it's difficult to determine if there's been value for money.

'Bureaucratic failure'

"The results of this case speak for themselves," said Sahir Khan, executive vice-president at the Institute of Fiscal Studies and Democracy at the University of Ottawa, and a former assistant parliamentary budget officer.

"We need to have clarity over the original budget, the original issue, the issue of on time, on budget is important."

Former procurement officer Allan Cutler took a look at the IBM pay modernization project contract that was released to CBC.

In his reading of the deal, Cutler said he finds little to fault IBM. Rather, the contract "clearly states the government is responsible for critical decisions … any mismanagement of these critical items are strictly the responsibility of the government."

"I find the contract was set up for bureaucratic failure," said Cutler, the person who blew the whistle on the Liberal sponsorship scandal in the 1990s.

Cutler and other procurement experts also wonder about the 39 amendments to the IBM contract.

Public Services and Procurement tells CBC that there was always the expectation that the deal with IBM would have "add-ons" and amendments.

Amendments risk

Roman Klimowicz, former principal analyst at the Treasury Board Secretariat, said that every time a contract is amended, it becomes more complicated and less stable.

"It seems like an awful lot of amendments. On the surface, taking a $5-million contract going to $180 million, all through amendments, it can be seen as a problematic," said Klimowicz. "The more you amend the contract, the riskier it gets."

The request for proposal details the government's right to extend the terms of the Phoenix maintenance and support contract "for a period of up to approximately 20 years."

Klimowicz wonders if it was a good idea to give IBM so much control over defining the project, implementing and operating it — and now attempting to fix it.

"There appears to be a conflict potentially," said Klimowicz, who was never involved in the Phoenix contract.

"The statement of requirement could leave loopholes, could leave escape avenues in it … then IBM basically has an open bag of money to help themselves to."

'Keys to the kingdom'

The unions that represent computer specialists and compensation advisers inside the bureaucracy would have preferred that the government rely on in-house expertise, rather than hire companies including IBM to complete so many phases of the project.

"For certain, an open bag of money, but it seems to me that it's beyond that," said Debi Daviau, president of the Professional Institute of the Public Service of Canada.

"I mean you've almost given them control of the department, when it comes to the implementation of Phoenix. You've given them the keys to the kingdom."

According to Daviau, the government recently shifted the roles of 28 computer scientists into the Phoenix program to help IBM fix "1,000 software glitches," and she said many more need to be hired.

Phoenix isn't the first publicly funded IT mess that IBM has taken the lead on.

In Ontario, IBM was hired to develop the Social Assistance Management System or SAMS, which was three years behind schedule, riddled with errors and grossly over budget.

"There's a history there," said Chris Aylward, vice-president of the Public Service Alliance of Canada." "In Australia with Queensland the health authority — the same contract and they've had the same issues — very similar issues that we're facing now." IBM was tasked to build a new payroll system in Queensland, which didn't work and ended up costing more than $1.2 billion. It became the centre of a court case and public inquiry.

Defending IBM

But when it comes to Phoenix, Aylward isn't focusing his blame on IBM. Like the procurement experts, he faults the scope of the initial contract for the resulting failure.

"If you want me to paint one room in your house and you come in and say, well, there's four rooms not painted yet, well that's not what you asked me to do, right? And we believe that that's what went wrong with this," said Aylward. "Public Works and Government Services simply didn't put in the contract exactly or specifically what they needed done."

This sentiment is echoed in a statement sent to CBC from IBM Canada: "IBM was hired to install and customize third-party commercial payroll software the Crown had selected. IBM delivered its scope of work per the Crown's specifications."

Yet the initial blame for Phoenix, in 2016, landed at the feet of public servants operating the new pay system, who were said to lack training.

Aylward said IBM engineers are sitting alongside unions and public servants trying to fix the root of the problems.

No one knows just how long it will take to fix Phoenix.

"When we get to a payday when our members are paid correctly and on time, that's the end. And if that takes another six months, 12 months, 24 months, and it takes another billion dollars, then that's what it's going to take," said Aylward.

Federal pay system privacy breaches included salary information: watchdog
The Canadian Press
September 21, 2017

OTTAWA -- The federal privacy watchdog says inadequate testing, coding errors and poor monitoring of the beleaguered Phoenix federal pay system resulted in exposure of the personal information of public servants.

In his annual report tabled today, privacy commissioner Daniel Therrien found at least 11 breaches occurred and the personal information at issue included employee names and salary information.

Therrien says most of the vulnerabilities were government-wide, meaning the information of all employees in the Phoenix system at the time of each breach was at risk.

In some cases, the commissioner found, information could be changed and transactions could be conducted.

In addition, Therrien determined there may be lingering vulnerabilities that could lead to future breaches.

The Phoenix pay system has been riddled with other problems, leaving some public servants without pay cheques for many weeks.

Phoenix payroll system under budget? Sounds like creative accounting to expert
Federal government continues to pour millions into failed Phoenix project, with no end in sight
CBC News
Julie Ireton
September 22, 2017

The implementation costs of a payroll system that was delayed and has never worked properly actually came in under budget at a cost of $307 million, the federal government says.

That figure is $2 million less than what the government projected several years ago — but it doesn't include the multimillions earmarked for fixing Phoenix.

Over the past year and a half, the government has had to announce about $400 million in new Phoenix spending, and as more federal workers continue to receive incorrect pay, the government can only estimate its final price tag for an operation that may not function fully for years to come.

It is already inching up toward $750 million.

The rising costs and limited information from government has left MP Nathan Cullen, the New Democrat finance critic, "dumbfounded."

"The tab for all taxpayers keeps going up," Cullen said on Parliament Hill Thursday. "What is it finally going to cost us? It's taking all of our effort just to drag basic information out of this government."

CBC requested an interview with Carla Qualtrough, the minister of public services and procurement, but she was not available.
Roman Klimowicz, a former principal analyst at Treasury Board Secretariat who was involved in huge procurement projects, told CBC News that information technology projects usually do cost more than first expected, but sometimes the government isn't completely transparent about the final tally.

"Open up your kimono and tell everybody what happened and be truthful about it," he suggests. "Whatever the amount, it's probably a lot more than the amount that is published. It comes under creative accounting."

How we got here

Bureaucrats initially proposed revamping the government's aging pay system back in 2005. The first proposals were rejected by Treasury Board managers, CBC has learned. But by 2011, the department — then called Public Works and Government Services Canada — had a plan in place to create Phoenix.

Klimowicz said it was optimistic for bureaucrats to think the pay modernization project was actually going to save money.

"But you can't get a project approved saying I'm going to spend $300 million and by the way, it can't save us any money," said Klimowicz. "It's very difficult to get the government to agree to spend a lot of money if they don't think that there's a downstream benefit financially."

Over the years, internal government documents have boasted that the Phoenix project was on time and on budget. The department's performance report for 2015-16 says, "The consolidation of pay services project successfully completed its project scope on time and on budget in December 2015."

New and future costs

We now know the $78 million in departmental savings that was promised by Phoenix was never realized. In fact, 100 departments and agencies have been forced to spend extra money to deal with the fallout over the Phoenix system since it was implemented in February 2016.

From Vancouver to Shawinigan to Halifax, about a dozen satellite pay centres have been set up to help manage the problems the Phoenix system introduced.

The Public Service Alliance of Canada said about 1,000 advisers were laid off or left government when a new, centralized pay centre was established in Miramichi, N.B., but now a hiring blitz has begun.

The new hiring incentives include a $4,000 bonus to attract and retain compensation advisers. Pay centre workers are earning double overtime.

Compensation advisers from different parts of the country tell CBC they can do "all the overtime you want." The government is now retendering contracts with technology companies.

Already, 36 outside firms have been involved in the government's pay project, including the primary contract with IBM Canada.

University of Ottawa political science student and part-time web developer Lucas Cherkeweski examined open government websites to seek out all the contracts the procurement department awarded for Phoenix.

"The data is kind of open in name only," said Cherkewski. "We call that transparency theatre."

So he built a tool to help tabulate the contracts, discovering hundreds of millions of dollars in awards under "pay modernization project."

But Public Services and Procurement Canada tells CBC the database that details the Phoenix contracts is actually flawed, and some contracts have been mislabeled in the open data.

The department has not published corrected data.

The fix

At the end of August, the government gave the new role of fixing Phoenix to Danielle May-Cuconato, an assistant deputy minister. The new task was called "Pay Stabilization Project."

Meanwhile, the architects and initial overseers of Phoenix are long gone, with their awards and bonuses.

"In industry, if something had gone as badly as this, there would have been several firings, right up to and including the person in charge of the whole organization," said Klimowicz. "In government, that doesn't happen."

While the unions said they're working closely with the government to try to fix the system, there's still a lot of disappointment and anger that workers are still not being properly paid. It could take years and millions more dollars to finally get the system working right.

"I'm convinced if somebody came along tomorrow and said here's a magic button, it's going to fix Phoenix, and it's going to cost you $5 billion, this government would buy it, and say, 'OK fine, if this is what it's going to take to fix it, we want it,'" said Chris Aylward, vice-president of the Public Service Alliance of Canada.

Ottawa appeals ruling that returned citizenship to son of Russian spies
The Canadian Press
Jim Bronskill
September 22, 2017

OTTAWA — The federal government is appealing a court decision that handed Canadian citizenship back to the Toronto-born son of Russian spies after it was revoked by Ottawa.

In asking the Supreme Court of Canada to hear the case, the government says the “absurd result” of the Federal Court of Appeal’s decision “raises important issues about the integrity of Canadian citizenship” and should not be allowed to stand.

It likely will be several weeks before the Supreme Court decides whether to hear the case.

In June, the appeal court ruled in Alexander Vavilov’s favour — the latest turn in a long-running spy saga brimming with international intrigue.

Vavilov, 23, was born in 1994 as Alexander Philip Anthony Foley to Donald Heathfield and Tracey Ann Foley. The following year the family — including an older boy, Timothy — left Canada for France, where they spent four years before moving to the United States.

One day in June 2010, the U.S. Federal Bureau of Investigation turned up at the family’s Boston-area home.

In all, 11 people — four of whom claimed to be Canadian — were indicted on charges of conspiring to act as secret agents in the United States on behalf of the SVR, the Russian Federation’s successor to the ruthless KGB.

Heathfield and Foley admitted to being Andrey Bezrukov and Elena Vavilova.

Bezrukov had cribbed the birth record of a baby with the surname Heathfield who died in Montreal at six weeks in early 1963, assuming his identity, the FBI said.

Bezrukov and Vavilova were among those sent back to Moscow — part of a swap for prisoners in Russia.

Alexander finished high school in Russia, studying in English.

He changed his surname to Vavilov on the advice of Canadian officials in a bid to obtain a Canadian passport. But he ran into trouble at the passport office and in August 2014 the citizenship registrar informed Vavilov the government no longer recognized him as a citizen of Canada.

The registrar said his parents were employees of a foreign government at the time of his birth, making him ineligible for citizenship.

The Federal Court upheld the decision two years ago.

But in June the appeal court set aside the ruling and quashed the registrar's decision. It said the provisions of the Citizenship Act the registrar cited shouldn't apply because Vavilov's parents did not have diplomatic privileges or immunities while in Canada.

In its application to the Supreme Court, the federal government says the registrar's original decision was "rational and defensible."

The appeal court's interpretation, on the other hand, means the legislative provisions in question deny citizenship to children of foreign intelligence agents posted to an embassy and benefiting from diplomatic privileges, while allowing citizenship for children of undercover intelligence agents engaged in surreptitious espionage.

It is absurd to interpret the legislation in a way that avoids visiting "the sins of the parents" upon Vavilov, whose parents were undercover Russian spies, but happily visits those same "sins" on the children of accredited diplomats, the government says.

"This is not a case about the 'sins' of Vavilov's parents, but rather their employment as Russian spies and their duty and service to Russia at the time of his birth in Canada."

Timothy Vavilov, 27, also went to court after being stripped of Canadian citizenship, and the ultimate outcome of his case is expected to hinge on the result of Alexander's proceedings.

Editorial: Phoenix pay system could burn through some Liberal seats in 2019
Ottawa Citizen Editorial Board
September 23, 2017

On Thursday, Canada's privacy commissioner reported new errors with the Phoenix pay system, glitches that have exposed salary information and other data about some public servants. Daniel Therrien noted there are still weaknesses in the system's security and there could be more privacy breaches in future.

His revelations were yet another indignity heaped atop the frustration, desperation and disgust felt by thousands of public servants who have suffered pay problems under Phoenix over the last 18 months.

Bureaucrats, however, may not be the only victims of this massive modernization botchup. Almost halfway into its mandate, the Liberal government now faces the very real possibility that Phoenix won't be fixed before the next federal election.

Well, so what? Most people outside Ottawa don't mourn the lot of public servants. A missing paycheque here, an incorrect overtime payment there – none of this will change votes outside the bubble.

But in the National Capital Region, where a large portion of the workforce earns its keep in government jobs, the flagging Phoenix could affect many usually safe Grit ridings. The Liberals' local re-election teams must be wringing their hands.

For it is entirely possible the Phoenix disaster will drag on. Fixing the pay system has been like Whack-a-Mole: Solve a problem here, another one springs up there. One hundred departments or agencies have already been forced to spend extra money dealing with the cranky pay system.

So desperate is the government for help that it recently offered contracts and signing bonuses to retirees to work on system fixes. As well, it plopped a new assistant deputy minister into the maelstrom, Danielle May-Cuconato. And of course the political minister in charge has changed: It's now Carla Qualtrough, who is scrambling to get up to speed. She confirmed Friday that the government has spent $142 million to recruit and train more people to work on Phoenix, and to cover a host of attempted solutions. The NDP calls all this "a box of Band-Aids."

Some of what the government is doing may work, but it's not exactly being transparent. It's only thanks to digging by the CBC that the public is now seeing some of the contract costs between the government and IBM for the initial Phoenix system – and the current mounting pricetag associated with trying to make it work (The CBC's calculations add up to almost $750 million.) The unions say there are still more than 1,000 software malfunctions.

What else can go wrong with the Phoenix fixer-upper fiasco? For the Liberals, the ultimate losses may be at the ballot box.

More problems with Phoenix pay system revealed
Rabble.ca
Meagan Gillmore
September 22, 2017

Thousands of federal government employees, from summer students to managers, have been underpaid, overpaid or not paid at all since the government began using the Phoenix pay system in 2016. Justin Trudeau's Liberals implemented the payroll system introduced by Stephen Harper's Conservatives, despite warnings about potential problems.

Past and current federal employees rabble has spoken to in recent weeks all express deep conviction for their work. They feel betrayed by an employer who does not pay them properly or, in their view, admit responsibility for the problem. Some expressed frustration with the unions that represent them and wonder what more could be done to solve the situation.

In this series, rabble.ca takes a broader look at Phoenix: the background of the problem; the people affected by it; the responses from unions, and what solutions may be possible.

The Phoenix pay system has been in place for more than 18 months, and problems with it only continue to grow. Workers across the country and throughout departments have consistently been overpaid, underpaid or not paid at all.

The government started paying employees with Phoenix in February 2016, and different departments moved to the system at different times. The Trudeau Liberals implemented the system introduced by the Harper Conservatives, even after being warned about potential problems.

On September 21, the Office of the Privacy Commissioner of Canada tabled its annual report. The report includes details about an investigation into privacy concerns related to Phoenix. The commissioner reported there have been at least 11 privacy breaches related to Phoenix involving employees' names, salary information and Personal Record Identifier (PRI) numbers. The investigation concluded that vulnerabilities were government-wide, and resulted from coding errors, inadequate training, and insufficient monitors and controls of the system.

The investigation did not find that any of the personal information was disclosed to people outside of the government. But the commission did find instances where employees looked at the personal information of other government employees in the system.

The report also says the government knew about the potential for privacy concerns as early as January 18, 2016 -- before Phoenix was launched.

The commissioner recommended six ways the government could address these problems. They include developing and implementing controls to monitor and document access to personal information in Phoenix; improving system testing; assessing potential risks with Phoenix regularly and informing affected individuals of the breaches.

The government said it agreed to the recommendations. But, in the commission's view, it has not done enough to implement all of the recommendations.

Also on September 21, CBC reported on the contract between IBM Canada and the government to create Phoenix. According to the report, IBM was the only company to bid on the project to create one system that would be used for more than 100 government departments and dozens of collective bargaining agreements. IBM landed the deal in 2011 and the job of maintaining and implementing Phoenix is to continue until at least 2019.

The contract has been amended 39 times, bringing the value of the contract to $185 million. It began at $5.7 million. The government claims that the cost of the implementation of Phoenix, $307 million, was two million under budget, according to CBC News.

The government has been slow to release information about the scope of the problems related to the pay system.

On a webpage devoted to the Phoenix situation, the government says it is "working tirelessly to resolve all pay issues as quickly as possible." Yet numbers on the website indicate any resolution is coming at a slow pace. As of August 23, 49 per cent of transactions were being processed within service standards, which vary between 20 and 45 days depending on the type of transaction. While this shows some improvement -- as of July 26 only 35 per cent of transactions were processed within service standards -- it falls vastly short of the government's stated goal of 95 per cent of transactions processed within service standards.

The government has been looking for ways to address the problem. Earlier in September, it sent letters to former compensation officers, asking them to consider returning to help with the problem.

But Public Services and Procurement Canada, the ministry tasked with Phoenix, has been responding to its own challenges. In late August, Judy Foote resigned as minister. Foote had stepped aside from her duties in April, citing family concerns. Carla Qualtrough, formerly the minister of sport and persons with disabilities, has been named to the role.

The government has also been inconsistent in explaining reasons for the continued problems.

It has both praised unions for helping workers negatively impacted by Phoenix, and blamed the backlog of cases on recently signed collective agreements. On August 30, while in Moncton,

New Brunswick, Prime Minister Justin Trudeau praised public service unions for helping workers affected by Phoenix's problems. He was in the province, in part, to visit the Phoenix call centre in Miramichi. This came days after the government blamed delays on the need to change pay rates as a result of new contracts.

The problems with Phoenix have impacted workers across departments, from summer students to managers. rabble.ca has spoken with several union representatives and current and former federal employees throughout the past few weeks. They said some workers have left the public service because of the pay concerns, and reported difficulties with recruiting new workers. Yet they also said many employees continue to go to work because they know their jobs are too important.

Whether the federal government is as dedicated to fixing the problem as its employees are to working during the problem remains to be seen.

Meagan Gillmore is rabble.ca's labour reporter.

Life under the cloud of Phoenix's ashes
Rabble.ca
Meagan Gillmore
September 24, 2017

Thousands of federal government employees, from summer students to managers, have been underpaid, overpaid or not paid at all since the government began using the Phoenix pay system in 2016. Justin Trudeau's Liberals implemented the payroll system introduced by Stephen Harper's Conservatives, despite warnings about potential problems.

Past and current federal employees rabble has spoken to in recent weeks all express deep conviction for their work. They feel betrayed by an employer who does not pay them properly or, in their view, admit responsibility for the problem. Some expressed frustration with the unions that represent them and wonder what more could be done to solve the situation.

In this series, rabble.ca takes a broader look at Phoenix: the background of the problem; the people affected by it; the responses from unions, and what solutions may be possible.

Since the federal government started using the Phoenix pay system to pay their workers, hundreds of thousands of civil servants have been thrust into financial uncertainty. Frustrated by an impersonal system they say does not address their concerns, and a lack of clarity about when these problems will be fixed, these employees have been forced into situations many never anticipated. Adult children have asked retired parents to pay for their mortgages. Employees spending more time at work trying to make sure they get paid than doing their official jobs. Parents are unsure about if they can afford child care.

While they wait for answers, they live with questions about when and how this problem will be fixed -- or if that's even possible.

"It's just always going to be a cloud over top of our heads"

For Christine Harrington, processing employment insurance claims as part of a specialized unit of Service Canada in Kamloops, B.C. was the job of a lifetime. She responded to unique situations, whether created by the introduction of new government bills or natural disasters, like the Fort McMurray wildfires in 2016.

"Sometimes we'd have to fly by the seats of our pants and figure it out as we went, but it was always working towards making sure that clients were in a good situation," said Harrington, who considers the response to the Fort McMurray wildfires a career highlight. A task force was assembled so claims were processed within days, not weeks. When people needed help, someone was available to talk with them.

But a few months later, pay problems plagued Harrington's worklife: "You could never get anyone on the phone," she said, describing her attempts to reach people at the Phoenix call centre in Mirimachi, New Brunswick.

She "took a lot of pride in working for the government," she said, but now struggles to talk about her difficulties with Phoenix without getting nauseous or anxious. She's fearful to return to her job because she doesn't know if she'll get paid.

Harrington started at Service Canada in October 2013. In April 2016, just as Phoenix was implemented for her, she took a four-week leave because of back pain. She returned gradually, but was paid at her normal, full rate. Her overpayment grew. By the time she was working full-time, it was $5,000, she said.

In July, she stopped being paid altogether. Nobody could explain why. This continued for 10 weeks. She received some emergency grants. In September, she "randomly" got a payment for $15,000 she said.

Harrington estimates she put in 28 requests to Phoenix about her concerns. Most of her communication with the call centre has been through voicemail.

Instead of doing what she loved, most of work hours were spent trying to make sure she was getting paid properly.

She cried at work every day and fought headaches and nausea. She battled insomnia, and for the first time in her life, high blood pressure.

"I was crumbling. I crumbled."

Harrington finally took a medical leave in October 2016, although she said her doctor wanted her to take one earlier. She's not receiving pay now, and is no longer eligible for employment insurance. Before, she was the main breadwinner for her husband and three children. Her husband, a satellite technician, bought the company where he works.

Harrington contacted her union, the Public Service Alliance of Canada (PSAC). They filed a grievance. But in Harrington's mind, there isn't much more that can be done. Phoenix's problems are too big, she said.

Her problems won't end anytime soon, either. She estimates her total overpayment stands at about $20,000, an amount she's been told she can pay back in 10 per cent increments from each paycheque when she returns to work.

"It's ridiculous that people are going to have to live under the cloud of Phoenix when it's all gone," Harrington said. "It's just always going to be a cloud over top of our heads."

"No other employer would ever have been allowed to not pay their employees for 10 weeks," she said. "That wouldn't be allowed, and for some reason, because it was the government it was allowed. And it's really sad."

'Your money is being held for ransom, and you can't even talk to the kidnapper'

The hardest part about Sherie Gladu's job planning recreational programs for the Township of St. Joseph in northern Ontario is worrying about her last job at Parks Canada.

Gladu left Parks Canada in May, after being with the agency since 2011. She began working in groundskeeping and maintenance. In 2015, she started planning activities at national historic sites Fort St. Joseph and the Sault Ste. Marie Canal. That's one of the things she loved most about her workplace, she said: opportunity for advancement.

But it was hard to love her job when she didn't know if her employer would pay her enough to cover the cost of commuting to it.

Problems with Phoenix weren't the only reason Gladu left her job; she also wanted a better work-life balance. But it motivated her to start looking sooner than she anticipated.

"It just was one of those things that sort of beat down on you so much that you just start looking."

Gladu and her colleagues switched to Phoenix in May 2016. Other federal employees had told them about problems, but they "were crossing our fingers that they had gotten some of the bugs worked out."
They hadn't.

In June, Gladu's paycheques stopped. This lasted for six weeks. She watched her savings dwindle, and began to wonder how she would afford daycare for her two school-aged children.

She received an emergency salary advance of 60 per cent of what she was owed.

Her pay resumed in August. But she was being paid as if she was still a maintenance worker, so her paycheques were hundreds of dollars less than what they should have been. This continued throughout the fall. Gladu estimates the government owes her at least $2,000, before taxes, for money lost during this time.

In November, she began being paid for the right position, but she was paid as if she was in her first year in the role, not the second. This issue was only resolved shortly before she left.

Before Phoenix was introduced, Gladu never had problems like this with receiving her pay, she said.

After she left Parks Canada, she received a letter telling her she owed the government $500 in backpay. Gladu kept the letter and said she lives with the concern they might try to regain the money from her.

Gladu said she has 11 formal complaints in the Phoenix system, half unresolved. She's called the service centre in Miramichi, but hasn't been able to speak with "anyone who knows anything about what's happening with (her file)." The lack of personal communication, she said, is the biggest problem with the system.

"Your money is being held for ransom," she said, "and you can't even talk to the kidnapper."

Gladu was a member of the Public Service Alliance of Canada (PSAC). She said she reached out to the union, but the responses and updates were vague. She would have gladly gone on strike over issues with Phoenix, she said.

"If we don't fight, we're sure to lose," said Gladu. "The squeaky wheel gets the grease, right? We weren't squeaking. We weren't squeaking near enough."

'This isn't just a normal transactional issue that's annoying'

Jennifer Carter works as a manager with Indigenous and Northern Affairs Canada in Ottawa, making sure funds are distributed properly to different organizations. For seven months in 2016, she didn't get paid.

"I used to joke that I was volunteering," said Carter, who has worked with the federal government since 2000. "But I actually still showed up every day because it's too important to not."

In February 2016, Carter returned to work after more than a year on sick leave, a result of workplace burnout, stress and depression. She assumed she was getting paid properly -- until her bank called her in June to say her mortgage had bounced.

Fortunately, she has good credit, and her retired parents were able to help her.

"Coming back after a mental-health leave, you can imagine how much fun this was," she said. Colleagues have told her she must be doing better if this situation hasn't broken her.

Carter said she was not paid at all from February to August 2016. Payments resumed for two weeks -- and then stopped. She's getting paid now, but deductions haven't been calculated properly.

She estimates she owes at least $7,000 in overpayments as a result, but the government's "taking their sweet time" asking for it back. "I run my life hoping eventually they'll send me a bill and I can afford to pay them."

Carter said her boss was amazing, and did all he could to fix her situation. She tries to do the same with her staff, directing them to staff dedicated to helping people with Phoenix-related problems. Solutions, though, seem hard to find. Her union, the Canadian Association of Professional Employees (CAPE), did little more than send her grievance forms to complete, she said.

She said responses from the federal government lack empathy or understanding of how people are being affected.

"This isn't just a normal transactional issue that's annoying. This is something that's impacting people's lives," said Carter. She knows of people who are choosing not to buy cars because of Phoenix, or can't afford to send their children who have disabilities to specialized schools.

Government employees make less than people realize, she said. Private companies would face lawsuits for not paying their workers, but government employees are essentially told to "suck it up," she said.

"My bank doesn't 'suck it up' so good," she said. "My credit card company doesn't like it very much."

Still, Carter firmly rejects the suggestion she and her colleagues should stop coming to work because of the pay problems. It's the job of public servants to show up and work, she said. All of her staff have had problems with Phoenix, too -- but none have stopped coming to work because of this, she said.

She's heard colleagues say they wish they could stop coming to work but can't "because people really believe in their jobs."

Meagan Gillmore is rabble.ca's labour reporter.

Sever Phoenix fiasco from Miramichi
Ottawa Sun
Rick Gibbons
September 24, 2017

So, as they say in Miramichi, maybe it’s time to cut bait, hoist the anchor and ship this whole smelly Phoenix payroll mess back from whence it came — to Ottawa — lock, stock and, well, you know.

Oh, the jobs are great and decentralization is always popular outside Ottawa come election time. But the idea of locating a new government department equipped with a beta tested system to manage the complicated payroll needs of an entire federal public service in a small New Brunswick town (pop: 17,800) with little resident technical knowhow or payroll expertise was a foolhardy exercise steeped in pork barrel politics.

For nearly two years now, the consequences of this misadventure have been felt every government pay day when public servants across the land try to figure out why they were overpaid, underpaid or, in some cases, not paid at all.

Truth be known, the pay centre was put in Miramichi by the Conservatives to appease the locals after killing off the Long Gun Registry, which was located there by the Liberals, leaving about 200 Miramichians wondering where their next paycheque was coming from.

Enter Phoenix.

In a bid to get a handle on the problems with the system, the government has tried all manner of incentives to get retired or laid off former government payroll experts to relocate to Miramichi, but to no avail. It’s even tried to entice some back into government departments in Ottawa, years after they were unceremoniously dumped in the rush to centralize government payroll responsibilities and ship it all off to Miramichi.

If Mistake No. 1 was locating the system in Miramichi, Mistake No. 2 is keeping it there in the face of mounting technical glitches and growing costs that now approach the $200-million mark. Remind me again, the definition of insanity?

Government assurances to the contrary, there’s really no end in sight to the bills or to the complaints pouring in from public servants who just damn well want to get paid.

OK, I can hear the screams from Miramachi residents from here. We agree, it ain't your fault. Still, the only cheques the government seems to know how to produce effortlessly these days are the ones that go back to software installer IBM for yet another fix to a system that was supposed to have been off-the-shelf and ready-for-use when it was selected.

And the system likely would have worked — at least better than it does now — had the government not meddled with hundreds of technical change requirements that turned a proven system into a Rube Goldberg contraption capable of making even simple tasks unnecessarily complicated.

Don't blame IBM. It says the problems lie with poor training and the constantly changing demands of government, ie: garbage in is garbage out.

And, I'll say it again — don't blame the people of Miramichi for a computer cockup that originated in Ottawa. But, come on — you shouldn't put a government department armed with a system of this nature into Miramichi any more than you should put the Bank of Canada in Moose Jaw.

The problems aren't limited to government employees not getting paid. There's also the issue of privacy or lack of.

Last week, the federal privacy commissioner blamed poor system testing and coding errors within Phoenix for exposing personal information about some public servants. The government initially played down the breach as oh-so minor affecting basic information of only a few public servants, which prompted this response from the Privacy Commissioner:

We established that at least 11 breaches occurred and the personal information at issue included employee names, PRI, and salary information. Most of the vulnerabilities were government-wide, meaning the information of all employees in the Phoenix system at the time of each breach was at risk. We established that for some breaches, information could be changed and transactions could be conducted. Furthermore, we determined that there may be persistent vulnerabilities that could lead to future breaches.

That doesn't exactly give comfort to public servants who already are at their wit's end trying get paid and now have to worry about their privacy being breached.

So, what to do with Phoenix? Pack it up and mark it Return To Sender. Ship it back to Ottawa and hire back sufficient expertise to get the system running properly.

As for the poor souls of Miramichi, ship them another government department, a Crown corporation or maybe a standalone agency. Anything has to be better than this nightmare.

McAleese: Here's why Canada needs more automatic pardons for crimes
Ottawa Citizen
Samantha McAleese
September 25, 2017

As the House of Commons Standing Committee on Health discussed the Cannabis Act last week, there has been a lot of chatter about providing expedited – if not free and automatic – pardons to people with simple possession convictions.

This is a step in the right direction, but there are thousands of other people with different kinds of criminal records who are now law-abiding, yet face discrimination as it relates to employment and access to other basic necessities who need similar consideration to become fully contributing members of Canadian society.

Thanks to the previous federal government, we have a two-tiered system in place for people who want (and need) their criminal record sealed. Apart from the lengthy wait-times and strict eligibility criteria introduced under the Safe Streets and Communities Act in 2012, the $631 application fee is enough to deter many from applying for a record suspension (formerly known as a pardon).

There are often other costs associated with the application process that can increase the price to around $1,000 – making it an impossible cost for those living in poverty.

For the most part, people want to apply for a record suspension so that they can find employment. Without a record suspension, employers can access all conviction information which limits access to higher paid and permanent jobs. The reality is that without a job, people cannot save the money required to have their record sealed.

This leaves many individuals stuck in a cycle of unemployment and poverty, and often means they rely on social assistance or break the law to meet their basic needs.

To date, there have been successful legal challenges in Ontario and British Columbia with respect to the changes made to the Criminal Records Act by asserting that they infringe upon the charter rights of individuals with criminal records.

B.C. Supreme Court Justice Heather MacNaughton wrote in her decision that “a criminal record is punishment” and that the changes made by the previous federal government act in opposition to principles of rehabilitation and public safety. While these decisions mean that people in Ontario and B.C. can apply for pardons under the pre-2012 system, they are still required to pay the $631 user fee to access protections guaranteed under the Canadian Human Rights Act.

In January 2016, Public Safety Minister Ralph Goodale announced that reforming the Criminal Records Act was a priority for the Liberal government. He acknowledged that the changes made

under the previous government were unnecessarily punitive and that the $631 application fee was far too high. In December 2016, Public Safety Canada conducted a public consultation, but the results of that survey have yet to be released.

While many criminalized people wait for action, many individuals and organizations who work with them support a free and automatic pardon process as is the practice in jurisdictions like the United Kingdom and in our own youth justice system. A more streamlined record management process would allow people with criminal records to access various social domains such as employment, education, travel, safe housing and volunteer opportunities, and would better support meaningful integration into the community.

People should not have to pay for human rights protections and continue to be punished well after they have served their debt to society. To continue with the status quo as it relates to pardons in Canada is not only harmful to the criminalized, but to us all.

Fundamental reforms to the Criminal Records Act were needed yesterday and the federal government needs to act now.

Samantha McAleese is a PhD candidate in sociology at Carleton University and a member of the Criminalization and Punishment Education Project.