Law society's new policy compels speech, crossing line that must not be crossed
At the core of free speech is the liberty to criticize the content of the law. For no one is this more important than lawyers
National Post
Bruce Pardy
October 3rd, 2017

Every lawyer gets emails from the Law Society: reminders to file reports, pay fees, or use assistance programs to cut back on the booze. But a recent message almost made me choke on my sandwich. "New obligations for 2017" was its subject line, "Actions you need to take." All lawyers, it said, must prepare and submit a personal "Statement of Principles" attesting that we value and promote equality, diversity and inclusion. According to the advisory, "The intention of the statement of principles is to demonstrate a personal valuing of equality, diversity, and inclusion with respect to the employment of others, or in professional dealings with other licensees or any other person."

My first instinct was to check my passport. Was I still in Canada, or had someone whisked me away to North Korea, where people must say what officials want to hear? Forced speech is the most egregious violation of freedom of expression, protected by section 2(b) of the Charter of Rights and Freedoms. In free countries, law governs actions rather than expressions of beliefs. People can be required to obey the speed limit and pay taxes, but they may not be compelled to declare that the speed limits are properly set or that taxes are a good thing. The Supreme Court of Canada has said that forcing someone to express opinions that they do not have "is totalitarian and as such alien to the tradition of free nations like Canada, even for the repression of the most serious crimes."

The email might as well have announced that the thought police had taken over the Law Society of Upper Canada (soon to drop its historical moniker and become known, probably, as the Law Society of Ontario). In 2012 it created a working group to investigate systemic racism in the legal profession. In 2016 the working group reported, wait for it, that there is systemic racism in the legal profession. (It is doubtful whether the data upon which the report relied actually supports this conclusion, but that is not the point of this column.) The Law Society accepted its recommendations for action, three of which are being implemented this year. One of those is the requirement for personal Statements of Principles, which require not just compliance with the law but concurrence.

At the core of free speech is the liberty to criticize the content of the law. "However admirable the objectives and provisions (of the law) may be," the Supreme Court said, "no one is obliged to approve of them: anyone may criticize them… and seek to have them amended or repealed, though complying with them so long as they are in effect."

For no one is this more important than lawyers, who are the last line of defence against authoritarian orthodoxy. Had this requirement been imposed upon another of the governed

professions, nurses say, or engineers, they would hire a lawyer to protect their right to think and speak for themselves. This time, it is the lawyers themselves whose ability to argue about the law's propriety is threatened.

The contours of anti-discrimination laws have long been the subject of debate within legal circles. For example, Richard Epstein, a prominent American legal scholar, in his 1992 book Forbidden Grounds: The Case Against Employment Discrimination Laws, argued for the repeal of such laws on the grounds that they "set one group against another, impose limits on freedom of choice, unleash bureaucratic excesses, mandate inefficient employment practices, and cause far more invidious discrimination than they prevent." Whether Epstein is right or wrong is part of the debate. The Law Society's new requirement effectively prohibits Ontario lawyers from engaging in that debate. Instead, they must betray their integrity and submit a Statement of Principles that professes values that they may not hold.

This policy crosses a line that should not be crossed. It is not enough that we obey. Now we must also agree and actively promote. The late Alan Borovoy, former general counsel of the Canadian Civil Liberties Association, said that the greatest threat to liberty is not from without but from within. "The source of the most insidious peril," he said a decade ago in a speech at Queen's University, "is not evil wrongdoers seeking to do harm, but parochial bureaucrats seeking to do good." I suspect Borovoy would be shocked that his warning would apply so acutely to the governing body of the legal profession.

The Law Society does not say how it will punish lawyers who do not comply. It states only, and ominously, that they "will be advised of their obligations in writing." Perhaps compelling speech upon penalty of actual sanctions would be unconstitutional. How should lawyers respond? They have a number of choices. They could conform. That might suggest that lawyers are unable or unwilling to defend themselves. They could decline. That might determine whether elected "Benchers" actually represent them. Or they could just submit a copy of this column.

Provincial relations loom large in Supreme Court fall cases
Globe and Mail
Sean Fine
October 3, 2017

When retired steelworker Gérard Comeau of New Brunswick drove over the Restigouche River into Quebec to buy beer and liquor in the fall of 2012, he fell into an RCMP snare.

Mounties in both provinces had teamed up on a special project. On the Quebec side, officers kept an eye on New Brunswickers as they purchased liquor. Then, they followed them in unmarked cars onto the J.C. Van Horne Bridge. At that point, they radioed ahead to their colleagues on the other side of the river, giving them the licence plate number and a vehicle description.

Police in New Brunswick caught Mr. Comeau with 354 bottles and cans of beer and three bottles of liquor, and fined him $292 under a provincial law that sets a limit of 12 bottles of beer or one bottle each of wine and liquor bought outside the provincial liquor authority. But Mr. Comeau challenged that law in provincial court, arguing that Canada's founding Constitution protects free trade between provinces. And he won.

This fall, the Supreme Court will hear New Brunswick's challenge of Mr. Comeau's legal victory, in a case that could cause the fall of interprovincial trade barriers affecting other products, such as milk and eggs.

"Comeau has the potential to be groundbreaking for our federation," says Hugo Cyr, dean of law and political science at the University of Quebec at Montreal. "What kind of barriers can provinces impose on products imported from other provinces? To what extent does the Constitution provide that Canada must be a common market?"

It is not the only case to address a sore spot in the Canadian federation during the fall session that begins on Tuesday.

The court is also being asked whether a 1969 deal in which Quebec bought hydro-electric energy from Newfoundland and Labrador is unfair to the latter and must be renegotiated. The two provinces set a fixed price for energy produced by the Churchill Falls dam, decreasing over the 65-year term of the contract. Hydro-Québec, the provincial power utility, is projecting a windfall of $245-billion (in 1989 dollars) over the life of the contract, according to a court filing from Churchill Falls (Labrador) Corp. Ltd.

While one is a constitutional case and the other is rooted in Quebec's civil code, the two cases will both help shape relationships between provinces, according to Peter Russell, a political science professor emeritus at the University of Toronto.

"What kind of federation are we going to be? Are we going to have what we used to call 'comity' in our federal union, treating each other with respect? Are we going to be a decent, friendly kind of federation?"

He said he was stopped by the Ontario Provincial Police around 1959 as he brought beer from Quebec into Ontario, where he intended to give it to friends parched from a beer-workers strike. He told the officer the law violated the Constitution and he would see him in court, but the officer chose not to give him a ticket.

Section 121 of the 1867 Constitution says all goods manufactured from one province are to be "admitted free" into any other province. New Brunswick's Public Prosecution Services argues in a court filing that Canada's model of "co-operative federalism" depends on a flexible interpretation of the Constitution.

In the Churchill Falls case, the key issue is whether Quebec's civil code requirement that business deals be done in good faith obliges the province to renegotiate. Nalcor Energy, a provincial Crown corporation based in St. John's, owns Churchill Falls Corp. Ltd., and says the energy market has changed in a way that was inconceivable in 1969.

Energy was then a "public good with no real market value," it says in a filing to the Supreme Court. Today, Hydro-Québec is "a profit-centre generating billions of dollars selling power to its own Quebec consumers, and billions more exporting to previously non-existent spot markets at 20, 30, even 40 times the Contract price." But two Quebec courts, including the Court of Appeal, rejected that claim, saying there was no requirement that the contract be renegotiated, partly because the parties foresaw price fluctuation when they made the deal.

Dean Cyr says the case could have a far-reaching impact. "It will pit the security of contracts and foreseeability of law against the protection of those who end up losing on the deal. This could obviously have an impact on the willingness of parties in the future to enter into contracts."

Other cases to be heard this fall

Trinity Western University v the Law Society of Upper Canada (and TWU v the Law Society of British Columbia), Nov. 30-Dec. 1: Law societies in B.C. and Ontario refused to recognize the graduates of the proposed Christian law school, saying that to do so would be tantamount to accepting discrimination. The B.C. Court of Appeal overturned one decision, while Ontario's top court supported the other. The case features a record number of intervenors, 26, including faith groups and same-sex advocacy groups. It is a reprise of a 2001 case in which the court upheld lower-court rulings forcing the B.C. College of Teachers to recognize the school's graduates.

Michael Bourgeois v the Queen, Oct. 13: Mr. Bourgeois was convicted of sexual assault, but a dissenting appeal-court judge in Alberta said that the facts of the case, combined with "errors, flaws and defects in the reasons of the trial judge, leave me with considerably more than a 'lurking doubt' or 'feeling of unease.'" At a time when appeal courts have criticized several trial judges for being unfair to accused men in sexual-assault cases, Bourgeois provides an opportunity to scrutinize the reasoning process of a judge when two versions of what happened are diametrically opposed.

Benjamin Robinson v the Queen and Kwesi Millington v the Queen, Oct. 30: Two Mounties are challenging their perjury convictions arising from testimony at the Braidwood Inquiry into the death of Robert Dziekanski, a Polish immigrant who had been lost for 10 hours in the Vancouver International Airport in October, 2007, when four RCMP officers tasered him five times, although he held only a stapler.

Amanda Lindhout kidnapping trial delayed as 30-month time limit nears

Lawyers for Ader want his trial put on hold until a Federal Court appeal in a separate but related case is complete, a period that could span months or years

National Post
Christie Blatchford
October 3rd, 2017

OTTAWA — The trial of the alleged negotiator in the kidnapping of Amanda Lindhout is delayed, either indefinitely or until Thursday.

The Canadian freelance journalist, then just 27, was abducted by a group of armed men near Mogadishu, Somalia, with Nigel Brennan, a photographer colleague from Australia, on Aug. 23, 2008.

The two were finally released, after 460 days in captivity, in November of 2009.

Ali Omar Ader, a Somalian citizen who was lured to Canada by an RCMP officer posing as a book agent, was arrested in Ottawa in June of 2015 and charged with hostage-taking, an offence punishable by a life sentence.

He is pleading not guilty.

Ader, who is now 40, is alleged to have been the negotiator for the kidnappers and the man who had multiple phone conversations with Lindhout's mother.

That would make him a "party" to the hostage-taking itself, a party being someone who either committed the offence or aided or abetted those who did commit it.

The trial was slated to start before Ontario Superior Court Judge Robert Smith in an Ottawa courtroom on Monday, but is on hold at least temporarily.

Lawyers for Ader have asked for the delay pending the results of their appeal to the Federal Court of Appeal in a separate but related proceeding.

Last week, Federal Court of Canada Judge Patrick Gleeson issued an order upholding the statutory prohibition on disclosure of sensitive material deemed dangerous to Canada's national security interests to Ader's criminal lawyers.

As lead defence lawyer Trevor Brown told Judge Smith, not having those documents amounts to "an impairment of Mr. Ader's right to a fair trial."

Brown wants the trial put on hold until the Federal Court of Appeal process is complete, an unknown period that could span months or years. To do anything less, Brown said, would be "trying to fix things that are broken at the back end."

In other words, if the appeal is successful and as a result new information is disclosed, it could render any conviction of Ader unfair, Brown said.

To this, federal prosecutor Croft Michaelson effectively said nonsense.

He reminded Smith that the Federal Court judge had heard from Brown, in a secret closed hearing this summer, in order to properly understand the "defence theory" of the criminal case and how, if at all, the disputed documents might be useful in Ader's defence.

After all, Michaelson said, it was with that very question in mind that the Federal Court judge reviewed the documents, yet he concluded that the information in them would be of "minimal value" in the criminal proceeding.

"This trial should not be delayed so the accused can pursue an appeal with faint hope of success," Michaelson said.

Besides, he noted, the trial is already "on month 27" of the 30-month ceiling the Supreme Court of Canada decision in R v Jordan has imposed upon courts for how long it should take a case to move from the date of charge to trial.

Since the Jordan decision set out its strict time limits, all prosecutors and courts are acutely aware of the ticking clock. But for cases where there are "exceptional circumstances" that explain a lengthy delay, charges that take longer than 30 months to go through the process may be tossed.

Brown dismissed the Jordan concern, saying it would be "an ironic state of affairs" if in its fear of Jordan repercussions, the court is prepared to "stampede" to trial and "trample over the rights" of Ader.

It's not good enough for a court to say that if he were to succeed in getting new information at the Federal Court of Appeal, Ader could win a new trial or a mistrial, Brown told the judge.

"The best chance to get it right is the first time," he said.

To this, the judge mildly noted that it's a question of weighing the risks — taking a chance on the Jordan time limits versus "your chance on an appeal."

But Michaelson said this trial hinges on Ader's "own words" on the recordings of his phone calls and his later "confessions" to the RCMP agent. "Mr. Ader has to answer for what he said and did between 2008 and 2009," Michaelson said.

He did agree, however, to a two-day delay, meaning the earliest the trial could begin is Thursday.

Judge Smith will announce his decision Tuesday.

The Latest: Supreme Court term begins with worker rights
Associated Press
October 2nd, 2017

WASHINGTON — The Latest on the Supreme Court's new term (all times local):

12 p.m.

The Supreme Court has begun its new term with an argument about the rights of employees to complain about pay and conditions in the workplace.

Justice Neil Gorsuch and his eight colleagues took the bench just after 10 a.m. Gorsuch is starting his first full term as a justice following his confirmation in April.

The justices immediately confronted a case that could affect up to an estimated 25 million non-union workers.

The issue is whether their employers can force them to individually use arbitration to resolve disputes. The case pits labour laws intended to allow workers to band together against an older law encouraging the use of arbitration, instead of the courts.

Gorsuch said nothing during the hour-long argument and the court seemed otherwise closely divided about the outcome.

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3:15 a.m.

The Supreme Court is starting its new year, with Justice Neil Gorsuch on board for his first full term.

The nine justices are taking up several high-profile, difficult cases. This follows a term in which they were mostly shorthanded after Justice Antonin Scalia's death, and the justices avoided controversial issues.

President Donald Trump tapped Gorsuch for Scalia's seat. He joined the court in April.

The term's first argument Monday is a major clash between businesses and their employees, focused on how workers can complain about pay, conditions and other issues.

Employers want to be able to enforce a provision of millions of contracts that forces workers with complaints to go to arbitration individually, not in groups.

The employees say going it alone is too costly and opens them up to retaliation.

Supreme Court to hear public sector union dues case (again)
NCSL
Lisa Soronen
October 3rd 2017

In 2016 the U.S. Supreme Court was expected to overrule a nearly 40-year old precedent requiring public sector employees who don't join the union to pay their "fair share" of collective bargaining costs.

Justice Antonin Scalia died shortly after the court heard oral argument in Friedrichs v. California Teachers Association. The court ultimately issued a 4-4 decision that, practically speaking, kept Abood v. Detroit Board of Education (1977) on the books.

With a ninth justice now on the bench, the Supreme Court has agreed to try again to decide whether to overturn Abood in Janus v. American Federation of State, County and Municipal Employees. In Abood the Supreme Court held that the First Amendment does not prevent "agency shop" arrangements where public employees who do not join the union are still required to pay their "fair share" of union dues for collective-bargaining, contract administration and grievance-adjustment. The rationale for an agency fee is that the union may not discriminate between members and nonmembers in performing these functions.

In Harris v. Quinn (2014) the Supreme Court refused to extend Abood to Medicaid home health care providers because they aren't "full-fledged" public employees. Justice Samuel Alito's majority opinion, joined by Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy, and ClarenceThomas, was very critical of Abood, discussing at length its "questionable analysis." Justice Elena Kagan's dissent, joined by Justices Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor, included a lengthy and vigorous defense of Abood.
In Harris, the justices' views of Abood were made readily apparent. So all eyes and ears will be on whether Justice Neal Gorsuch will join the conservative wing of the court and vote to overturn Abood.

Even in a term as interesting as this one promises to be, Janus will be a big case. Agency fee is considered a foundational principle for public sector collective bargaining in the U.S. Overturning it will represent a major change in the law and could affect public sector unions. Lisa Soronen is executive director of the State and Local Legal Center and a frequent contributor to the NCSL Blog on judicial issues.

ASFC cherche des avocats pour porter les valeurs canadiennes
Droit Inc
Delphine Jung
3 octobre 2017

Elles sont très recherchées dans le monde, dit l'un des parrains d'Avocats sans frontières qui organise son gala annuel...

Le 26 octobre, Avocats sans frontière Canada fêtera ses 15 ans lors d'un gala où plusieurs grands noms du milieu juridique seront présents.

Avocats sans frontières Canada sensibilise la communauté juridique autour de sa mission qui est de favoriser l'accès à la justice dans le monde. Ainsi, l'organisme tiendra une soirée qui aura lieu au Capitole de Québec et qui aura pour thématique « Juristes engagé.e.s – Lawyers for change ».

Plusieurs figures du milieu juridique ont accepté d'être les parrains et marraines de la soirée. Parmi elles, Louise Arbour, représentante spéciale du secrétaire général des Nations Unies pour les migrations internationales, Marc-André Blanchard, ambassadeur du Canada aux Nations Unies, Claire L'Heureux-Dubé, présidente d'honneur d'ASFC et ancienne juge à la Cour suprême du Canada, Philippe Kirsch, ancien président de la Cour pénale internationale, Louis Lebel, avocat conseil au cabinet Langlois et ancien juge à la Cour suprême du Canada et Louise Otis, présidente du Tribunal administratif de l'OCDE et du Tribunal d'appel de l'OIF, ancienne juge à la Cour d'appel du Québec.

Cette dernière, qui connaît bien l'organisme, ne cache d'ailleurs pas son enthousiasme quant à sa participation à cet événement.

« J'ai fait du terrain avec eux en Haïti où j'ai été impliquée après le tremblement de terre en 2010. La justice doit être en première ligne dans les camps de réfugiés et je trouve que la force d'ASF, c'est son immense générosité dans la transmission des pouvoirs et dans la formation qu'ils donnent aux juristes sur place afin de les aider à établir leur propre stratégie », dit-elle.

Évidemment, elle a « tout de suite dit oui à leur invitation ».

Une soif pour les « valeurs canadiennes »

Marc-André Blanchard, ambassadeur du Canada aux Nations Unies, a également été impliqué avec ASF, notamment lorsqu'il était associé directeur chez McCarthy Tétreault. Le cabinet est ainsi devenu un partenaire de l'organisme en 2008.

« Le Canada est un bel exemple au niveau de ses institutions et de ses règles de droit. La meilleure contribution que le pays puisse faire est de partager ses connaissances et ses avocats. Il y a une véritable soif dans le monde pour les avocats canadiens et les valeurs canadiennes », explique l'ambassadeur.

Pour lui, ASF doit encore grandir, d'autant plus qu'il se dit convaincu par ce que l'organisme apporte de positif sur le terrain.

Après un cocktail réseautage et un souper, l'ambassadeur et tous les autres parrains et marraines de l'événement prendront la parole. Des nouvelles capsules vidéo filmées dans les pays d'intervention seront dévoilées. ASF promet aussi quelques surprises.

Lac Mégantic: début du procès pour trois ex-employés de la MMA
La Presse Canadienne
3 octobre, 2017
La Couronne va appeler 24 témoins civils et 11 policiers, en plus d'un témoin expert. Les 3 accusés plaident non coupable...

Le procès criminel est en cours pour trois anciens employés d'une compagnie ferroviaire accusés à la suite du déraillement de train fatal survenu le 6 juillet 2013 à Lac-Mégantic.

Chacun des trois hommes est accusé de négligence criminelle ayant causé la mort de 47 personnes. Chacun d'entre eux a plaidé non coupable, lundi, devant le juge de la Cour supérieure Gaétan Dumas.

Le jury de 14 membres commencera maintenant à entendre la preuve contre le conducteur de locomotive Thomas Harding, le contrôleur ferroviaire Richard Labrie et le directeur des activités de la Montreal, Maine & Atlantic Railway (MMA) au Québec, Jean Demaître.

Le juge Dumas a amorcé le procès en lisant ses indications aux jurés. La Couronne poursuivra avec sa déclaration préliminaire.

Au total, 47 personnes sont mortes et une partie de Lac-Mégantic a été détruite lorsque des wagons remplis de pétrole brut ont déraillé et pris feu.

La Couronne a annoncé vouloir appeler à la barre 24 témoins civils et 11 policiers, en plus d'un témoin expert lors du procès, qui devrait se poursuivre jusqu'en décembre.
Le procès se tient dans la ville de Sherbrooke.

Ottawa tables statute clean-up bill: 41 federal laws fixed or repealed
Lawyer's Daily
Cristin Schmitz
October 4th, 2017

The Minister of Justice and Attorney General of Canada, Jody Wilson-Raybould, says there are no Charter problems with a legislative clean-up bill introduced into the Commons on Oct. 3.

The federal government considers The Miscellaneous Statute Law Amendment Act, 2017 (Bill C-60) as simply housekeeping legislation.

According to the government, the proposed legislation amends 41 laws to correct grammatical, spelling, terminological, typographical and cross-referencing errors; update archaic wording; and correct discrepancies between the two language versions.

"At a brief glance, it looks like it is doing exactly what it says — very minor, and basically technical, corrections — changing '(a) through (e)' to '(a) through (e.1)', that sort of thing," commented Dalhousie University law professor Stephen Coughlan.

Bill C-60 also updates the names of some organizations, for example, "Canadian Institute of Chartered Accountants" is replaced with "Chartered Professional Accountants of Canada".

As well, Bill C-60 repeals eight statutes that no longer have any application.

In the Charter statement simultaneously tabled in the Commons on Wilson-Raybould's behalf by the Minister of Public Safety and Emergency Preparedness, Ralph Goodale, the justice minster states that her mandatory review of Bill C-60 "has not identified any potential effects on Charter rights and freedoms."

Laws amended include: the Bankruptcy and Insolvency Act; the Competition Act; the Companies' Creditors Arrangement Act; the Canada Labour Code; the First Nations Fiscal Management Act; the Motor Vehicle Safety Act; the Employment Equity Act; the Canadian Environmental Protection Act; the Immigration and Refugee Protection Act, and the Species at Risk Act.

The repealed statutes are the Maintenance of Ports Operations Act, 1986; Postal Services Continuation Act, 1987; Postal Services Continuation Act, 1991; West Coast Ports Operations Act, 1994; West Coast Ports Operations Act, 1995; Maintenance of Railway Operations Act, 1995; Postal Services Continuation Act, 1997; and the Railway Continuation Act, 2007.

The government said Bill C-60 is the 12th in a series of bills introduced under the Miscellaneous Statute Law Amendment (MSLA) Program. It was drafted based on the recommendations of the 13th Report of the Standing Committee on Justice and Human Rights that was tabled in the

Commons on May 31, 2017 and of the 21st Report of the Standing Senate Committee on Legal and Constitutional Affairs, that was tabled June 21, 2017.

The legislative process for introducing an MSLA bill in Parliament is different from the usual legislative process and involves four main steps: the preparation of a document containing the proposed amendments; the tabling of that document in Parliament and its review by a committee of each House; the preparation of an MSLA bill (based on the committees' reports) that contains the proposed amendments that were approved by both committees; and finally, the introduction of the bill in Parliament.

The proposed amendments must meet all of the following criteria: not be controversial; not involve the spending of public funds; not prejudicially affect the rights of persons; and not create a new offence or subject a new class of persons to an existing offence.

Such bills usually receive three readings in each House without debate since the amendments contained in the bill have already been considered and approved by committees of both Houses.

Why impaired driving legislation will make court delays worse
Ottawa Citizen
Tyler Dawson
October 4th, 2017

See if you can figure this out: Court delays are a massive problem in Canada; the most frequent type of criminal case in the country is impaired driving; the federal Liberals have introduced legislation specifically designed to catch, and charge, more people with impaired driving; and yet, the justice department is arguing this new legislation should lead to "efficiencies" in our bogged-down courts.

How can all of these be true simultaneously? Or is it more likely that something here isn't going to work out as the Liberals anticipate?

In July 2016, the Supreme Court of Canada, in the infamous Jordan decision, set firm limits on how long criminal trials can take. If they take too long, the only option available to a judge is to stay the charges, so the accused doesn't face justice. One way to reduce delays is simply to have fewer cases in the courts, fining people instead, say, or as in legalizing cannabis, by wiping out some criminal offences entirely.

Justice department spokesman Ian McLeod said many measures in the drunk driving proposal "are expected to contribute to efficiencies in the criminal justice system," such as changing disclosure rules (what information is shared between the Crown and defence) and eliminating certain defence tactics that can delay proceedings. At the same time, the bill's proposal to allow police to randomly breathalyze drivers, without any suspicion an offence is being committed, is meant to nab more people.

The bill would make it an offence not only to be drunk and driving, but to be drunk within two hours of driving. McLeod said this means drivers will no longer be able to claim they were drinking but drove before becoming drunk (called a “bolus drinking defence”); or be able to use the defence of becoming drunk between driving and the police arriving with the breathalyzer. As for disclosure, McLeod said the legislation proposes to limit disclosure to “scientifically relevant material,” which would mean information such as breathalyzer maintenance records wouldn’t need to be given to the defence.

The catch is twofold: Defence lawyers say they rarely use those two time-lapse-type defences. “I probably run more impaired driving trials in British Columbia than any other lawyer right now, and I have never in all my time practising run a bolus drinking defence,” defence lawyer Kyla Lee told the House of Commons justice committee. So, it seems debatable whether or not wiping out those defences would speed up trials.

The second part of the catch is that defence lawyers have to, well, defend their clients. Lawyer Sarah Leamon told the committee they’ll keep fighting for disclosure – and this takes court time. And, these records matter: In March 2016, a Brampton judge tossed out impaired charges against a man because of breathalyzer reliability concerns. “An accused person has the right to know the entirety of the case against them,” Leamon said.

Then there’s the issue of new mandatory minimum fines and prison sentences. They’ll cause delays, simple as that. When you’re facing a guaranteed penalty, you might as well fight it out to the bitter end, in hopes of acquittal.

In addition to finding people guilty or not guilty of crimes, courts assess the constitutionality of legislation. No doubt, random breath testing for alcohol will be disputed, but so too will tests for cannabis impairment. And, the justice committee heard there just aren’t reliable tests for pot impairment.

This means that unless something changes, the government plans to saddle people with criminal records based on unreliable testing; this will be fought in court.

“Inevitably, as charges are laid, those charges are going to be challenged,” says Alberta Conservative MP Michael Cooper, “and what that’s going to mean is a lot of court time and a lot of resources that are going to be spent around prosecuting individuals charged for drug impairment under the legislation.”

Already facing the major problem of court delays, the Liberals seem poised to make it much worse, not better.

Tyler Dawson is deputy editorial pages editor of the Ottawa Citizen.

SCC's 'barnburner' fall session features TWU, Groia, Comeau and other hot cases
Lawyer's Daily
Cristin Schmitz
October 3rd, 2017

Two cases that have galvanized the legal profession — TWU and Groia — are among the 28 appeals the Supreme Court of Canada is hearing during a busy fall session that marks the swansong of the court's longest serving chief justice.

After 28 years at the highest court (nearly 18 as its leader), Chief Justice Beverley McLachlin, 74, will hear her final round of appeals from Oct. 3 to December 8 and then retire one week later.

"This is a barnburner of a term — it is a fitting end to the chief justice's remarkable tenure," commented University of Ottawa constitutional law professor Carissima Mathen. "There are cases spanning the legal spectrum, from the foundational tenets of federalism, to tricky conflict of rights issues, to very important cases in criminal law."

Mathen, who is also the vice dean of the school's common law faculty, noted that with Chief Justice McLachlin's departure Dec. 15, the court will receive a new puisne judge from the west or north, as well as the appointment of a new chief justice.

"The adjustment period undoubtedly depends on who is selected for both of these roles," Mathen told The Lawyer's Daily. "But there is no doubt that this will be a significant shake-up. It is frankly difficult to imagine what the post-McLachlin court will look like. Experience and history suggest that it will probably contain not a few surprises."

The fall session promises to be "one of the most eventful in years," said Osgoode Hall Law School dean Lorne Sossin. The cases "are diverse and potentially divisive," he pointed out, citing "the contest between equality rights and religious freedom in Trinity Western University's (TWU) litigation with the law societies in B.C. and Ontario over its proposed law program, which already has caused a stir in the application for intervention by several LGBTQ groups which were initially denied intervention, only to have that decision reversed by the chief justice."

The court's fall session kicked off Oct. 3 with argument in a Civil Code of Quebec appeal that asks whether some Quebec hockey fans who rioted after a 2008 win by the Montréal Canadiens are jointly and severally liable in damages for their destruction of 10 police cars (Ville de Montreal v. Lonardi—the judges reserved decision). Most of the appeals originate from Alberta (nine cases) and Ontario (seven cases).

Looking ahead, the court's docket also includes: a constitutional blockbuster sparked by a New Brunswick man's purchase of cheaper beer and liquor in Quebec that he transported home in violation of provincial limits — a case that could knock down interprovincial trade barriers within Canada (R. v. Comeau, Dec. 6); Newfoundland's challenge to the 1969 deal committing

the province to sell cheap power to Quebec from Labrador's Churchill Falls, with the appellant arguing that the contract should be renegotiated given the duty, under Quebec's civil law, to act in good faith (Churchill Falls (Labrador) Corp. Ltd. v. Hydro Quebec, Dec. 5); and a far-reaching test case by a Jehovah's Witness member expelled by his congregation's elders that asks the judges to decide whether courts can override membership decisions made by voluntary associations, such as religious communities (Judicial Committee of the Highwood Congregation of Jehovah's Witnesses v. Wall, Nov. 2).

The Comeau appeal, which queries whether the so-far narrowly construed s. 121 of the Constitution guarantees free trade among the provinces and territories, "addresses interprovincial trade laws that have been a part of the national economic fabric for almost a century," Mathen remarked. "The case takes us back to the intent of those who founded Canada, and is as close to an American-style 'originalism' case as we ever get."

Lawyers will be particularly focused on the hearings of two of the cases on the docket.

The first case of special interest to lawyers is an Ontario appeal featuring an ostensible clash between lawyer civility and vigorous advocacy in the courtroom which asks is it the presiding judge or the law society, or both, who regulate a barrister's courtroom conduct? (Groia v. Law Society of Upper Canada, Nov. 6).

The second appeal involves another apparent clash—this time between a B.C. Evangelical Christian university's religious freedom to oblige its law students to abide by a faith-based code of conduct prohibiting same-sex sexual intimacy, and the rights of LGBTQ students to have equal access to law school. The court is asked: Was the refusal of B.C. and Ontario legal regulators to accredit TWU's nascent law school "reasonable"? (Trinity Western University v. Law Society of Upper Canada; Law Society of British Columbia v. TWU, Nov. 30 and Dec. 1).

Together the TWU and Groia cases have generated especially fierce debate about what it means to be a lawyer — and what it means to be a self-governing legal profession — as evidenced by the extraordinary number of interveners in each appeal: 27 and 11 respectively (by comparison, there were 18 in the Quebec Secession Reference, and 28 in the Same-Sex Marriage Reference). "The TWU issues may present the court's biggest challenge this fall, not least because differences between the two [regulators' decisions] created the possibility of different outcomes, and a divided court, in the Ontario and B.C cases," commented Osgoode Hall constitutional law professor Jamie Cameron.

Groia also promises to be memorable, Sossin observed, especially as the appellant, Toronto securities litigator Joseph Groia, is now a Bencher of the Law Society of Upper Canada that imposed the disciplinary sanctions in the first place.

“The Groia matter has already been litigated in four proceedings — a Law Society Hearing Panel, a Law Society Appeal Panel, the Ontario Divisional Court and the Ontario Court of Appeal — with none finding in Mr. Groia's favour thus far.”

Groia argues he should not be disciplined for alleged incivility in submissions he made in defence of a client in a major securities prosecution — submissions about which neither the Ontario Securities Commission prosecutors, nor the presiding judge, complained to the law society.

Other noteworthy questions the Supreme Court will consider in its fall sittings include:

Do property owners owe a duty of care to trespassers and thieves who are injured during the commission of a crime — especially if the injured parties are minors? In this Ontario appeal, one of the joyriding inebriated teenagers who took an unlocked car with keys left in the ashtray from the lot of the appellant's commercial garage was catastrophically injured when the car crashed: Rankin v. J.J., Oct. 5.

Does the Crown have to show a strong prima facie case (proof of irreparable harm) in order to obtain an interim injunction against a media outlet that requires the removal of website content that was posted before a publication ban? The appellant CBC refused to remove the material, prompting the Crown to apply for the injunction and an order citing the broadcaster for contempt: CBC v. The Queen, Nov. 1.

What is the proper interpretation of a child’s “habitual residence” in the Hague Convention on the Civil Aspects of International Child Abduction, which kicks in when parents remove children to other countries in violation of court orders. What role, if any, should the views of the child play? Office of the Children’s Lawyer v. Baleve and Bagott. Nov. 9.

What are the limits, if any, to a court assuming jurisdiction over an alleged libel on the Internet that is downloaded by someone in Canada? How should the principle of forum non conveniens apply to internet libel? Haaretz.com v. Goldhar, Nov. 29.

Are maintenance records for breathalyzer devices subject to first-party, or third-party, disclosure rules? Gubbins v. The Queen; Vallentgoed v. The Queen, Dec. 8.

Une procureure réclame 50 000 $ au DPCP!
Radio-Canada
4 Octobre 2017
Une procureure aux poursuites criminelles et pénales suspendue sans salaire pour « manque de loyauté et insubordination » réclame 50 000 $ en dommages à son employeur...

L'Association des procureurs aux poursuites criminelles et pénales (APPCP) transpose sa bataille contre le Directeur des poursuites criminelles et pénales (DPCP) sur un terrain qu'elle connaît bien : celui des tribunaux.

L'APPCP intente deux recours devant la Commission de la fonction publique (CFP) pour contester la suspension de la procureure Geneviève Dagenais, selon ce que Radio-Canada a appris.

La procureure d'expérience, qui pilote régulièrement des dossiers de meurtre au palais de justice de Montréal, ne peut plus mettre les pieds dans son lieu de travail depuis le 29 août dernier. D'abord relevée de ses fonctions avec salaire, elle est à présent suspendue sans solde depuis une semaine, et ce, pour une période de dix jours ouvrables.

La lettre de la discorde

Le conflit a éclaté avec son employeur après qu'elle eut envoyé une lettre au juge Jean-François Buffoni, le 17 juillet dernier. Dans cette missive, elle se plaignait de ne pas avoir d'expert psychiatre pour venir témoigner au procès d'un homme, Ahmad Nehme, accusé d'avoir tué sa femme.

Dans sa lettre, dont Radio-Canada a obtenu copie, elle dénonce « l'important problème d'absence de ressource en psychiatrie judiciaire » au DPCP.

Me Dagenais écrit qu'elle se retire du dossier puisque, selon elle, ses supérieurs ne lui offrent aucune solution. « J'estime que me forcer à procéder sans expert dans le présent dossier contrevient à plusieurs dispositions du Code de déontologie des avocats », écrit-elle.

Le DPCP n'a pas digéré ces critiques.

En se retirant du dossier et en transmettant la lettre au juge, aux avocats de la défense et à « quelques amis », l'employeur estime que Me Dagenais a commis une faute grave et manqué à ses obligations de « loyauté, de subordination et de respect à l'autorité constituée ».

C'est ce qu'a écrit le directeur adjoint du DPCP, Vincent Martinbeault, dans une lettre envoyée à la procureure la semaine dernière pour l'informer qu'elle était dorénavant suspendue sans solde jusqu'au 10 octobre.

50 000 $ en dommages

L'APPCP, qui représente Me Dagenais, estime que les mesures disciplinaires sont « sans fondement » et a répliqué en envoyant deux avis de mésentente au tribunal administratif de la CFP, ce qui est une démarche exceptionnelle.

L'APPCP exige que la procureure réintègre ses fonctions et réclame 50 000 $ en dommages au DPCP : 10 000 $ pour atteinte à la réputation, 30 000 $ en dommages moraux et 10 000 $ en dommages punitifs.

Elle demande aussi à ce que Me Dagenais soit remboursée pour la perte de salaire et que son dossier d'employée soit blanchi sur cette question.

« Par cette lettre, Me Dagenais n'a fait que remplir ses obligations tant professionnelles que déontologiques envers le tribunal et les propos qui y sont contenus ne peuvent d'aucune façon être considérés comme un manque de loyauté, de l'insubordination ou une faute grave », écrit l'avocate de l'APPCP, Johanne Drolet, dans des documents dont Radio-Canada a obtenu copie.

L'association reproche aussi à la procureure en chef Natalie Brissette d'avoir tenu des propos qui ont porté atteinte à la réputation de Geneviève Dagenais. « Nous avons été informés que Me Brissette a tenu des propos tendancieux, lorsqu'interpellée par des collègues de Me Dagenais quant aux raisons motivant le relevé provisoire, ayant notamment mentionné que ceux-ci ne savaient pas toute l'histoire. »

Radio-Canada a pu constater que l'affaire a causé tout un émoi dans les couloirs du palais de justice de Montréal.

Pas de commentaires

Le nouveau président de l'APPCP, Guillaume Michaud, ne veut pas faire d'autres commentaires, et précise simplement que l'association va défendre Me Dagenais « jusqu'à ce qu'elle obtienne justice ». Le 1er septembre dernier, l'APPCP avait envoyé une mise en demeure au DPCP, qui serait demeurée lettre morte.

Pour sa part, le porte-parole du DPCP, Jean-Pascal Boucher, s'est limité à répondre que « le DPCP ne commente pas les questions de relations de travail impliquant les procureurs. Ce sont des questions de nature privée et elles ne sont pas discutées sur la place publique ».

Un autre procureur, Me Éric Côté, s'occupe présentement du procès pour meurtre d'Ahmad Nehme au palais de justice de Montréal, et la poursuite a finalement embauché un expert psychiatre.

Est-il temps de diffuser les procès en matière criminelle?
Droit Inc
François Boillat-Madfouny
4 octobre 2017

Opinion
Nous avons la technologie nécessaire pour appliquer l'adage selon lequel « non seulement la justice doit être faite, mais elle doit être vue faite »

Le principe de l'audience publique est une notion fondamentale de notre système de justice. Son application devrait-elle davantage impliquer la diffusion audiovisuelle des procédures judiciaires?

Actuellement, au Canada, seule la Cour suprême du Canada enregistre et diffuse en ligne ses audiences. Devrait-on étendre ce principe aux cours d'appel et aux tribunaux de première instance? Plus spécifiquement, y a-t-il lieu de diffuser les procédures judiciaires de première instance en matière criminelle?

Le débat n'est pas nouveau, surtout dans la littérature académique américaine. Il prend toutefois une couleur bien intéressante au 21e siècle alors que notre rapport à l'information – et à sa circulation – prend des formes qu'on ne pouvait imaginer lorsque le concept du procès public a été consacré.

L'avènement d'internet comme outil indispensable à la vie en société favorise l'instantanéité et l'abondance d'information – et de désinformation. La popularisation des médias modernes et sociaux révolutionne la circulation de l'information dans nos sociétés.

Ces nouvelles réalités nous poussent à nous demander comment le principe de l'audience publique doit se manifester de nos jours et si la diffusion audiovisuelle des procédures judiciaires criminelles doit être privilégiée au sein de notre système de justice pénale canadien.

Ceux qui plaident en sa faveur avancent en premier lieu que le principe de l'audience publique étant essentiel à notre démocratie, la diffusion des procès en ligne n'en serait que la consécration parfaite. Nous avons la technologie nécessaire pour appliquer parfaitement l'adage maintes fois cité selon lequel « non seulement la justice doit être faite, mais elle doit être vue faite ».

En fait, il faut distinguer le principe de l'audience publique du simple accès physique aux tribunaux. Ce n'est pas parce que le public peut accéder à la salle d'audience que le procès satisfait aux exigences de publicité d'une société démocratique. Théoriquement, il est public; pratiquement, absolument pas puisque le membre du public n'a ni le temps, l'argent ou l'intérêt d'aller écouter un procès public dans une salle d'audience qui, de toute façon, ne pourrait accueillir tous les citoyens.

Un public mieux informé acceptera plus aisément une décision

C’est dans ce contexte que les médias traditionnels jouent le rôle d’intermédiaire entre le public et les tribunaux. Or, bien que leur rôle soit noble, les médias sont tout de même motivés par des intérêts commerciaux et peuvent se tromper. Et alors que la prolifération des médias modernes facilite la circulation de désinformation et de « fausses nouvelles », la diffusion neutre permet alors d’éviter ces intermédiaires qui ont tendance à interpréter et vulgariser le procès de façon sensationnaliste et sans nuance.

Par ailleurs, la diffusion audiovisuelle entraînerait aussi plusieurs bénéfices éducatifs qui contribueraient à renforcer la confiance du public dans le système pénal canadien. Cette confiance est primordiale et il ne faut surtout pas la sous-estimer. Sans l’impression que la branche judiciaire est juste et équitable, elle perd la force morale sur laquelle elle fonde son autorité. Contrairement aux autres branches du pouvoir donc les chefs peuvent être écartés par des élections lorsque la confiance du public est perdue, la branche judiciaire doit rester la plus indépendante et digne de confiance possible puisque ses membres sont inamovibles. Or, lorsqu’elle semble distante, mystérieuse et incompréhensible, il devient difficile pour les membres du public de lui faire confiance et de ne pas conclure que ses décisions sont arbitraires ou biaisées lorsqu’ils ne sont pas d’accord.

Un public mieux informé quant aux différents facteurs à prendre en considération dans le cadre du processus de détermination de la peine d’un accusé pourra beaucoup plus facilement accepter la décision du juge puisqu’il comprendra son processus réflectif, même si, ultimement, il n’est pas d’accord.

Parmi les autres arguments en faveur de la diffusion audiovisuelle, on peut avancer sa contribution au renforcement de la capacité d’autogouvernance du public, le fait que les séances des deux autres branches de pouvoir sont déjà diffusées ou l’imputabilité des acteurs judiciaires.

Le public trop émotif ?

Les contre-arguments – outre le droit de l’accusé à un procès équitable, au droit d'un témoin à la vie privée et à la protection de la dignité et du décorum des procédures judiciaires – sont notamment à l'effet que la diffusion embrouille la frontière entre les tribunaux judiciaires et l’opinion publique.

Dans notre tradition judiciaire, les tribunaux sont les seuls à pouvoir légitimement décider ce qu’est la « vérité » et ordonner les conséquences qui devraient s’ensuivre selon la loi.

À cette fin, les tribunaux et le législateur ont élaboré et perfectionné une série de règles de fond et de preuve que les juges doivent suivre. Cette mise en forme pénale renforce l’autorité des tribunaux comme seuls décideurs, et cherche spécifiquement à écarter toute influence politique ou publique quant à la décision appropriée qui devrait être prise dans un contexte factuel donné.

Elle renforce l'idée que l'émotivité du public et le biais du politique ne doivent en aucun cas influencer le processus des tribunaux. Or, la diffusion de procès transforme le public en participant au procès en lui donnant la fausse impression qu'il possède toute l'information nécessaire pour pouvoir légitimement déterminer la culpabilité ou non d'un individu.

Cette politisation de la branche judiciaire et juridicisation de l'opinion publique diminuent l'autorité des tribunaux et banalisent le procès et les décisions qui est sont issues, surtout si le public n'est pas d'accord. Or, la beauté – voire l'essence – de la branche judiciaire est précisément qu'elle doit être indépendante et ne pas être influencée par le public ou la politique. Sans cette indépendance, son autorité s'évapore.

Bref, le débat concernant diffusion audiovisuelle, encore qu'il ne soit pas récent, doit reprendre de l'importance alors que notre rapport à l'information et à sa circulation évolue. Nombreux facteurs sont à considérer. Toutefois, vu l'importance inégalée de la confiance du public dans notre système de justice pénale et des craintes qu'elle diminue progressivement depuis quelques années, ce débat doit absolument être réintroduit dans l'enceinte publique.

Quebec City and Edmonton attacks: Why it's difficult to lay terrorism charges in Canada
Globe and Mail
Sean Fine
October 3, 2017

The attacks had all the hallmarks of terrorism. In Quebec City, a man is accused of fatally shooting six worshippers at a mosque, and attempting to kill others. In Edmonton, a man is accused of driving a van into pedestrians and stabbing a police officer. Yet neither has been charged with committing an act of terrorism.

The answer may lie in a prosecutorial view that a terrorism charge is superfluous when the available penalties are already severe for murder and attempted murder. Here's a look at terrorism law in light of the two incidents.

What is the distinguishing feature of terrorism?

The motivation. It's not just any act of violence (or other act, such as a disruption of an essential service like electrical power), but violence committed for a political, religious or ideological purpose; and violence aimed at intimidating the public (or a portion of the public), or the government.

How does terrorism differ from a hate crime?

Hate is treated as an aggravating factor in a crime, which means that it may lead a judge to give a longer sentence than if hate had not been present. It is not, generally, a crime in itself. By contrast, terrorism offences usually exist alongside Criminal Code offences such as murder or

attempted murder. Prosecutors first need to prove those offences before moving on to show the terrorist motives. There are also terrorism offences aimed at filling in the gaps in law, largely after 9/11, such as stopping the raising of funds for terrorist groups, or collecting weapons or materiel, or otherwise facilitating, promoting or assisting terrorists.

So why didn't prosecutors in Quebec lay terrorism charges in last January's attack on the mosque worshippers? Wasn't that aimed at intimidation, and done for some form of political or ideological objective?

The answer may be that the penalties for mass murder are already the most severe in the Criminal Code; terrorism charges would add a layer of complexity, but not necessarily a greater punishment. Terrorism cases are handled by federal prosecutors. This week, Quebec's prosecution service declined to explain why no terrorism charges were laid. The intent to intimidate looks clear enough to University of Toronto law professor Kent Roach, an author in the area of national-security law. The political objective, he says, would depend on the evidence. Inferring one from the act may not be enough to prove a terrorist motive existed.

What are the penalties?

First-degree murder brings an automatic penalty of life in prison, with no chance at full parole for 25 years. In multiple murders, prosecutors may ask that the parole eligibility periods be stacked together. A sentence effectively of 150 years without parole in the mosque shooting is a possibility for 27-year-old Alexandre Bissonnette, even without terror charges. (There is no death penalty for terrorist offences in Canada.) "A lot of times, it's driven by the economics or the workload," John Major, a retired Supreme Court judge who headed the Air-India inquiry into Canada's worst terrorist incident, said of such prosecution decisions not to add charges. He likened it to the Robert Pickton mass-murder case, in which prosecutors obtained convictions on six charges, and stayed the remaining 20 charges. Steven Penney, a law professor at the University of Alberta, said laying terror charges in cases involving serious criminal offences can make matters more difficult: "You're adding to the level of risk that some of the charges may not be successful."

What is so difficult about prosecuting for terrorism?

It's more complicated than a "garden-variety" Criminal Code offence, a source close to the Public Prosecution Service said. "Terrorism offences have only been in effect since 2001. We've had murder for 500 years. You have to prove someone's motivation and, generally, motive is irrelevant in criminal court." One question that could arise is whether Canada's civilian spy agency, CSIS, would have to disclose its information to the accused. And at a time when delay is a big concern, the extra time could take away from other important cases, the source said.

What about the Edmonton van incident last weekend, which looked straight out of the Islamic State playbook? And wasn't an IS flag found in the van?

The RCMP says it is still investigating, and if it finds that more charges are warranted, it will file them. So far, it has filed 11 charges against Abdulahi Hasan Sharif, a 30-year-old Somali refugee: five counts of attempted murder, five of dangerous driving causing bodily harm and one weapons offence.

What is lost by not filing terrorism charges?

Symbolic value. "Given the high penalties for attempted murder or murder, the debate is largely symbolic but symbols matter," Prof. Roach said. "We need to be even-handed with the terrorism label and not associate it with any particular religious or political grouping."

Phoenix Falling - Phoenix business case doomed from start, experts say
2009 report that led to adoption of failing federal government pay system obtained by Radio-Canada
CBC News
Julie Ireton
October 4th, 2017

Experts who have analyzed the original business plan that led to the adoption of the federal government's Phoenix pay system say it lacked proper risk analysis and was politically motivated, but say it also contains lessons that the current bureaucracy could learn from.

The internal document, which lays out the recommendation for Phoenix, was authored by top federal bureaucrats in 2009 and uncovered recently by Radio-Canada.

"When you see this document and you see what's happened now, it kind of behooves us to go back and connect the dots," said Kevin Page, president of the Institute of Fiscal Studies and Democracy at the University of Ottawa and a former parliamentary budget officer.

The business case
The bureaucrat formerly in charge of Phoenix, Rosanna Di Paola, issued the report titled "Initiative to Fix the Pay System Business Case" in May 2009. According to public documents, the plan was approved by the government just two months later.

Di Paola, who was not available for an interview, continues to work as an executive within Public Services and Procurement Canada, but she was shuffled off to another job after the pay problems began to multiply.

The business case she helped author recommended consolidating pay staff at a centralized pay centre outside the national capital, using customized, off-the-shelf software and cutting hundreds of back office staff to save $688 million. The report suggested the new system would "pay for itself" in fewer than four years.

The political themes contained in the document are taken directly from the government's 2008 speech from the throne, and emphasize "reforming and streamlining the way it does business."

In reality the adoption of Phoenix led to thousands of public servants being improperly paid, and has cost the government close to $750 million to first implement, then fix the problem-plagued system.

"I think the lessons and the mess go hand in hand," said Robert Shepherd, a former government executive and current professor at the School of Public Policy and Administration at Carleton University, and a researcher of ethics and accountability within the federal government.

Shepherd said it's not the first time the federal government has "made a mess" of large procurement contracts.

"One can go back to helicopters, to ships, to fighter jets, to large service contracts. Phoenix is just one in a long line."

Cuts to the core of the public service over the past several decades are also to blame for a lack of key talent inside departments to draft recommendations and develop big projects, according to Shepherd.

A weak document

In hindsight, there is some irony to be found among the pages of the 2009 business case.

The reports warned of the risk if staying with the government's former pay system, then about 40 years old.

"Continued risk of major, visible delays and or errors in paying employees could affect the government's financial credibility with financial institutions and with Canadians. The government could fail to meet its obligations as an employer," the business case warned.

But it was the new system that would eventually cause the government to fail to meet its obligations. As of mid-September, a government insider reported that 162,000 public servants — a majority of the federal workforce — had been waiting more than a month to have their pay fixed.

Political reaction

The current Liberal government is quick to blame their Conservative predecessors, who approved the 2009 business case.

"The Phoenix pay system was immediately amputated from the people it needed, the financial resources that it needed," said Steve MacKinnon, parliamentary secretary to the minister of Public Services and Procurement Canada.

"It was a bad analysis of risk. But this was a government that … instructed public servants to come up with plans to represent savings."

But the Liberal government was in charge by the time Phoenix started to roll out in February 2016, and while ministers repeatedly call the fiasco it has created "unacceptable," there has been no clearly stated way forward.

"There's no question there will be other reports, the auditor general and others will have studied this process," said MacKinnon. "We will fix this problem to everyone's satisfaction and we will fix it using public employees."

Christian Paradis, the former minister of public works under the previous Conservative government, did not respond to requests for an interview.

"You look at this business case, you can drive trucks through some of the holes under the risk analysis," said Kevin Page. "So it's really important we learn what we can from this stuff so we prevent this cycle happening, failures that continue."

One project that could take tips from the handling of the Phoenix system is a historic investment in infrastructure totalling more than $180 billion over 12 years. The spending includes an infrastructure bank and new partnerships with the private sector, which Page said can be risky.

Q&A: How can justice system balance rights and values?
Inclusiveness should be the leading principle, says Patrick Molinari, incoming president of Canadian Institute for the Administration of Justice
Montreal Gazette
Marian Scott
October 4, 2017

Should a woman be allowed to receive government services with her face covered? What about someone in a headscarf, turban or skullcap?

Is Quebec’s Liberal government putting all Quebecers on trial by proposing hearings into systemic racism?

Debates over diversity continue to roil Quebec, as demonstrated by the Liberals’ stinging defeat in the Louis-Hébert by-election on Monday.

On Wednesday, Premier Philippe Couillard said he was rethinking planned hearings into systemic racism in response to the electoral loss.

But in a multicultural society, leaders, judges, lawyers and police need to uphold the rights of all, as guaranteed by the constitutional Charter of Rights and Freedoms.

The clash between rights and values was the topic at a conference this week by the Montreal-based Canadian Institute for the Administration of Justice (CIAJ), a national, educational organization for judges and others in the justice system.

About 175 judges, lawyers, police officers, community workers and others, took part in sessions on rights in an increasingly diverse society.

The Montreal Gazette spoke with Patrick Molinari, incoming president of CIAJ and professor emeritus of law at the Université de Montréal.

Q: As your conference is titled, we are seeing a clash between fundamental rights in Canada and what some define as Canadian values or Quebec values. How does this affect judges and lawyers?

A: I think the crux of the matter is discussing religious diversity from the perspective of what are Canadian values or Quebec values.

You will probably recall Gurbaj Singh Multani, the boy who was ousted from his school in Montreal because he was wearing a kirpan (a knife carried by Sikhs as a religious symbol).

He was with us on Monday afternoon, and he ended his presentation by saying how, when the Supreme Court restored his right to go to school wearing religious signs, it brought back his trust in the Canadian legal system.

That was pretty overwhelming listening to him and to Mr. Rodney Small, who was involved in a Supreme Court case about racial profiling. He came all the way from Halifax to explain how 20-odd years ago he was singled out as a black Canadian in a crowd. And the Supreme Court of Canada ultimately decided that he was the victim of profiling. He also expressed trust in the Canadian system.

I think it gave everyone in the room, including myself, a profound feeling that things need to be done.

Q: What do you think has to be done?

A: I think it’s that people have a frame of mind that includes the necessity of being open to others. In my view, inclusiveness should be the leading principle, whether you base it on multiculturalism or interculturalism.

Q: In this session of the Quebec National Assembly, the government will be voting on Bill 62, which requires people receiving government services to have their faces uncovered. How does this type of legislation intersect with fundamental rights?

A: It wasn't addressed per se. There were discussions about cultural diversity, about religious diversity and values that underpin these rights and freedoms. But they were never addressed from the specific view of a specific statute or specific enactment other than the Canadian Charter of Rights.

Q: People are very polarized over cultural and religious diversity. To what extent is it possible for judges and lawyers to separate themselves from their personal attitudes?

A: You can't expect people to be totally neutral. Neutral societies don't exist.

I believe that fostering forums where people can address issues, openly discuss these issues and challenge ideas, makes one more aware of what he or she is.

Q: Do the legal profession and judiciary sufficiently reflect the diversity of Canada today?

A: I don't have the exact count but from what I saw in the room, there are judges and lawyers from all groups and I think it is bound to be diverse because our society is diverse. It may take more time for some groups to really join in but it will happen after a while.

Female lawyers are interrupted more frequently
An analysis of three decades of Supreme Court oral arguments finds male attorneys are treated more deferentially.
Pacific Standard
Tom Jacobs
October 4, 2017

The United States Supreme Court is back in session, and this term it will rule on a number of important issues, including partisan gerrymandering of election districts. While it's impossible to predict which way the decisions will go, one thing can be said with near-certainty: Female attorneys arguing before the justices will be treated less deferentially than their male counterparts.

In a recently published study, University of Alabama scholars Dana Patton and Joseph Smith analyzed the transcripts of 3,583 oral arguments presented to the court over more than three decades. They found "female lawyers are interrupted earlier and more often, allowed to speak for less time between interruptions, and subjected to more and longer speeches by the justices compared to male lawyers."

Their study, published in the Journal of Law and Courts, provides evidence that deep-seated gender bias infects even a top-level government institution that is rigorously committed to equal treatment.

The researchers analyzed written transcripts of all Supreme Court oral arguments from 1979 through the end of the 2013 term. It found 10.9 percent of the attorneys making these (usually 30-minute) presentations were women—a figure that increased to 14.2 percent after the 2000 term.

"Men were allowed an average of 225 words before the first interruption (by a justice), compared to 192 words for women," they report. "Male lawyers spoke an average of about 95 words between interruptions, compared to 83 words for female lawyers."

"Justices' interruptions are both longer and more frequent during presentations by female lawyers," the researchers add. "Justices interrupted women an average of 51.3 times, compared to 49.2 times for men."

Could this be explained by the fact that female lawyers represent different kinds of clients? To control for that possibility, Patton and Smith compared the experiences of men and women lawyers representing the U.S. Office of the Solicitor General.

They found that, compared to their male counterparts, women representing the solicitor general's office "are allowed fewer words at the beginnings of and during their presentations, and they endure longer and more frequent interruptions."

OK, but is it possible that women are more likely to represent underdogs—perhaps ones with weaker cases that are more prone to challenge? Perhaps, but the researchers found it doesn't matter.

"Female lawyers do not enjoy the well-documented positive effect of being on the winning side of a case," they write. "While male lawyers are treated substantially more deferentially when they represent the winning side of a case, female lawyers enjoy no such benefit."

Somewhat surprisingly, "the increasing number of female justices on the court does not seem to have mitigated the disparate treatment of female lawyers," the researchers add. The only element that tempers this tendency is "when the legal dispute concerns a gender-related issue." In such cases, they found female attorneys are not disadvantaged, presumably because issues of sex and bias are front and center in the justices' minds.

Patton and Smith argue that their findings have implications that go far beyond the Supreme Court. If women professionals are treated unfairly "in a place one would least likely to expect it," they write, "men likely receive more deferential treatment from bosses and coworkers in all manner of workplaces compared to their female counterparts."

Perhaps professional women are at an inherent disadvantage, no matter if the authority figure they answer to is wearing an expensive suit, or a judicial robe.

New mandate letter makes fixing Phoenix pay system minister's No. 1 priority
Updated mandate also directs public services minister to sort out government's IT issues
CBC News
Karina Roman
October 4, 2017

An updated mandate letter from the prime minister puts fixing the pay of public servants at the top of the priority list for Minister of Public Services and Procurement Carla Qualtrough.

"Ensure that public servants are paid accurately and promptly for the highly valued work they do on behalf of Canadians," says the first bullet point in the new ministerial mandate letter released by the Prime Minister's Office on Wednesday. "You will help ensure the pay system is stabilized and able to perform within service standards."

Qualtrough was sworn in as the new minister in August, taking over from Judy Foote, who has retired. Qualtrough's mandate letter is one of six new letters released today, following the late summer cabinet shuffle.

In Foote's 2015 mandate letter, public service pay wasn't mentioned, as the Phoenix pay system wasn't launched until February 2016. Since then, the government has had difficulty paying tens of thousands of public servants properly. Those affected have either been paid too little, too much or not at all.

Another significant change is that Qualtrough's ministry is no longer tasked with helping to create a "single online window" for all government services. Several of the federal government's large information technology problems have been beset by problems.

The move to unite all government websites under one Canada.ca domain, for example, which began under the previous Conservative government, has been plagued with problems. The Liberal government finally pulled the plug on a large part of the failing initiative last July.

Shared Services Canada
The new mandate letter is instead directing the minister to solve the many internal government IT issues that originate with Shared Services Canada.

Shared Services is a federal department created in 2011 to take over the delivery of email, data centres and network services for 43 government departments and agencies. Since its inception, those departments and agencies have complained of shoddy service and warned that its failures are a national security risk.

Qualtrough is being asked to improve the "delivery of information technology" within the government, including the renewal of Shared Services.

"So that it is properly resourced and aligned to deliver common IT infrastructure that is reliable and secure, while at the same time providing departments what they need in order to deliver services that are timely, citizen-centred, and easy to use," the mandate letter states.

Modernizing procurement

In a tacit acknowledgement that many IT problems started with outdated procurement practices, the minister's existing task of modernizing procurement has been substantially beefed up.

It includes a new aim of increasing the diversity of bidders on government contracts by putting an emphasis on "businesses owned or led by Canadians from under-represented groups, such as women, Indigenous Peoples, persons with disabilities, and visible minorities."

Other procurement goals include being better at holding contractors accountable, measuring government performance on the competitiveness, cost and timeliness of procurements, and ensuring prompt payment of contractors.

The minister is also expected to bring forward "a new vision" for Canada Post. The Liberal government has promised a decision on the Crown corporation and its home delivery services by the end of 2017.

No mandate on fighter jets

The new mandate doesn't mention the replacement of the air force's aging CF-18 fighters, which was a major promise of the Liberals during the last election and a source of political pain in recent months.

The minister is instructed to work with the defence, innovation and fisheries ministers to "ensure the women and men of the Canadian Armed Forces and the Canadian Coast Guard get the equipment they need on time and on budget."

The Liberal government's recent defence policy laid out plans to buy 88 advanced jet fighters, but when the competition will begin has not been revealed.

In releasing the policy, Defence Minister Harjit Sajjan said the replacement program would kick off almost immediately. It has yet to be announced.

5 other mandate letters

New mandate letters for the ministers of veteran's affairs, health, Crown-Indigenous affairs, Indigenous services, and sports and persons with disabilities were also released today.

Two years ago, there was no mention of the opioid crisis in the health minister's mandate letter. Now Canada's response in dealing with it is a major part of the portfolio.

Due to the splitting of the Indigenous ministry into two new departments, the health minister will no longer oversee Indigenous health services.

The minister of sport and persons with disabilities has several new priorities, including making public transit more accessible and investing in Indigenous sport as "an important means to strengthen Indigenous identity and cultural pride."

EXCLUSIVE

Phoenix creators helped build failed pay system's business case

Appearance of conflict of interest beginning in early days of Phoenix raises flags

CBC News
Julie Ireton
October 4, 2017

Two companies that were awarded tens of millions of dollars in contracts to help create the new federal pay system played a part in recommending the Phoenix project in the first place, CBC News has learned.

This appearance of a conflict of interest in the very early days of the project is raising flags for those who monitor federal procurement and accountability.

The internal government report that recommended a new pay system in 2009 relied heavily on two studies — one from IBM and another from PricewaterhouseCoopers. These were two of the companies that went on to help develop Phoenix for a combined price tag of more than $200 million — and counting.

"That's a cause for concern," said Christopher Stoney, who follows procurement and accountability issues as a professor at the School of Public Policy and Administration at Carleton University. "[It's] clearly getting into areas here of conflict of interest."

The recommendation

In May 2009, top government bureaucrats delivered a document called Initiative to Fix the Pay System Business Plan, which convinced decision makers to bring in a new, modern pay system. That system would later be called Phoenix.

A year earlier, international professional services firm PricewaterhouseCoopers published a report called Analysis of Industry and Government of Canada Pay Administration Services Delivery Model Options. The PricewaterhouseCooper's study has not been made public, but it is quoted liberally throughout the Phoenix business plan.

The PwC study suggested the most cost effective choice for the Government of Canada would be to create a consolidated pay centre and use customized off-the-shelf pay software. It was advice the government embraced.

PricewaterhouseCoopers also reviewed the business case as, in the government's words, "an independent Third Party to ensure unbiased and accurate content."

The company has earned $17.4 million through its work on the Phoenix system since 2009, according to the federal government database Buyandsell.gc.ca.

"I think anybody looking at this would be concerned that there was this possible undermining of independence," said Stoney, who co-edits the annual publication How Ottawa Spends. "At some point it seems as though that independence was eroded and [PwC] became increasingly key players in this."

IBM's role

The government's Initiative to Fix the Pay System Business Case also depended on research provided by IBM in a February 2007 report called Pay Benchmarking Study for the Government of Canada.

In September, CBC reported details about IBM Canada's extensive responsibilities to design, implement, operate and fix the Phoenix system, for a price tag that has so far reached $185 million.

The 2007 IBM study pointed out that custom, off-the-shelf software systems are "consistently more cost effective and enable higher quality and efficiency, when implemented and sustained properly."

This was exactly the kind of system that IBM was hired to implement for Phoenix.

IBM also noted the government's old system was at risk of failure. Its report warned that these "payroll errors can have significant consequences for both the financial picture of the organization and talent retention."

'Brought into the tent'

"It's clear that two of the contractors that played a role on the build and operations played a role in the business case," said Kevin Page, president of the Institute of Fiscal Studies and Democracy at the University of Ottawa.

"So we literally brought them into the tent, asked them to see whether or not the business case was strong, asked them to do benchmarking, which is critical to performance of a business case."

Page was appointed Canada's first Parliamentary Budget Officer in 2008 and was in that role when this business plan was developed. But he had never seen the business case until CBC sent it to him recently.

More transparency and openness about this project may have allowed better costing and risk analysis and an improved outcome, said Page.

"If you wanted to set up a process and you didn't want to give anybody the sense of an unfair advantage — and it should always be an objective — then you don't invite firms to help us strengthen the business case and then invite them in to actually help us build and operate the system," said Page.

IBM was the sole bidder for the contract to develop the modernized pay system, a job set to continue until at least 2019.

The rules

According to the government's own rules, contracting should "stand the test of public scrutiny in matters of prudence and probity, facilitate access, encourage competition, and reflect fairness in the spending of public funds ... and whenever practical, an equal opportunity must be provided for all firms and individuals to compete."

The Liberal government has yet to provide details on how and when the pay system will be fixed, but academics who've looked at the business case believe there are lessons to be learned from the Phoenix creation and execution.

"The fact is, the way it did develop makes you think perhaps there should be some restrictions put on the involvement of supposedly independent third parties reviewing cases like this to then actually go on and be a key part to the proposed solutions," said Stoney.

Union demands compensation for Phoenix failures
iPolitics
Kathryn May
October 4th, 2017

***This article is subject to a pay wall and cannot be reproduced in its entirety*
A major federal union is demanding compensation for public servants after the troubled Phoenix system missed deadlines to issue raises and retroactive pay owed under new collective agreements.

Debi Daviau, president of the Professional Institute of the Public Service of Canada, said Phoenix was unable to properly deliver the raises and back pay owed to several groups

represented by the union within the required timeline, and is on track to miss the deadline for employees covered by the other two dozen contracts that PIPSC has negotiated with Treasury Board.

“It looks like Phoenix is not going to make any of…

Feds ignored issues with Phoenix pay system before rollout: report
The Canadian Press
Jordan Press
October 5, 2017

A critical report about the federal government's problem-plagued pay system says officials underestimated the project's complexity and seemed to ignore warning signs before giving it the go-ahead.

The report released Thursday said the most senior officials in the public service didn't fully comprehend the complexity of switching dozens of aging pay systems over to the Phoenix system, a change – first launched by the former Conservative government in 2009 – that was further complicated by cuts to the number of federal pay advisers.

The $165,000 review from an Ottawa-based consulting group, commissioned by the federal government, says briefings on the rollout were focused only on positive news, and that the department overseeing the project had a strong culture against "speaking truth to power."

So even if there were concerns, the consultants say they were ignored in most cases, including concerns from departments like Health Canada and the Canadian Coast Guard that Phoenix wasn't ready to handle their unique payroll needs.

Just prior to the February 2016 launch, testing on the system was surprisingly incomplete, along with a large number of major defects in Phoenix that had "no planned fix date," say the consultants, who looked at everything that happened between 2008 and April 2016.

Still, the governing Liberals gave the go-ahead for the project early last year and since its launch, Phoenix has resulted in thousands of public servants being either overpaid, underpaid or not paid at all.

Two ministers overseeing the file apologized to the families affected by the fiasco, calling the situation unacceptable and saying the lessons learned in the report would be applied to major IT projects going forward.

"The question we as government ministers hear most often is, 'Why can't you just fix the damned thing?'" Treasury Board President Scott Brison said.

"This is a big problem, years in the making, and we are determined to use the lessons learned to help fix our pay system and to ensure that the mistakes of the past are not repeated in future transformations."

But Brison and Public Services Minister Carla Qualtrough stopped short of saying when the pay problems will finally come to an end, noting that oversight on a solution is more robust than it was before Phoenix went live.

Ten new judges appointed to Ontario Court of Justice
Lawyer's Daily
Carolyn Gruske
October 5th, 2017

As of Oct. 11, there will be 10 new faces sitting on Ontario Court of Justice benches across Ontario.

Justice Timothy Edward Breen comes out of Osgoode Hall, where he is an adjunct professor. Before joining academia, he was a partner at Fleming Breen, where he focused on criminal defence and specialized in appeals. Justice Breen has volunteered with Environmental Defence Canada and March of Dimes Canada. He will preside in Toronto.

Justice Sandra Caponecchia has been an acting deputy Crown attorney and an assistant Crown attorney for Peel Region. Internationally, she served as trial counsel at the Special Tribunal for Lebanon in The Hague in 2014. Justice Caponecchia has volunteered as a board member for Victim Services of Peel and has actively participated in the training of new recruits, constables and supervisors for the Peel police. She will preside in Brampton.

Justice Susan Marie Chapman practised criminal and administrative law as a partner at Ursel Phillips Fellows Hopkinson LLP. Justice Chapman has volunteered with various women's rights community organizations, sexual assault centres and legal clinics. She will preside in Toronto.

Justice Karen Michelle Erlick has served as a Crown attorney for most of her career. Most recently, she was a team leader in the Vertical File Management System at Old City Hall. Justice Erlick volunteers with the Vertical File Management System fundraising committee and is a coach and trainer with a local girls' hockey association. She will preside in Toronto.

Justice Rachel Grinberg has been a sole practitioner who specialized in criminal law. She has also served as the alternate chair of the Ontario Review Board for the past 10 years. Justice Grinberg is a member of the board of directors of the Red Door Family Shelter. She will preside in Toronto.

Justice Rita Jean Maxwell has been an adjunct professor of evidence law with the University of Toronto's faculty of law and Ryerson University's law practice program. She has also acted as

legal counsel for the Ontario Court of Appeal. Justice Maxwell is an active volunteer with the Ontario Justice Education Network and Law In Action Within Schools program. She will preside in Toronto

Justice Lori Beth Montague most recently served as deputy Crown attorney with Peel Region and before that, she was assistant Crown attorney in the same region. Justice Montague is a volunteer board member with Operation Springboard and has also volunteered with Victim Services of Peel. She will preside in Toronto.

Justice Daniel Francis Moore worked as counsel with Heller, Rubel Barristers and practised criminal law. He has also been a lecturer at Seneca College. Justice Moore volunteers with the Beaver Scouts. He will preside in Toronto.

Justice Heather Frances Pringle has worked as a sole practitioner who specializes in criminal law. Justice Pringle has volunteered with the Criminal Lawyers' Association and as a high school mock trial coach. She will preside in Toronto.

Justice Vincenzo (Enzo) Rondinelli has worked with the Pro Bono Law Ontario-Supreme Court of Canada Assistance Program, the Pro Bono Inmate Appeal Program and the Legal Aid Ontario Committee. He has also been an adjunct professor at Osgoode Hall. He will preside in Toronto.

Phoenix: By the numbers
Ottawa Citizen
The Canadian Press
October 5th, 2017

The federal government's Phoenix payroll system left thousands of civil servants underpaid, overpaid or not paid at all after it went live in February 2016. Some of the numbers released Thursday:

8.9 million: Approximate number of annual pay transactions the federal government handles each year.

300,000: Number of public servants that the federal government has to pay on a regular basis.

$17 billion: Total value of all those payments processed by federal pay systems.

$78 million: Savings that Phoenix was supposed to have created in its first year of operation.
2: New temporary pay processing centres that the federal government is opening.

357,000: Approximate number of problematic pay transactions that have to be resolved

356: Additional payroll experts the government has hired to help with the backlog.

Feds underestimated complexity, ignored concerns about Phoenix pay system, review finds
An independent consultant's report laid out 'lessons that are yet to be learned' more than a year after the problem-plagued pay system was first launched.
Hill Times
Emily Haws
October 5th 2017

An independent report on the problem-plagued Phoenix pay system rollout released Thursday says the government underestimated its complexity.

Public Services and Procurement Minister Carla Qualtrough (Delta, B.C.) apologized to affected public servants in an Oct. 5 press conference, and said the review confirmed many of the thoughts she already had. She noted fixing the pay system is the first priority in her mandate letter from the prime minister, given to her after he moved her into the job in August.

“The implementation of such a complex business transformation across the entire government of Canada was a massive undertaking that I believe history will record was set up to fail,” she said, noting there was poor planning on almost every key aspect. “There’s no easy or quick fix for the problems in the pay system.”

The report’s “lessons learned” included: assigning accountability and authority to a single office, properly defining the scope of the project, fully testing the software before launch, and not expecting savings until well after implementation.

Overall, the independent consultants hired to do the review found the officials working on the project were most concerned with being on time and on budget. Briefings were usually positive and the culture of the department responsible prevented people from speaking negatively about the project. The report said bad news was usually buried, with concerns mostly ignored. Even at the pay system’s launch in February 2016, testing was incomplete, with no planned fix date and no contingency plan.

Other lessons included making sure to have sufficient employee knowledge capacity, and communicating effectively. The report noted workplace culture was also important, and that the 17 lessons it outlined “are yet to be learned” by the government.

Though work on the new pay system began under the previous Conservative government, the Liberals launched it in February 2016. It was supposed to consolidate the payroll of over 300,000 public service employees, but instead it has left many of them overpaid, underpaid, or not paid at all. Radio-Canada recently reported that as of Aug. 8 nearly half of the 313,734 federal public servants paid through Phoenix had been waiting at least a month to have their complaints dealt with. The government contracted IBM to configure the software for the government payroll system.

The program was supposed to save the government $70-million per year, but so far the Liberals have sunk in about $400-million to fix it.

The review the government commissioned from Ottawa-based Goss Gilroy Inc., cost $165,000. Treasury Board President Scott Brison (Kings-Hants, N.S.) said it was commissioned to identify mistakes so they aren't repeated.

The 60-page report covers the Transformation of Pay Administration Initiative from 2008 until April 2016. The initiative was defined as two projects: Pay Modernization and Pay Consolidation. Pay Modernization was the replacement of the 40-year-old existing payroll system with a commercial off-the-shelf option—the implementation of Phoenix. Pay Consolidation was the transferring of departmental pay services to one centralized pay centre, located in Miramichi, N.B. This included laying off experienced compensation advisers in Ottawa and hiring a new smaller number of compensation advisers in Miramichi.

The report said it was not meant to lay blame, but provide guidance for current and future projects. The consultants conducted almost 40 individual interviews and eight half-day workshops that involved over 100 people. They interviewed employees, compensation advisers, managers, and executives, as well as union representatives and private sector entities.

Mr. Brison and Ms. Qualtrough said they have already started implementing the lessons, such as by designating a working group of cabinet ministers ultimately responsible for fixing Phoenix. The report found part of the problem was that no one group had the accountability, authority, and capability to carry out the project.

Public Services and Procurement Canada was responsible for the implementation of Phoenix, but the report said it did not appear to have the authority to ensure other government departments did what needed to happen to make the system work.

The Public Service Management Advisory Committee, a group of more than 40 deputy ministers, was the senior coordinating body for the project, but it wasn't accountable for it.

Unions react swiftly

Donna Lackie, former national president of the Public Service Alliance of Canada's Government Services Union, said she has not yet had a chance to read the report, but agreed with the lessons The Hill Times read out to her on Oct. 5. The union represents the compensation advisers on the front lines of Phoenix.

She agreed with the report's recommendation to make sure there are enough workers, expertise, and corporate memory to implement the project. The consultants also noted the importance of an easily implemented contingency plan, which they said it found no evidence of.

“We knew that divesting yourself of your corporate knowledge and your experienced compensation advisers was certainly not the way to go,” Ms. Lackie said.

Debi Daviau, president of the Professional Institute of Public Service of Canada, said the report missed one key concern of her members: she said the government is over-relying on outsourced information technology services.

“The surprise is that it was allowed to go ahead at all and against the warnings of so many, including, prior to its rollout, unions like mine,” she said in a statement.

Government adding more offices to process backlog

The government announced Thursday it’s planning to set up two more temporary pay offices in Kirkland Lake, Ont., and Charlottetown P.E.I., in order to process backlogged Phoenix cases, with Lackie saying another 200 compensation advisers would be hired to help clear the backlog.

The government has already hired over 350 temporary compensation advisers, as well as 30 federal information technology professionals to work out what one union representative said was the system’s 1,000-plus bugs, on top of other IT professionals already working it.

The latest source of backlogged cases has been the implementation of new collective agreements.

Most public service unions have recently hammered out new contracts with the government, but acting on those new contracts often involves retroactive pay and signing bonuses.

In some cases, compensation advisers must retrieve data from an old pay system. This time-consuming process has meant more compensation advisers were moved to dealing with collective agreements instead of solving backlogged Phoenix cases, leading the government to hire more compensation advisers.

Mr. Brison noted the collective agreements at the Oct. 5 press conference, saying they were working on getting the problems solved. Mr. Brison and Ms. Qualtrough said the case backlog will probably get worse before it gets better.

The number of pay changes waiting to be processed grew from 237,000 on Aug. 23 to 257,000 as of Sept. 20, according to the government’s latest monthly update on how it’s dealing with the backlog.

“There is no question that we have made significant progress in terms of [the collective bargaining] negotiations, but it does impose challenges, which we’re seeing right now in terms of the Phoenix system,” said Mr. Brison.

'Ours to fix', say feds following report on Phoenix rollout fiasco
CTV News
Rachelle Aiello
October 5th, 2017

OTTAWA – The federal government's underestimation of the complexity of overhauling the public servants pay system led to the failure of the Phoenix rollout, according to the findings of an independent consulting group's report.

Now, as the current administration tries to dig itself out from under thousands of problematic pay cases, the new minister in charge says the findings offer a road map in what not to do in setting things right.

"This was set up to fail, and we need to set it up to succeed," said Carla Qualtrough, the new public services and procurement minister, adding that she found the report validating.

The report released Thursday found that between 2008 and April 2016 sufficient steps were not taken to set the new pay system up for success, nor was the federal government nimble to fix issues that did arise.

Qualtrough admitted the Liberals did initially underestimate the complexity of the transformation, but didn't shy away from pointing to the previous government's role in where things are today.

The new system, initiated by the previous Conservative government in 2009, was meant to streamline the payroll of public servants and save more than $70-million annually. Already, the government has planned to spend $400-million over two years trying to fix it.

The government first rolled out the new Phoenix pay system for approximately 300,000 employees in February, 2016, and by summer that year, there were 82,000 cases of public servants either receiving no pay, or incorrect pay.

The initial promise from the department was to have the backlog of problematic pay cases resolved by Oct. 31, 2016. As of Sept. 20, there were 257,000 cases of employee pay issues left to be resolved, an increase from the month before due to an influx of new collective agreements that had to be processed.

"There's no easy or quick fix for the problems in the pay system," said Qualtrough. "The file is ours to fix, and we will."

Goss Gilroy Inc. was commissioned by the Treasury Board to take on a "lessons learned" study of the government's introduction of the Phoenix pay system's two-part rollout: replacing the old

software; and moving pay from within each department into one centralized centre in Miramichi, N.B.

The $165,000 study identified 17 key lessons that it says the government should take into consideration, as Public Services and Procurement Canada continues to pay people through Phoenix.

The lessons stated in Thursday's report are meant to respond to a number of the lead department's failings, including:

• not putting accountability and authority in the hands of a single office;

• ineffective communication of the changes coming;

• erring in counting on savings ahead of the rollout being completed;

• not continually reassessing the timeline; and

• not making sure it had enough staff, or adequately trained staff to execute the implementation.

"These are lessons that are yet to be learned, not lessons that have been learned," the report says. "It will be critical for the government to actually apply these lessons in future transformations and more immediately in the transformation challenge currently before the government."

Qualtrough said the findings of the report will inform the government's ongoing plans to resolve the pay issues. She said the government is also looking to hire more staff, and her department is partnering with Veterans' Affairs to set up two new temporary pay centres in Charlottetown and Kirkland Lake. The Liberals have already established satellite pay centres in Gatineau, Winnipeg, Shawinigan and Montréal that they say will stay open until Phoenix is fixed.

Treasury Board President Scott Brison said the most common question this government gets on the Phoenix file is "why can't you just fix the damn thing," and he said, this new report provides insight into why the hole they are in is "so deep."

"This is a big problem, years in the making, and we are determined to use the lessons learned to help fix our pay system and to ensure that the mistakes of the past are not repeated in future transformations," he said.

In the execution of this study, the auditors consulted documents and spoke with more than 100 people across departments and outside of the bureaucracy.

Auditors also noted that the planned testing of the new pay system was incomplete, and the department's reliance on assumptions around eliminating the backlog that eventually piled up, also compounded the problem.

Broadly, it suggests the government needs to work on improving the culture of "agility, openness, and responsiveness" going forward. The report also recommends the government look at how the private sector can help fill in any capability gaps when pursuing initiatives like this.

Prime Minister Justin Trudeau has assembled a ministerial working group to take on fixing the payroll system, and it was the top mandate priority on Qualtrough's new mandate letter that was made public yesterday.

Feds hopelessly unprepared for Phoenix failures: report
iPolitics
Kathryn May and Tim Naumetz
October 5th, 2017

**This article is subject to a pay wall and cannot be reproduced in its entirety
A new independent report says that the troubled Phoenix pay system was doomed from the start by a plan that underestimated the scope and complexity of the project — and focused too closely in its early stages on saving money at the expense of making the project work.

The long-awaited review identified 17 lessons learned from mistakes made in managing Phoenix that the government should address now, and before embarking on future large, government-wide projects.

The report, by consultant Goss Gilroy Inc., concluded Phoenix went off the rails because bureaucrats managing it failed to recognize they were implementing something more...

Government petitions call for end to Phoenix pay system, call centres
Yukon woman's petition supported by Liberal MP has enough
CBC News
The plagued Phoenix payroll system is being targeted by two official House of Commons petitions — one that calls for a change in how compensation errors are managed while the other one demands the pay system be abolished altogether.

Canadians can force a federal government response to a petition by having it approved by a government clerk, sponsored by an MP and getting at least 500 signatures.

Two petitions about the troubled Phoenix pay system, which has caused tens of thousands of federal public servants to be improperly paid over the last 18 months, are now gathering signatures.

The first went up in late September, launched by Yukon resident Sylvie Gewehr. As of Sunday afternoon, it had just under 1,450 signees.

It calls for the federal government to scrap the call centres it has set up to handle pay problems and instead have compensation workers meet one-on-one with workers with pay problems.

She's also asking for these compensation officers to be able to access and fix Phoenix data and for people with issues to get clear, written updates on their status.

Fixing Phoenix is the top priority for new Public Services and Procurement Minister Carla Qualtrough, according to her mandate letter from the prime minister.

Qualtrough said last week the government is hiring more people to work on Phoenix, saying there's no easy or quick fix but the government will make sure it is fixed.

The last update on the cost of managing Phoenix's issues came in May, at approximately $402 million.

Liberal MP backs petition

The petition is sponsored by Yukon MP Larry Bagnell, a Liberal who said he always sponsors petitions when asked by his constituents, whether or not they're critical of his party's management of the issue.

"It's awful when people work and they don't get paid for their work on time, or they get paid too much and it's a surprise and they have to pay it back," Bagnell told Radio-Canada Sunday.

"Most people don't have a lot of extra money, they live often paycheque to paycheque and it's devastating if the paycheque doesn't come with the full amount in it … it has to get fixed up." Bagnell said he's glad the government has dedicated extra money and people to fix these pay problems.
Stéphane Aubry, vice-president of the Professional Institute of the Public Service of Canada (PIPSC), said the petition aligns with what his union has been asking for and is a good way to put pressure on the government for a quick fix.

2nd petition wants new system

Other examples of petitions sponsored by Liberal MPs include one that calls for adding Cree translation services in the House of Commons, calling for more childhood cancer research funding and another one to make National Aboriginal Day a national statutory holiday.

The other Phoenix-related petition was launched last week and hadn't yet reached 500 signatures as of Sunday afternoon. It's sponsored by Chilliwack—Hope MP Mark Strahl, a Conservative, on behalf of a resident from Chilliwack, B.C.

It calls for the pay system to be abolished and replaced with a system that has been proven to work, to fix all pay problems and "to stop wasting" taxpayers' money.

The federal government has 45 days to respond to qualified petitions after their 120-day signature window closes and they've been tabled in the House by their sponsor.

Let’s hope government learns Phoenix debacle’s hard lessons
Ottawa Sun
Rick Gibbons
October 9th, 2017

A university or college course in project management could devote an entire year or more to the disastrous planning and rollout of the Phoenix pay fiasco, based on the findings of a new study released last week.
The study, by outside consulting firm Goss Gilroy Inc., offers some fresh outsider perspective on a mess that still plagues the government and many employees nearly a decade after an idea to overhaul the public service pay system first hit the drawing board.

There are lots of lessons learned in the report and plenty of warnings against ignoring them next time government decides to undertake a complex project of this magnitude. Hope somebody is taking notes, because the next snafu could hit taxpayers.

Unfortunately, absent from the report are any assurances that the government now seems to have the Phoenix mess well in hand and that public servants can now start sleeping better knowing the pay problems that have plagued them for the past 18 months will be fully fixed anytime soon.

The report delves into all aspects of the project, from its poor conception to operational calamity. There are findings aplenty of shortcomings at virtually every step along the way, beginning with wholly unrealistic expectations from the former Conservative government that it could achieve big and immediate cost savings by simply overhauling and centralizing the way it pays public servants.

Also, you can’t start a complex IT project of this magnitude then regularly demand big changes without the wheels falling off along the way. And turns out you can’t lay off hundreds of highly experienced payroll administrators and hand the job to a few hundred inexperienced and undertrained workers at a new payroll centre in Miramichi without calamitous results.

Robyn Benson, the national president of the Public Service Alliance of Canada, has called my earlier observations to that effect "insensitive and ill-informed." Here's what the consultant's report had to say:
"(W)hen new compensation advisors were brought on board at the Pay Centre, many did not initially have the required level of knowledge to administer pay. The study team heard that it can take several years for someone new to compensation and pay to fully grasp the work given the complexity of the federal public service pay environment driven by myriad ever-changing union agreements, and system rules and regulations."

And here's what it had to say about those hundreds of payroll experts turfed to the sidelines in the race to centralize pay processes with less experienced staff and who warned the government that the plan was doomed to fail because payroll was more than a simple transactional exercise:
"Most of those consulted for the study admitted that very few people (other than compensation advisors) understood the degree of complexity associated with the day-to-day requirements to ensure accurate pay."

So, you would hope somebody took the time to listen to them. Fat chance.

The report offers plenty of advice to the next government that plans a systems change of this magnitude, among it: Improve your communications and listen to your employees. As for those same employees, don't be so afraid to tell the boss the truth, even if it's negative.

"The public service culture and environment at the time of the change initiative was described as being unreceptive to inconvenient feedback … We heard this tendency to 'bury bad news' and to only brief up the good news was one of the reasons some of the major concerns were not raised, were not considered, or did not reach senior levels."

Also, test the system until it works before implementation. Roll out when the system is ready and not simply to hit unrealistic and arbitrary deadlines.

Hopefully, government is listening.

As bad as this rollout was, the damage caused by mismanagement was limited to the government's own employees. Imagine a similar catastrophe involving system changes to old age pensions or taxes.

If you think the headache over Phoenix was bad, just wait till the day that a systems change impacts millions of taxpayers or retirees.

Dépenses inutiles: une juge scandalisée
Droit Inc
Martine Turenne
10 octobre, 2017
Une juge du tribunal de la jeunesse dénonce le fait qu'un enquêteur fédéral se soit déplacé de Montréal uniquement pour une comparution d'une minute

La juge Doris Thibault a parlé d'une « dépense inutile et injustifiée » et d'une « situation scandaleuse » lorsqu'elle a appris la présence, pour une minute, d'un enquêteur venu assister à la comparution d'un mineur, selon ce que rapporte le Quotidien de Chicoutimi. Ce dernier est accusé d'avoir pointé un laser vers un avion CF-18 de la Base de Bagotville.

L'affaire remonte à jeudi, lorsque le dossier du jeune homme a été amené au Palais de justice de Chicoutimi. On en était à la toute première étape des procédures, soit celle de la comparution. Le procureur fédéral a alors demandé à la juge Thibault la permission de faire entrer l'enquêteur au dossier, qui arrivait de Montréal.

« Pourquoi l'enquêteur serait-il ici pour une comparution d'au plus trois minutes ? », a demandé la juge, selon Le Quotidien.
Il s'agissait des procédures habituelles pour les représentants du gouvernement fédéral, lui a-t-on appris. « Que faites-vous ici ? Vous êtes parti de Montréal pour assister à une comparution ! Je considère cette situation comme scandaleuse. Il s'agit d'une dépense inutile et injustifiée. On peut bien trouver que nous payons beaucoup d'impôt annuellement », a répété la juge lors d'un entretien avec Le Quotidien.

« Il a eu beau me dire qu'il était à Bagotville mercredi, il aurait pu retourner chez lui après. Là nous avons payé une chambre d'hôtel et des repas. Je lui ai ordonné de ne pas se représenter ici avant la tenue du procès », a ajouté la juge Thibault.

Le dossier a été reporté en novembre, le temps que la défense, représentée par Me Sylvain Morissette, puisse analyser les éléments de l'enquête.

Chaos inside the Phoenix pay centres — Is anyone's pay right?
Staffers say troubled payroll software is weakening integrity of entire system
CBC News
Julie Ireton
October 10, 2017

Federal payroll workers are falling back on Excel spreadsheets, Google and, in some cases, pen and paper to make up for the litany of problems with the Phoenix pay system which, several staffers say, is weakening the integrity of the entire compensation system.

Workers from offices in Winnipeg, Edmonton and the central pay centre in Miramichi, N.B., who spoke to CBC News on condition of anonymity, said they're often forced to come up with creative solutions to the pay system's glitches.

"They do what they have to do," said Donna Lackie, former national president of the union representing the pay workers, who recently visited the centre in Miramichi.

"If one is able to discover a tool for a certain pay function, they share that with each other."

Some were even using Google to try to find answers to their Phoenix questions in the pay system's early days, she said. Since its debut 18 months ago, tens of thousands of public servants across Canada have been improperly paid.

One staffer, who has worked in the federal pay system for more than 25 years, told CBC she questions all the transactions coming out of Phoenix.

"We are nowhere near as comfortable with the integrity of the information and the integrity of the amount of pay and everything," the staffer said.

"Phoenix is very unreliable. It's almost volatile. Whatever we put in, I'm never 100 per cent sure that is what the outcome is going to be."

Incomplete and shredded

Back in 2012, four years before the Phoenix switch was flipped, hundreds of staffers in Miramichi started working on the transition to the new pay system. The government had already decided to lay off 1,000 workers in other locations across the country and to centralize the pay centre operations in New Brunswick.

Workers tell CBC News the Miramichi centre received truckloads of paper pay files from all parts of Canada, which were to be entered into the new, developing system.

But they said the boxes of paper were coming from people who were losing their jobs. Some files were incomplete. They also found out that other files had been shredded.

"It's unbelievable the amount of forensics we had to do," one staffer said.

"The government put these people in a difficult position. They were being let go, their loyalties were gone."

50,000 backlogged cases

By the time the Phoenix system started to roll out in February 2016, workers say they already had 50,000 cases of improper payment in the backlog.

They said the day Phoenix started, none of the staff — not even the trainers — had seen the new technology in operation, so no one knew exactly what to do. They soon realized the technology wasn't programmed to do what it was supposed to.

This was formally acknowledged by government ministers with the tabling of a report last week.

"[Phoenix] was set up to fail," said Carla Qualtrough, minister of public services and procurement.

80 collective agreements, 80,000 rules

Qualtrough said the Phoenix architects underestimated the extreme complexity of the federal government's pay system, and that proper oversight and accountability were not in place from the start.

The system needs to carry out some 8.9 million annual transactions valued at $17 billion, with more than 80 collective agreements and 80,000 business rules, according to the report.

Phoenix is not able to handle all those transactions. So payroll workers must complete many manual steps and work outside the program to get people paid.

"Our current human resources, pay and finance processes do not align with Phoenix, resulting in many time consuming, manual calculations and delays from employees waiting for their pay," Qualtrough said.

'That's not automation'

Staffers say they often rely on Excel spreadsheets to figure out transactions before inputting the numbers into Phoenix.

"We actually have to complete an Excel document and upload it into Phoenix so it can create a payment. That's not automation," one worker told CBC.

"We write everything down. We're printing so we have our backup."

Another payroll worker, who works in Edmonton, told CBC she's not confident that the transactions they're putting in are always accurate.

"It's not only the pay that's now affected, it's their deductions. I don't think pension contributions are taken accurately," she said.

"The unions aren't getting their union dues, or they're getting too much, or they're having it refunded to the employee. Our insurance, dental, health care, how are they getting the employers share of the premiums?"

November deadline

The government has said the system will be fixed, but it will take time. There continues to be a massive backlog. In September 160,000 government workers were improperly paid, according to an internal government document, and according to Qualtrough another current complication is the integration of about 25 new collective agreements into the system.

"Frankly, the number of transactions in the backlog is going to go up before it goes down," she said.

Integrating the collective agreements is a top priority, because if that work is not complete by mid-November, the government will be breaking the law.

Qualtrough said 356 new payroll staffers have recently been hired and the government hopes to hire many more to help those who've been slogging it out for years already.

"Our workload has exploded, we're barely keeping our head above water. We've tripled our workload," said one.