Quebec's face veil ban may face a Supreme Court challenge

One legal expert says it's likely that the controversial Bill 62 will be challenged, and that the case will probably end up at the Supreme Court of Canada.

Toronto Star

Giuseppe Valiante for the Canadian Press

October 23, 2017

MONTREAL—A lot is unknown about how Quebec will implement a new law banning people wearing face veils from receiving public services, but what's virtually certain is that it will be challenged in court.

In the near future, a Muslim woman wearing a veil, and possibly with the backing of one or several civil rights organizations, will likely attempt to receive a public service in Quebec and be denied.

The interaction will spark a court challenge that will probably end up in the Supreme Court of Canada, said Natasha Bakht, a law professor at the University of Ottawa.

"I think it goes without saying," she said regarding the numerous civil rights groups gearing up to help challenge Bill 62. "Many groups will be impassioned by this."

Bill 62 prohibits anyone wearing a face covering from receiving or giving a government service and extends to public transit.

It was adopted last week to much criticism outside Quebec, but most of the details of the law, specifically regarding how it will be enforced, have not yet been made public.

The National Council of Canadian Muslims, the Canadian Civil Liberties Association and the Women's Legal Education and Action Fund have all told The Canadian Press they are studying the law and considering their next steps.

Another avenue to contest the law is the Court Challenges Program of Canada, set up to help finance cases involving language equality rights.

The body was recently restored by the Liberals after being abolished by the Conservatives in 2006, but Bakht said it's not yet up and running.

Quebec Premier Philippe Couillard says Bill 62 is mainly about security and identifying people properly during an exchange of public services.

But Bakht said that's a "thinly veiled argument" because the only people in society who regularly cover their faces in public are a minority of Muslim women.

Members of the national assembly voted 66-51 in favour of the legislation, with both major opposition parties voting against it because they wanted a much stricter law.

“This law is light years away from true secularism,” said Nathalie Roy of the Coalition for Quebec’s Future, which wants all teachers, judges, Crown prosecutors, police and prison guards to be banned from wearing any conspicuous religious symbol.

Roy said her party would also include language to ban all bureaucrats from wearing “accessories of submission,” and would explicitly ban the Islamic chador, burka or niqab.

The Parti Quebecois adopted its version of a secularism charter in 2013 similar to what Roy is proposing, but the party lost the 2014 election and it was never implemented.

Solange Lefebvre, a professor at Universite de Montreal who researches culture and religion in society, said Quebec is influenced by French intellectual circles when it comes to secularism and religious neutrality.

“It’s very clear why they did this,” she said.

“It’s the French influence. Quebec is a territory where the majority of people are francophone and who are historically Catholic and this combination with the intellectual ideas in France make it so France has a (strong) influence in Quebec.”

France, which has had a law banning all face coverings in public places since 2010, is far stricter on the issue than Bill 62 aims to be.

Bakht said the law is an expression of the popular sentiment in Quebec in legislative form.

Crown prosecutor appointed to Newfoundland Supreme Court
The Telegram
Tara Bradbury
October 23, 2017
Vikas Khaladkar: lawyer, archeologist, friend of Freddie Mercury and now judge

He may well be the most interesting man you’ve ever met. Besides his long career as a lawyer, Vikas Khaladkar has experience as an archeologist, an inventor, a photographer, a father and grandfather, an immigrant to Canada and a school friend of Freddie Mercury.
Now he can add Newfoundland and Labrador Supreme Court judge to the list.
Khaladkar’s appointment to the court’s trial division was announced Friday by federal Justice Minister Jody Wilson-Raybould.
Khaladkar had been a Crown prosecutor with the Special Prosecutions Office since 2007, having accepted a one-year position that became permanent. Born in Dar es Salaam (in what is now

Tanzania), Khaladkar attended boarding school in India starting at age seven, alongside the future Freddie Mercury of Queen. Khaladkar and his family immigrated to Canada in 1962 and settled in Saskatchewan.
After earning a degree in anthropology and psychology from the University of Saskatchewan in 1972, Khaladkar started law school, but took a year off to work as an archeologist on an environmental impact study in that province. He met his future wife, a Newfoundlander, on that project and the couple now have two children and two grandchildren.
Khaladkar was called to the Saskatchewan bar in 1977 and practiced law there for 30 years. He was the first general counsel for what is now called the Federation of Sovereign Indigenous Nations, and represented the organization in negotiations leading up to the Charlottetown Accord.

In 1994, he was co-counsel on the first Canadian charter case dealing with an accused's right to counsel without delay heard by the Supreme Court of Canada.
In this province, Khaladkar has prosecuted a number of high-profile cases, including that of Trevor Pardy, who was convicted in 2015 of first-degree murder for the shooting death of his ex-girlfriend, Triffie Wadman, as well as all cases that have come before the court relating to breaches of privacy of information law.
According to his LinkedIn profile, Khaladkar invented a system for managing bingo games via computerized tracking and production of cards, making it easier to determine winners and harder for players to cheat. He is also an accomplished nature photographer.
Khaladkar is replacing Newfoundland Supreme Court Justice Richard LeBlanc, who elected supernumerary status at the end of September.

Supreme Court quashes unreasonable non-decision and says: Come on, man!
Canadian Lawyer Magazine
Ron Poulton
October 23, 2017

House arrest is one of the more lenient types of criminal law penalties. It is considered an "alternative to incarceration for less serious and non-dangerous offenders." However, until the Supreme Court decision in Tran v. Canada, released on Oct. 19, Immigration, Refugees and Citizenship Canada had equated a term of house arrest with a term of incarceration of the same duration. That has all changed.

Here is the background. A permanent resident of Canada convicted of a federal offence punishable by a maximum term of imprisonment of at least 10 years or a federal offence for which a term of imprisonment of more than six months has been imposed will be found described in s. 36(1)(a) of the Immigration and Refugee Protection Act and subject to a removal order. There is no defence the permanent resident can offer at the removal hearing stage. In fact, the minister no longer sends its counsel to attend. In these circumstances, a removal order will be issued.

Thanh Tam Tran, a permanent resident of Canada, had been convicted of a federal offence and sentenced to 12 months house arrest, otherwise known as a 12-month conditional sentence. At the time he committed the offence, the maximum term of imprisonment for the crime he committed — which was a marijuana grow op — was seven years imprisonment. At the time, he was sentenced for the offence, but later, when an immigration officer looked at his case, the law had changed by increasing the maximum sentence to 14 years imprisonment.

The Canada Border Services Agency contacted Tran and informed him that it was considering writing him up on allegations of serious criminality. Tran responded by arguing that house arrest could not be equated with a term of imprisonment and that the legislative changes should not be applied to him retroactively, so that the maximum term of imprisonment for his offence should be held at seven years not the new 14-year maximum. An immigration minister's delegate was charged with deciding whether or not to send the case to an admissibility hearing. He received Tran's submissions and decided he had no jurisdiction to consider the legal merits and would send the case on to the admissibility hearing. Tran challenged this decision, and even though no "decision" on the law was rendered by the delegate, the Federal Court of Appeal upheld it, stating that on a reasonable standard of review, either interpretation of the legislation — one equating house arrest with imprisonment and one saying they were not the same — was possible and as such the "decision" was reasonable, even though a decision never actually happened.

No, I am not joking!

The Supreme Court quickly overturned the Court of Appeal on a number of grounds. On standard of review, the court began by saying that on either standard of review, correctness or reasonableness, the decision that term of imprisonment and house arrest had the same value under immigration law was in error. The court gave the example of a first accused who is considered not a dangerous offender and who is sentenced to house arrest of more than six months and a second accused, who is considered more dangerous, being imprisoned for less than six months. In the former case, under the Court of Appeal's understanding of IRPA, the person has committed serious criminality and is subject to a deportation order; in the latter case, he has not. The Supreme Court identified this outcome as absurd, supporting their finding that Parliament never intended house arrest to be included as a term of imprisonment in s. 36(1)(a) of IRPA.

The second important feature of the decision relates to when the maximum term of imprisonment for the purposes of s. 36(1)(a) of IRPA is to be decided, either at the time of the offence or at the time an immigration officer considers it. This is important because, regardless of the sentence imposed, if the maximum term of imprisonment is at least 10 years, then the permanent resident is also subject to a deportation order.

Not surprisingly, the Federal Court of Appeal had held that the phrase "punishable by a maximum term of imprisonment of at least 10 years" could be interpreted without reference to Tran and in the "abstract," meaning that, by the time the case reached an immigration officer, the

possible sentence would be based on the law then in place and not the law in place when the offence was actually committed. The Supreme Court quashed this portion of the Court of Appeal's holding as well. The Supreme Court noted that, at the time of the offence, the maximum penalty was seven years, below the serious criminality benchmark of 10 years. The court held that Parliament could not alter the "mutual obligations between permanent residents and Canadian society without doing so clearly and unambiguously." In this case, it failed to do so. Section 36(1)(a) must be interpreted in a way that respects these mutual obligations, meaning that the obligations imposed on the permanent resident must be knowable. As such, applying a retroactive application to the change in the maximum sentence imposed was a breach of this principle. Serious criminality for the purpose of s. 36 (1)(a) of IRPA was to be considered as of the date the offence occurred, not the date an immigration officer considered the matter.

Was any other decision possible?

Come on, man!

Justin Trudeau should name an Indigenous justice to the Supreme Court: Editorial
As Prime Minister Justin Trudeau mulls the shortlist of candidates now before him, he has a unique opportunity to make an especially profound contribution to legal history, to the future of Canadian justice and to the relationship between Canada and First Nations.
Toronto Star
Star Editorial Board
October 23, 2017

The appointment of a new justice of the Supreme Court is always a moment of historic import. There are only nine, they serve until age 75, and their decisions touch the most vital issues of our lives.

But as Prime Minister Justin Trudeau mulls the shortlist of candidates now before him, he has a unique opportunity to make an especially profound contribution to legal history, to the future of Canadian justice and to the relationship between Canada and First Nations. It is time the federal government put an Indigenous jurist on the Supreme Court.

On the 150th anniversary of Confederation, the appointment of the first Indigenous justice to the country's highest court would be a powerful symbol of reconciliation, a project Trudeau has put at the centre of his agenda.

More than that, it would better position the legal system to respond to a longstanding crisis in Canadian justice: the vast over-representation of Indigenous people in prisons and courts.

As Justice Minister Jody Wilson-Raybould pointed out last year, while they form about 4.3 per cent of Canada's population, Indigenous people make up more than a quarter of prison inmates. In some parts of the country, they are up to 33 times more likely to end up behind bars. No

wonder 18 of the 93 calls to action from the Truth and Reconciliation Commission pertained to reforming our prisons and courts.

Adding an Indigenous perspective to the top court has the potential both to improve the quality of justice and to begin to build trust in communities that have long felt victimized by our legal system. As outgoing chief justice Beverley McLachlin, whose retirement created the current opening, once said, “Many people, particularly women and visible minorities, may have less than complete trust in a system composed exclusively or predominantly of middle-aged white men in pinstriped trousers.”

Some will surely argue that the candidate should be selected solely on merit, without regard for other factors. But when it comes to Supreme Court appointments, we already accept that other criteria matter. For instance, Trudeau instructed the advisory committee that composed the shortlist to choose only candidates who are functionally bilingual in English and French and only jurists from the West or North. But are the current conventions around regional representation really the best way to ensure the top court embodies the true diversity of our country?

Undoubtedly, the pool of highly qualified Indigenous candidates is relatively small. The benches of lower courts remain alarmingly white and male. Only 1 per cent of all Canadian judges are Indigenous – and only 3 per cent are people of colour. Our courts, at every level, should better reflect our population.

But as advocates have lobbied the government in recent months to select an Indigenous judge for the open seat on the top court, a number of apparently excellent candidates have emerged.

For instance, John Borrows, a renowned Anishinabe professor of law at the University of Victoria, is creating a program that blends the study of Indigenous legal traditions with that of the common law. He would bring a valuable new perspective to the court. Mary Ellen Turpel-Lafond, too, has been rumoured to be among the top candidates. The bilingual Saskatchewan Provincial Court judge, of the Muskeg Lake Cree Nation, spent 10 years as Representative for Children and Youth in British Columbia, where she was an outspoken and dogged advocate.

Whatever the government decides, it should not ignore the widespread desire to see an Indigenous person on the highest court. Ideally, Trudeau would deliver now. If not, he should at least explain why it was not possible this time around – and ensure that the circumstances are right when the opportunity next arises.

Innu nation seeks restorative options, more resources at Labrador justice summit
'Different concepts' need to be looked at to cope with busy courts, overcrowded prisons, says minister
CBC News
Jacob Barker
October 24, 2017

Justice workers and leaders of the Innu Nation made sure their voices and concerns were heard loud and clear at the Labrador Justice summit in Happy Valley-Goose Bay on Monday. They were calling for more culturally appropriate forms of dealing with justice in their community.

"The system has failed the Innu people," Innu Nation Grand Chief Greg Rich told CBC News. "It's not working and it needs to be addressed."

Chief Rich said that courts need to have more culturally appropriate solutions for Innu offenders. He'd like to see more restorative justice options for the Innu community which would move away from incarceration as a punishment and towards options such as sentencing circles and enrolling offenders in treatment programs instead.

"I think instead of punishing people, we need to send them out to programs like rehab programs," Rich said.

'A lot of these people are in there for their alcohol related [and] drug problems. So why don't we address the core of the problem?'- Innu Nation Grand Chief Greg Rich
"People stay there for their sentence, then they go back in the community and they go back and it's a cycle. So the justice department needs to think of that and what we can do to intervene."

Another huge barrier for Innu people in the justice system – even with interpreters in place – is language, according to Rich.

"A lot of the words that are used in the courts are very hard to translate," Rich said, adding there is no Innu word for "guilty", which requires an entire sentence to translate.

Rich would also like Natuashish to receive the same provincially funded justice positions that currently exist in Sheshatshiu. He also is calling for the circuit court, which currently travels to Natuashish, to also make a stop in Sheshatshiu.

"[Either] they don't have rides [or] they cannot afford a taxi because a taxi from here is $70," Rich said.

"If they are unable to be present at their court, there's a breach, there's a warrant issued to them. So I think the court needs to be back in Sheshatshiu."

Land-based solutions

"Without a doubt in my mind it's the land that helps the people," Sheshatshiu Innu First Nation Justice Coordinator David Penashue said.

Penashue runs a sweat lodge program for inmates at the Labrador Correctional Centre. He's seen the overcrowding issue at the facility first hand. He says a lot could be gained by keeping offenders out from behind bars and closer to cultural activities.

"In a sweat lodge, you can teach a lot of things. How to be a better man and to be a better father or do your anger management in a sweat lodge."

Busy courts

Justice Minister Andrew Parsons, who was in town for the event, acknowledged there are capacity issues at the Labrador Correctional Centre. The same is true at Happy Valley-Goose Bay provincial court, which services the Innu community of Sheshatshiu and also acts as a circuit court for coastal communities including Natuashish. The court is the second busiest in the province behind St. John's.

"I was at the correctional centre probably a month ago and I was talking to inmates there. If you look at the numbers, a majority of those numbers are aboriginal people, Inuit and Innu," Innu Nation Grand Chief Greg Rich told CBC.

"It's very simple, you know that a lot of these people are in there for their alcohol related [and] drug problems, so why don't we address the core of the problem?"

Parsons said the government does need to look at "different concepts".

"We need to look at restorative justice [and] we need to look at diversion," Parsons said.

"Is there a better way to handle [things] so that we're meeting the principles of deterrence and punishment but at the same time looking at something we may not have concentrated enough on, that's rehabilitation."

La ministre Vallée éclaircit le projet de loi 62
La ministre de la Justice s'est défendue d'avoir induit les Québécois en erreur: il n'y a pas d'interdiction de se cacher le visage dans l'espace public
Radio-Canada
24 octobre 2017

L'obligation de donner ou recevoir des services publics à visage découvert qu'impose la Loi favorisant le respect de la neutralité religieuse de l'État ne s'applique qu'au moment précis d'une interaction entre un prestataire et un fonctionnaire.

C'est ce qu'a précisé mardi matin la ministre de la Justice du Québec, Stéphanie Vallée, lors d'une conférence de presse visant à expliquer les modalités d'application de ce qui était désigné

jusqu'ici comme le projet de loi 62, jusqu'à ce qu'il soit adopté par l'Assemblée nationale mercredi dernier.

La semaine dernière, la ministre avait précisé qu'une personne ayant le visage masqué devrait le découvrir non seulement au moment d'embarquer dans un autobus, par exemple, mais également tout au long du trajet.

Mardi, la ministre a toutefois fait volte-face en expliquant que sa loi ne s'applique que « dans un contexte d'interaction directe » entre un agent de l'État et un bénéficiaire, mais pas « dans le prolongement de l'espace public », a précisé la ministre Vallée.

« C'est au moment de cette interaction que la loi s'applique en fonction des principes de communication, d'identification et de sécurité. Selon nature des services fournis, un ou plusieurs de ces objectifs justifient l'application de la règle ou, dans certains cas, sa non-application », a dit la ministre Vallée.

Ainsi, une personne au visage masquée pourrait se faire demander de se découvrir en se présentant devant un chauffeur d'autobus, pour des questions de sécurité. Mais une fois cette étape franchie, rien ne l'empêcherait de se masquer le visage de nouveau pour le reste du trajet.

Il en va de même dans les hôpitaux. Une personne se ferait ainsi demander de se découvrir au moment de l'inscription, mais pourrait se masquer le visage de nouveau en retournant dans la salle d'attente. Elle devra toutefois se découvrir de nouveau au moment d'être vue par un membre du personnel.

Le raisonnement s'applique également pour les bibliothèques publiques. Une personne au visage masqué pourrait ainsi circuler librement dans un établissement et y consulter des documents tout en ayant le visage couvert, mais elle ne pourra emprunter un document auprès d'un préposé sans l'avoir découvert.

La ministre s'est défendue d'avoir induit les Québécois en erreur avec ces commentaires de la semaine dernière, en soutenant avoir été « cohérente dans ses propos ». « Si mes propos ont pu être appelés à être interprétés, je fais amende honorable et je m'en excuse », a-t-elle ensuite ajouté.

La loi s'applique également pour les élèves d'une école secondaire et les étudiants des cégeps et des universités, pour des questions de qualité de la communication, a encore précisé la ministre. Il en va de même pour une personne qui va chercher son enfant dans un service de garde.

Tous les bénéficiaires appelés à recevoir de tels services peuvent cependant faire une demande d'accommodement raisonnable pour éviter d'avoir à se découvrir, a réitéré la ministre de la justice du Québec. « La loi adoptée n'est pas répressive. À dessein, elle ne contient pas de sanction. Le vivre ensemble ne se développe pas par des sanctions, mais par le dialogue.

Personne ne sera expulsé des transports collectifs, personne ne se verra refuser des soins de santé d’urgence, personne ne sera chassé d’une bibliothèque au Québec. »

Mme Vallée a également précisé, pour dissiper tout doute, que la loi ne s'applique pas dans les rues et les parcs, par exemple. Ces infrastructures sont payées par le public, a-t-elle expliqué, mais personne n'y interagit avec des agents de l'État.

Les avis juridiques ne seront pas dévoilés

La ministre de la Justice n'a pas l'intention de publier les avis juridiques sur lesquels elle s'est appuyée pour rédiger sa loi. « Nous ne pouvons rendre publics les avis juridiques, car ils sont sous le secret professionnel », a affirmé son attachée de presse, Isabelle Marier-St-Onge, à La Presse canadienne. Lorsqu'elle était dans l'opposition en 2014, Stéphanie Vallée estimait que l'absence d'avis juridiques sur le projet de charte de la laïcité témoignait d'un manque de sérieux de la part de l'ancien gouvernement péquiste. « C'est assez particulier. On fait un projet de loi, puis on va attendre que les gens viennent le valider en commission parlementaire? Ce n'est pas un travail rigoureux. Ce n'est pas un travail sérieux », avait-elle dénoncé à l'époque.

Des règles qui ne devaient pas être dévoilées

Les règles d'application de la loi ne devaient à l'origine être présentées qu'aux responsables des administrations, mais la ministre Vallée a concédé dans une entrevue accordée à La Presse canadienne en fin de semaine que, devant « l'escalade » des derniers jours, il était devenu essentiel « de bien expliquer » les tenants et aboutissants de la loi.

La loi prévoit que tous les services publics au Québec doivent être donnés et reçus à visage découvert. Elle permet cependant des accommodements raisonnables, qui doivent être accordés à la pièce, et ne prévoit aucune pénalité ou amende pour ceux qui n’en respectent pas les modalités.

La loi, adoptée 10 ans après la conclusion de la commission Bouchard-Taylor sur les pratiques d’accommodement reliées aux différences culturelles, a été adoptée grâce à la seule majorité libérale.

Bien que la loi instaure la notion de « neutralité religieuse » de l’État québécois, la ministre Vallée a fait valoir qu'elle ne s’applique pas qu’aux musulmanes qui portent la burqa ou le niqab, mais aussi à quiconque porterait une cagoule, voire un bandana ou des lunettes fumées qui masquent le visage.

Un sondage Angus Reid publié début octobre a conclu que 87 % des Québécois soutiennent les objectifs de la loi.

Les trois partis d’opposition ont voté contre le projet de loi, et l’Union des municipalités du Québec l’a dénoncé, en arguant qu’elle créera « de nombreux malaises et problèmes au lieu de favoriser le vivre-ensemble ».

Le maire de Montréal Denis Coderre n’a jamais caché qu’il jugeait cette loi inapplicable, en raison de ce qu’elle pourrait exiger des employés municipaux offrant des services, comme les chauffeurs d’autobus ou les bibliothécaires.

Le Syndicat canadien de la fonction publique, qui représente les employés des sociétés de transport de Montréal et de Laval, a aussi fait savoir que ses membres n’ont pas l'intention de l'arbitrer en l’absence de directives claires.

Highlights from the federal government's fall economic update, tabled Tuesday
Global News
The Canadian Press
October 24, 2017

OTTAWA — The federal Liberals gave an update Tuesday on the government's finances, and with it, how they plan to spend a windfall generated by better than expected economic growth.

Here are some highlights from the fall economic update:

— Positive economic developments have left the government with about $46.6 billion more to spend over five years than they'd projected in the 2017 budget.

— The economic update details ways they plan to spend roughly $14.9 billion of that over five years, leaving the rest to pull down the deficit.

— The deficit this fiscal year is now projected to be $18.4 billion, down from the spring projection of $25.5 billion. By 2021-2022, the deficit will fall to $10.9 billion. It had originally been projected to come in at $15.8 billion.

— The government focused on four major spending measures in the update: indexing the Canada Child Benefit to cost of living increases, expanding the Working Income Tax benefit program, formalizing a promised cut to the small business tax rate and ongoing work to overhaul the tax code.

— The indexation of the Canada Child Benefit project will now begin in July 2018, two years ahead of schedule. Over five years, the increases are projected to cost about $5.6 billion. As an example, the government says someone currently receiving the maximum amount of $6,400 for a child under six would see that rise to $6,496 next year, and $6,626 by 2019-2020.

— Expanding the Working Income Tax Benefit program. The program is designed to account for the fact that when people go off government assistance and get a job, their paycheque may not be as high as government support and so there's less incentive to work. The benefit seeks to make up some of that pay difference. The government says they'll spend $500 million a year starting in 2019 to allow more people to qualify.

— Taken together, measures to lower the small business tax rate to 10 per cent next year and nine per cent in 2019, along with ongoing overhauls to the tax code, will cost the government $1.3 billion between 2017 and 2022, but that doesn't take into account one of the major changes coming to tax rules on how passive investments are handled.

— Almost $9 billion in program spending is detailed in the update, some of which has not been previously announced at all, or has only been detailed in very broad strokes. Among the new programs: over $1 billion for Fisheries and Oceans Canada and Canadian Coast Guard Services over six years; $760 million for security at Canada's embassies and consulates over six years; $4 million over two years to expunge the criminal records of Canadian previously convicted of consensual sexual activity with same-sex partners; $526 million for legalization marijuana and a further $150 million over six years to handle drug-impaired driving.

Checking The Math Behind Carolyn Bennett's '2 Million' New Indians
A version of Bill S-3, An Act to Amend the Indian Act, would result in a number of new status Indians. But how many, really?
Huffington Post
Lynn Gehl
October 24, 2017

The Indian Act was amended in 1985 to bring it in line with the Canadian Charter of Rights and Freedoms. While this created 114,000 new or reinstated Indians, it did not resolve all the sex discrimination.

Worse, the 1985 amendment created a new form of sex discrimination where children of unknown and unstated paternity were discriminated against by Indigenous and Northern Affairs Canada (INAC) through their Unstated Paternity Policy. This policy made the assumption that if no father signature was on a child's birth registration form, he was non-Indian, which meant many children were deemed non-status and thus not entitled to their treaty rights. This policy applied in situations of sexual violence such as rape and incest, and further in situations where young girls did not have the legal right to consent to sex. This newly invented policy was diabolical.
Bill S-3, '6(1)a All the Way' and Bennett's 2 million Indians

While the Senate Committee on Aboriginal Peoples, listening to experts such a Sharon McIvor and myself, put forward a version of Bill S-3, An Act to Amend the Indian Act — a version that

would resolve all the sex-based inequities through the inclusion of the "6(1)a All the Way" clause — INAC Minister Carolyn Bennett, flip-flopping on her previous position, urged members of Parliament to vote against it. Bennett then put forward a version of the bill that would perpetuate sex discrimination.

Remaining with Canada's long-time policy goal and the need to eliminate Indians and extinguish their treaty responsibilities to Indigenous nations, Bennett, obfuscating the process, said the 6(1)a All the Way clause would result in two million new status Indians. This number was not rooted in a demographic analysis, but rather her need to fearmonger. It is my suggestion that the estimated number is more likely 60,000 to 100,000; Pam Palmater estimates 200,000.

Let me provide you with some insight into the past numbers and the potential number regarding the 6(1)a All the Way clause.

2010 McIvor created 45,000 Indians

Sharon McIvor took the issue where Indigenous men and their descendants born before 1985 were all ascribed the strongest form of Indian status — 6(1)a — yet Indigenous women and their descendants born before 1985 are ascribed lesser forms of Indian status — 6(1)c or 6(2) — to the British Columbia court. Relying on this comparison, Sharon won her case. It was a victory.

INAC appealed the decision to the B.C. Court of Appeal where the court ruled that some of the sex discrimination was justified. The justification was that the matter was an issue of matrilineal descent. Then the court relied on the 1951 double-mother clause imposed on the descendants of Indian men as the comparator group to narrow down the remedy. This was a terrible moment for Indigenous women.

Sharon wants 6(1)a for all her descendants born before 1985 rather than what she, her son and grandchildren gained: 6(1)c, 6(1)c1 and 6(2) respectively. The Supreme Court of Canada refused to hear her appeal and so Sharon is now at the international level. Regardless, through Bill C-3 the Indian Act was amended where 45,000 people became registered.

2015 Descheneaux and Yantha create 35,000 Indians

Stéphane Descheneaux was unable to pass status because he was only registered as a 6(2) Indian. This was the result of his matrilineal descent, meaning it was his grandmother versus his grandfather who was Indigenous. This is known as the cousins issue in that Stéphane's second cousin, born through the patrilineal line, was entitled to 6(1)a status.

In Susan Yantha's situation, as a girl child born out of wedlock pre-1985, she was only registered as a 6(2) Indian which meant she could not pass on status to her daughter Tammy, whereas her

hypothetical brother born out of wedlock was entitled to 6(1)a. This is known as the sibling issue.

While the Quebec court ruled on these cases before her, she was clear that there was the need to eliminate all the sex discrimination. It has been said that the resolution of the cousin and sibling issues will create between 28,000 to 35,000 Indians. It is the Descheneaux case that has resulted in Bill S-3 that is currently before parliament.

2017 Gehl case affects 100,000 births

As stated, the issue of unknown and unstated paternity was a form of sex discrimination invented in 1985. I was personally denied status due to an unknown paternal grandfather. It took me 30 years to move through the family oral history, archival research and the litigation process. In April 2017, Ontario's highest court ruled that this sex discrimination was unreasonable and I was granted Indian status. But I was granted the lesser form of status. This is why I am invested in making sure the 6(1)a All the Way clause remains a part of Bill S-3.

My court case was heard while Bill S-3 was moving through Parliament, so the required remedy will be included in Bill S-3. Parliamentarians are not debating this.

It is my hope that this discussion of numbers quells Bennett's effort to instill fear into the minds and hearts of parliamentarians.

Demographers Stewart Clatworthy and James S. Frideres agree that the estimated number of births affected by INAC's Unstated Paternity Policy as of 2004 totalled over 60,000. While the majority of these people were relegated the lesser form of 6(2) status, 15,000 were actually denied status. Through the Gehl clauses now codified in Bill S-3 these 60,000 people will be entitled to 6(1) status which means ALL their children will also be entitled; and 15,000 will be newly entitled as 6(2).

As we think about Clatworthy's and Frideres' numbers, we need to keep in mind that they represent births up to 2004. As of 2017, the numbers will be higher. I suggest 77,000 people may be entitled of 6(1) status and 25,000 people may be entitled to 6(2) status.

While an economic analysis is no excuse for sex discrimination, and I am clear in my understanding of this, it is my hope that this discussion of numbers quells Bennett's effort to instill fear into the minds and hearts of parliamentarians.

Lastly, it is said the government recently commissioned Clatworthy to determine the number of people who would be entitled to Indian status through the 6(1)a All the Way clause. Hopefully parliamentarians step up and remove all the discrimination Indigenous women and their descendants are dealing with.

Lynn Gehl Algonquin Anishinaabe-kwe. She is an author, artist, advocate, and stone collector. You can learn more about her work at www.lynngehl.com

Comment un employeur doit-il réagir face à des allégations d'inconduite sexuelle ?
La présomption d'innocence a toujours préséance dans notre système de justice. Et on peut s'inquiéter des dénonciations publiques, nous dit cet avocat
Droit Inc.
Sébastien Parent
24 octobre 2017

Le phénomène du #moiaussi a pris une ampleur considérable ces derniers temps. Les allégations d'inconduites sexuelles fusent de partout. Les victimes se succèdent pour dénoncer des gestes extrêmement répréhensibles qu'elles allèguent avoir subis : avances déplacées et insistantes, exhibitionnisme, harcèlement sexuel, ou carrément agression sexuelle, et j'en passe. Le nom des Salvail, Rozon, Brûlé et compagnie est sur toutes les tribunes.

Les conséquences sont immédiates et assez brutales. En moins de quelques heures, leurs émissions télévisuelles ou radiophoniques sont suspendues indéfiniment ou illico bannies de la programmation. Les différentes entreprises recourant à ces personnalités connues pour leurs publicités les larguent les unes après les autres. Leurs compagnies de production sont affectées, entraînant également des dommages collatéraux non négligeables chez les artistes, techniciens et employés œuvrant pour ces dernières.

Dans la foulée de ces évènements se pose la question de savoir comment un employeur doit réagir lorsqu'un de ses salariés fait l'objet de telles dénonciations dans les médias. Le congédiement s'impose-t-il immédiatement ? Ne devrait-il pas plutôt faire preuve de prudence étant donné que les faits reprochés ne sont qu'au stade des allégations ? Alors, comment protéger la réputation de l'entreprise ?

L'imposition d'une suspension administrative

En fait, la réponse se trouve dans l'arrêt Cabiakman provenant de la Cour suprême du Canada. Selon cette décision de principe, l'employeur dispose d'un pouvoir de suspension administrative, lui permettant de faire la lumière à propos des faits portés à sa connaissance et ainsi éviter de prendre une décision hâtive.

Pour être valide, la mesure administrative doit notamment avoir pour objectif de protéger les intérêts légitimes de l'entreprise, ce qui comprend sa réputation. De plus, l'interruption du lien d'emploi doit être pour une période déterminée ou déterminable. La durée de la suspension doit être relativement courte de préciser le plus haut tribunal du pays.

C'est donc une mesure préventive, qui se distingue d'une mesure disciplinaire. En effet, à ce stade-ci, l'idée d'une mesure punitive relativement aux inconduites sexuelles reprochées à

l’employé est écartée puisqu’une enquête s’avère nécessaire afin d’en confirmer le bien-fondé. C’est pourquoi le salarié devra être rémunéré au cours de la suspension, à moins de circonstances exceptionnelles.

Deux scénarios possibles selon l’endroit de l’inconduite

Selon le premier, les gestes à connotation sexuelle se déroulent dans le cadre de la prestation de travail du salarié. Et même si de tels gestes peuvent également être prohibés par le Code criminel, pas question d’attendre que des accusations criminelles soient portées contre l’employé. Dès qu’une inconduite de nature sexuelle est portée à sa connaissance, l’employeur peut réagir immédiatement et suspendre administrativement le salarié pour fin d’enquête.

Si les témoignages recueillis auprès de son personnel confirment ultimement les allégations initiales, dans ce cas il est très clair que l’employeur est en droit de sévir, ce qui peut aller jusqu’au congédiement. Plusieurs lois imposent d’ailleurs à l’employeur d’assurer la santé, la sécurité et l’intégrité de son personnel, en plus de devoir offrir un milieu de travail exempt de harcèlement.

Quant au second, les évènements d’inconduites sexuelles se déroulent hors du travail, mais font l’objet d’une dénonciation auprès des policiers ou d’accusations criminelles. L’employeur sera alors justifié de suspendre son employé jusqu’à ce qu’un verdict soit rendu au sujet de sa culpabilité ou de son innocence. Une fois le processus judiciaire complété, l’employeur prendra une décision éclairée quant au lien d’emploi du salarié, compte tenu de la gravité de l’infraction criminelle commise et de son lien avec le poste occupé.

Le problème des dénonciations dans l’espace public : le phénomène #moiaussi

L’employeur se retrouve dans une position extrêmement inconfortable face aux dénonciations d’agression ou d’inconduite sexuelles dans les médias et sur la place publique, lorsque les évènements allégués se sont déroulés dans le cadre de la vie privée du salarié, c’est-à-dire à l’extérieur du travail.

D’un côté, ce n’est pas très flatteur de voir un de ses salariés à la une d’un grand quotidien indiquant qu’il montre ses parties génitales en public ou qu’il abuse de son pouvoir pour agresser autrui. Bien entendu, l’employeur cherchera à se dissocier de ce genre de conduite déviante.

De l’autre, il faut tenir compte du fait que le salarié, dans la plupart des cas, ne fait l’objet d’aucune plainte formelle auprès des flics, aucune accusation criminelle n’est portée contre lui et encore moins une décision d’un quelconque tribunal le déclare coupable ou le reconnait fautif de quoi que ce soit.

Or, un des principes de la suspension administrative c’est qu’elle doit être limitée dans le temps et que sa durée doit être déterminable.

Dans un tel contexte, jusqu'à quel moment l'employeur suspendra-t-il le salarié faisant l'objet d'allégations dans les médias ? La durée de la suspension sera-t-elle tributaire de l'espoir qu'une victime se décide à déposer une plainte formelle ? Si aucune plainte n'est déposée, qui tranchera en fin de compte le bien-fondé des accusations ? Les individus adeptes des lignes ouvertes ? Les internautes sur les médias sociaux ?

Le système de justice pénale est loin d'être parfait, on ne peut le nier! Pour cinq victimes d'agression ; une seule qui dénonce. Cela ne légitime toutefois pas un individu à se faire justice soi-même. Certes, il est urgent de repenser le processus judiciaire pour les crimes à connotation sexuelle, ce qui implique de le rendre plus humain pour les victimes.

Sauf qu'en droit canadien, toute personne, même l'auteur du crime le plus odieux, a le droit de bénéficier d'un procès juste et équitable, d'une défense pleine et entière et surtout, de la présomption d'innocence tant et aussi longtemps qu'un tribunal ne l'a pas déclarée coupable hors de tout doute raisonnable. Cette personne conserve également son droit à la sauvegarde de sa réputation.

Bref, perdre son emploi indéfiniment en raison d'allégations d'inconduite sexuelle qui n'ont toujours pas été dénoncées devant le forum approprié balance au rancart la présomption d'innocence, qui n'est pas seulement un concept juridique qu'on enseigne dans les facs de droit, mais aussi un droit constitutionnel bien réel.

On peut s'inquiéter, avec raison, de cette nouvelle voie parallèle aux tribunaux qui s'érige en justice citoyenne. L'idée d'un tribunal populaire, où monsieur et madame tout le monde qualifient un être de violeur ou d'agresseur, avant qu'un juge n'ait pu trancher l'affaire au terme d'un procès (civil ou criminel), est franchement inquiétante dans un État de droit comme le nôtre.

#Étatdedroitaussi ?

Crown disputes bar society's finding that race a factor in lawyer's treatment
Public prosecution service said it doesn't agree with the panel's comment on its treatment of Lyle Howe
CBC News
Michael Tutton The Canadian Press
October 24, 2017

Nova Scotia's prosecution service is firing back at a ruling from the province's bar society, saying race played no role in how Crown lawyers treated a black lawyer.

The Nova Scotia Barristers' Society disbarred Lyle Howe on Friday and fined him $150,000 after a disciplinary panel ruling that said the defence counsel repeatedly misled the courts and committed other acts of professional misconduct.

The disciplinary panel commented "race played a role in how he [Howe] was dealt with by some members of the Crown office in Dartmouth," but added that this wasn't "significant" when they considered how he ran his practice.

In a news release Monday, the public prosecution service said it doesn't agree with the panel's comment on its treatment of Howe.

The service says it believes the reference — which wasn't fully explained in the penalty ruling — was to the practice that Howe was to be escorted when he was in their offices.

Service says it doesn't tolerate discrimination

In addition, in the July 17 decision finding against Howe, the panel said female Crowns were told they wouldn't have to meet with Howe when they were alone.

The press release issued Monday says these practices were instituted because Howe was suing a prosecutor for malicious prosecution at the time, leading a member of the Crown lawyer's union to send an email advising caution in their dealings with him, and that Howe was the subject of sexual assault charges. Those charges were eventually dropped against Howe.

"The Public Prosecution Service neither tolerates nor engages in discriminatory practices with respect to African Canadians or any other minority group," said Martin Herschorn, director of public prosecutions.

"Mr. Howe's treatment in the Dartmouth Crown Attorneys' Office at the time in question was a direct result of his behaviour and no other factor."

A spokesperson for the Nova Scotia Barristers' Society was unavailable for comment on the criticisms.

Howe claims race was a factor

Howe said in an interview on Monday that he disagrees with the prosecution service's statements, and says he feels there was broader racial discrimination against him by the Dartmouth prosecutors.

"They're confounding race being a factor with just the policy, but it's my understanding that race is a factor insofar as I'm treated more broadly speaking than just that policy," he said.

"There were numerous incidents of mistreatment upon myself by the Crown that I've demonstrated."

Howe planning to appeal

Howe, who said he is planning to request an appeal of the panel decision and penalty, added that from his recollection there were other emails and comments made that "relied on racial stereotypes."

The panel decisions rejected Howe's argument that the society had violated his charter rights under section 15, which guarantees equality before "the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

However, there were comments in the original panel decision raising issues about his treatment by the Dartmouth Crown office.

For example, in terms of the practice requiring an escort at the Dartmouth Crown office, the panel said, "the Crown office's approach to addressing Mr. Howe's situation allowed suspicion, speculation and surmise to attach directly to Mr. Howe — as a black male, and as a potential threat of physical or sexual violence to Crown employees."

Howe said the equity committee of the barristers' society should look further into these and other comments about how race played into his case.

"They haven't done anything to help me since the findings," he said of the equity committee.

"Many of the allegations against me, including the double booking and over booking, I demonstrated that many if not most white criminal defence lawyers behave exactly the same way, and I haven't heard of another individual being investigated or brought before a hearing panel," he said.

Le parlement doit rendre des comptes, dit le tribunal
La cour fédérale vient de mettre à mal l'application de l'immunité parlementaire aux affaires budgétaires
Droit Inc
Jean-François Parent
25 octobre 2017

C'est l'affaire des envois postaux faits par le Nouveau Parti démocratique, en 2014, qui a refait surface ce mardi matin en Cour fédérale.

Au NPD qui tente depuis cette époque de contester une décision du Bureau de régie interne (BRI) du Parlement, la juge Jocelyne Gagné vient d'accorder une victoire : le BRI ne peut pas

invoquer l'immunité parlementaire pour soustraire ses décisions au réexamen et à la contestation judiciaire.

« Les gouvernements ont toujours interprété l'idée d'immunité parlementaire de façon large, afin d'éviter la révision judiciaire », explique Julius Grey, qui a plaidé pour le compte du NPD.

En 2014, une enquête du BRI concluait que plusieurs députés du NPD avait utilisé les services gratuits de Postes Canada pour des envois postaux partisans.

Une pratique qu'ont souvent faite tant les Libéraux que les Conservateurs, soutenait le NPD dans sa défense de l'époque, laquelle alléguait par ailleurs que le comité, dont les décisions étaient prises en secret, était noyauté par les Conservateurs.

Le BRI a toujours contesté la demande de révision logée par le NPD sous prétexte que ses activités, tenues dans l'enceinte parlementaire, bénéficiaient de l'immunité et qu'elles étaient donc sans appel.

Le BRI refusait en outre d'expliquer en quoi, précisément, le NPD était fautif, mais lui réclamait néanmoins près de 2 millions de dollars pour un envoi postal qui avait cependant été déclaré inoffensif par le Directeur général des élections. « Nous avons voulu que la cour se prononce sur ce qui constitue le privilège parlementaire. Nous estimons qu'il ne doit s'appliquer qu'aux fonctions centrales des députés », afin notamment de protéger la liberté d'expression des élus, poursuit Julius Grey, de Grey Casgrain.

Le BRI débouté

À la contestation de la juridiction fédérale, la Cour a répondu au BRI que puisqu'il n'est finalement qu'un organe du parlement, il doit se soumettre aux tribunaux fédéraux. En outre, ses prérogatives sont déterminées par règlement, et non issues de privilèges constitutionnels. Enfin, de par nature administrative, le BRI ne peut prétendre aux protections nécessaires à la fonction de députés, par exemple.

Sur la nature des privilèges auxquelles le BRI peut prétendre, la juge Gagné n'a pas été plus conciliante. D'abord, le BRI a été incapable de démontrer que ses activités tombaient sous le coup d'une immunité.

Ensuite, ce n'est pas n'importe quelle activité qui se tient physiquement dans le Parlement qui peut bénéficier de l'immunité, mais bien celles qui profitent à l'exercice démocratique, et ce, dans le but de « protéger la liberté d'expression », écrit Jocelyne Gagné.

Sans que le BRI, qui était représenté par Mes Guy Pratte et Nadia Effendi, de BLG à Ottawa, n'a pu expliquer en quoi ses activités d'examen des dépenses des députés était un rouage essentiel de la démocratie parlementaire.

Un appel « certain » en Cour suprême

Julius Grey croit que cette cause sera portée en Cour suprême, où l'on demandera l'autorisation d'en appeler, « car toutes les parties veulent défendre leur interprétation dans ce dossier ».

Il déplore l'utilisation trop fréquente de l'immunité parlementaire en citant l'exemple d'un autre dossier qu'il plaide présentement en Cour d'appel du Québec.

En 2011, deux sikhs qui se rendaient à une commission parlementaire pour y présenter un mémoire se sont vu refuser l'accès à l'Assemblée nationale parce qu'ils portaient le kirpan, un symbole religieux. Balpreet Singh et Hamrinder Kaur ont tenté de faire invalider cette décision, pour laquelle Québec invoquait le privilège.

La Cour supérieure a tranché, en 2015 : la décision constitue un privilège absolu de l'Assemblée et la Cour ne peut intervenir, et ce, même s'il y avait atteinte à un droit constitutionnel, estimant que « ces privilèges ne sont pas assujettis aux Chartes ».

« Je suis confiant de gagner l'appel », dit Julius Grey, selon qui cette cause aussi ira jusqu'en Cour suprême.

Senate pulling out of Phoenix pay system, citing 'unnecessary delays and errors'
Global News
Monique Scotti
October 25, 2017

The Senate has confirmed it is dumping the beleaguered Phoenix payroll system after 18 months of struggles to ensure its employees are paid properly and on time.

On Wednesday, the Senate issued an official request for proposals, asking for "a service provider to assume responsibility for payroll processing, as well as all related pension benefit payments for all the employees of the Senate of Canada."

Senate spokesperson Alison Korn confirmed that the move was in "direct response" to the Phoenix debacle and is also designed to improve "overall autonomy."

Phoenix has been causing major headaches across the federal public service for nearly two years after being rolled out in early 2016.

The Senate, specifically, has been using Phoenix for its payroll since April 21, 2016, Korn noted.

"In the last two years, the problems generated by the Phoenix system have negatively impacted the quality and standards of service the Senate sets for its employees. While the Senate mitigated

many of the challenges on its own, they continue to face unnecessary delays and errors as a direct result of the system. This is unacceptable to the Senate as a distinct and separate employer from the Government of Canada."

Proceeding with its own payroll system "allows us to completely mitigate the issues resulting from Phoenix while continually striving for the utmost efficiency in our operations and it further establishes the autonomy of the Senate," Korn added.

The request for proposals issued on Wednesday appears to be the latest step in a process that has been unfolding for some time. It comes in the wake of a request from the Senate's Standing Committee on Internal Economy, Budgets and Administration that a review be conducted to provide alternative options to the Phoenix system.

A consultation was also held with external experts to seek advice on the best way to proceed with respect to the payroll process, Korn said. The request for proposals is the result.

Fixing Phoenix has proven a major challenge for the Liberal government, and Prime Minister Justin Trudeau recently made it the top priority for new Minister of Public Services and Procurement Carla Qualtrough.

Global News has reached out to Qualtrough's office for comment.

Since early 2016, tens of thousands of public servants at the federal level have been underpaid, overpaid or not paid at all.

The problems have been blamed on a hasty rollout, a steep learning curve and a lack of training for staff, cuts to the payroll workforce and technical glitches. The government has spent hundreds of millions trying to fix Phoenix, and last month looked poised to award Oracle, the company behind the basic payroll system that was then customized for the government by IBM, an additional $2-million contract to help "stabilize" the situation.

Fall fiscal update includes $123M to fix Phoenix Pay System
CTV News
The Canadian Press
October 25, 2017

It could be considered good news, a sign that the government is taking the problems of the Phoenix Pay System seriously, or it could be a sign of how much work is left to be done.
A line at the back of the federal government's fall fiscal update shows that the feds have budgeted an additional $93 million to be spent on fixing the pay system this fiscal year and an extra $6 million per year in each additional year until the 2022-23 fiscal year.

All of this extra money is new funding that was not included in the budget that was tabled on March 22.

The update says that the money is, "Funding to address critical challenges with the Government of Canada's pay system." That includes special payments to hire and retain pay specialists.

French LPP candidates participating in Access to Justice Week
Canadian Lawyer Magazine
Lisa Cumming
October 24, 2017

Kayla Cardinal Lafrance found it easy to make the choice to register for the University of Ottawa's French Law Practice Program. She wanted to focus on her studies first then figure out which area she'd like to specialize in.

"It was really hard to determine what I liked, I kind of liked everything," she says. "I didn't cater my whole law school experience to one field."

The University of Ottawa's Law Practice Program, in French the PPD, "Programme de pratique du droit," was designed to "promote access to justice for Francophones" and as an alternative to traditional articling. The program is only offered in French.

"We have a lot of academic knowledge coming out of university but nobody really asked us to do anything concrete," says Cardinal Lafrance.

The candidates do different mock experiences — one week it's working as a criminal lawyer, the next it's tackling a leasing problem.

"I honestly think it's the best decision I made since I started law school," Cardinal Lafrance says. In January, she will be starting a position in-house at the Bank of Canada.

To prepare them for work beyond the program, candidates also learn how to manage a practice, doing physical filing, digital filing and billing clients.

"We even get pretend cheques, the whole thing," she says. "Maybe something we could do is get on board with the future and try to go paperless, but honestly in the beginning it's good to do the paperwork to see how much better it would be if we could digitize the whole process."

This year there are 12 candidates in the program. Last year there were 25.

"I really like the vibe that we have because we're smaller," says Cardinal Lafrance. To her this means that she gets a very personalized experience.

Anne Levesque, the program director, wrote in an email that one factor impacting enrolment was the report the LSUC initially released last fall saying it would cut the program, before reversing the decision. As a result, many candidates found articling positions instead.

“However, since the beginning of the program not once has a candidate stated that the program’s reputation was a factor in selecting articling over the LPP. Rather, all candidates (even those who have withdrawn) say we have an outstanding reputation,” Levesque wrote. “It is not at all viewed as a backup plan or a second class path to the profession.”

Andréanne Charron decided on the LPP because she knew what area of law she wanted to specialize in.

“I didn’t see the point of, for example doing my articling in business law, when I wanted to go into social justice,” she says.

Charron landed a placement at the legal clinic in Cornwall and she was hired back upon completion.

She found that the in-class portion of the program helped her a lot. “It was very personal,” she says. “The lawyers that were teaching us, we know their names. We know our teams. For me it helps with the community feeling, having everyone together.”

Community, she says, is also an important part of networking.

“Someone knows someone and then you find out that this person knows 10 other people, it just seems that the French legal community is even smaller than you think because everyone knows everyone.”

The candidates are also encouraged to go to every networking event, Charron says, they’re not just limited to French events.

She also credits the program with making the candidates aware of the difficulties that francophone communities face, such as accessing justice in French, and encouraging them to be involved in their communities all the time.

For Access to Justice Week the candidates have been separated into teams and have been assigned a region of Ontario to conduct research on issues and barriers to accessing justice in French. The teams, working closely with l’Association des juristes d’expression française de l’Ontario and the Centre d’information juridique d’Ottawa, connected with a lawyer working in their region and asked to interview that person on the issues.

Cardinal Lafrance is presenting at the event on Hamilton.

“They’re like our lawyer-mentor for the region to give us the low-down for what works here, what doesn’t, what needs improving, maybe you should talk to this person and this person,” she says.

Cardinal Lafrance says it’s been easy to make connections.

“The perception of the [program] within the legal community is very well received, we make ourselves known,” Cardinal Lafrance says. “We have a lot of networking opportunities so it’s not just a way to access the profession but a way to get integrated into the profession.”

Dismantling the Indian Act and modernizing treaties is possible—and necessary
Opinion: As the Indian Act comes under scrutiny, treaties could serve as a reminder of what we could achieve—or a mark of our collective failure
Macleans
Ross Holden
October 25, 2017

Ross Holden has worked with Indigenous communities and organizations for close to 20 years, as a policy advisor for the Government of Canada, an independent consultant, and for the last four years as an Aboriginal Engagement Advisor for the Nuclear Waste Management Organization. The views expressed herein are his own.

Concern about the continued existence of the 141-year-old Indian Act, and the dysfunctional reserve system it spawned well over a century ago, is not merely a legal or policy abstraction. The imposition of inappropriate systems of governance and the ghettoizing of hundreds of thousands of First Nations people on “reserves,” many of them distant from markets for goods and services, have resulted in widespread social and economic dysfunction. It’s nothing less than a national disgrace.

In a recent opinion piece in these pages, Jean Teillet—an accomplished litigator who has argued numerous important questions of Indigenous law before the Supreme Court of Canada—presented a frank, if pessimistic, assessment of Canada’s prospects for eliminating this last major vestige of colonialism in Canada. Despite her skepticism, Teillet’s intention in writing the piece is to spark a dialogue on this most egregious failing of the Canadian polity, so kudos to her for doing so. Unfortunately, it may serve only to further entrench the long-standing case—or excuse—for inaction, clung to for decades by federal policymakers and First Nations leaders alike.

So in the interest of sustaining the hope that change is possible, I wish to offer an alternative perspective on the dilemma.

Plans to escape the made-in-Canada colonialism quagmire typically fall within one of two camps. The first, originally proposed in the infamous “Statement of the Government of Canada

on Indian Policy, 1969″ (aka the "White Paper"), is the unilateral elimination of the Indian Act and the reserve system, as well as assimilation into the Canadian mainstream. This option was soundly repudiated by First Nations leaders at the time, and though thinly veiled variants are still occasionally floated, it is neither a morally nor A likely legally viable option. The other scheme, favoured by many, would see the Indian Act replaced holus bolus with some form of self-government—maintaining the reserve system in its present form—with ever-increasing funding to prop up those (mostly remote) communities mired in poverty and hopelessness. It is the likelihood of success of the latter approach upon which Teillet has poured cold water.

To be honest, I can't blame her for being pessimistic. After decades of policy papers, legislative initiatives and self-government negotiations, little, if anything has changed. Indeed, after all these years, and all this sadness, there remain a number of questions about transitioning to self-government that continue to bedevil federal and First Nations leaders: Who determines community membership, and who controls the list? What about non-status Indians—would they receive benefits too? What will it cost to maintain remote reserves, and is that justified? What about the underlying title of reserve land? And what about the resources on traditional lands? Who makes decisions about, and benefits from, resource development?

These are all legitimate, but difficult, questions, and I am by no means suggesting that there are easy answers to them. But in trying to envision a healthy, just and sustainable future for Indigenous peoples in Canada, it may be worthwhile to look to the past, to imagine how things could have turned out had Section 91(24) of the Constitution Act of 1867—the "head of power" which assigned the federal Crown jurisdiction over "Indians, and lands reserved for Indians" and under which the Indian Act was promulgated—been used, not to assimilate Indigenous peoples into "mainstream" society, but to implement historic treaties in a manner consistent with their spirit and (professed) intent.

Yes, treaties. Though not discussed in Teillet's piece, treaties are critically important when considering the direction in which we as a society wish to go. The treaties entered into between Indigenous peoples and the Crown between the 18th century and the early 20th century, collectively referred to as the "historic treaties," cover approximately half of Canada's land mass. Though not as detailed and explicit as the subsequent modern treaties Canada would enter into in the second half of the 20th century, they nonetheless provided a legitimate basis for moving forward with parallel systems of governance, a shared desire that resource development not happen at the expense of traditional pursuits, and protection from encroachment by settlers. Unfortunately, instead of using the powers granted it under 91(24) in a manner consistent with the spirit of the historic treaties, the newly formed Canada used them to both segregate and assimilate Indigenous peoples—an attempt at cultural genocide, some would argue.
How would things have turned out had 91(24) been employed in an honourable, altruistic manner? To start with, 91(24) could have been used by the federal Crown to enact legislation for each treaty group providing for a system of governance chosen by that group. Prior to 1876, "Grand Chiefs" were rare in most of Canada, where governance structures could be fluid and temporary depending on the circumstances. But there is no reason why the many Mi'kmaw,

Anishnaabe, Cree, Dene and other nations that entered into historic treaties could not have appointed from among their leaders a Grand Chief to represent them in dealings with the Crown, even if only on an ad hoc basis. Rather than having over 600 individual Chiefs and their bands dealing directly with the federal Crown, as is the case today, Indigenous peoples could have been left to govern themselves as they wished, relying on their Ogichidaa to represent their interests to the outside world, and mediate a consensus-driven decision-making process within.

Reserves were promised by, and sometimes enumerated in, the historic treaties, but they were given legal effect and standing under the Indian Act. However, as it stands, the underlying title of "lands reserved for Indians" remains with the federal Crown. There has been a great deal of debate in recent decades as to the merits of this arrangement: on the one hand, retaining title collectively in the hands of the Crown provides some assurance that the land base will not erode; on the other hand, not owning the property on which people build their houses carries risk and acts as a disincentive to improve those dwellings. It is doubtful that Indigenous signatories to historic treaties would have opted for a "fee simple" system of private landholdings, but surely a traditionally-based landholding system that protected the interests of both the individuals and the collective could have been codified in the legislation applicable to each treaty group?

Thus established, those communities and their populations would have adapted to the climate and economy, as they always had. All First Nation communities, even the most remote and distant from markets, were at one time "sustainable," in that their population levels and infrastructure were consistent with the ability of people to live off the land, and later the costs associated with importing supplementary foodstuffs and other materials. In a free market for goods and services, the gap between costs vs. benefit would discourage many (but not all) people from living there, allowing the community to settle in at a sustainable population level consistent with its location. This would likely have been the case had the federal Crown not intervened in the economies of individual communities and instead allowed the broader treaty group to develop its collective economy in a manner consistent with its values, and within the limits of socioeconomic and environmental conditions.

And yet the treaty groups and reserve communities would not have been completely on their own: Treaty payments, which are paid to individual "status" Indians as a result of the Indian Act and the system of registration it spawned, could have been paid instead to the collective treaty group, or at least to individual bands, to support collective endeavours and social security. With the advent of the welfare state after the Second World War funding would similarly have been provided to support the unemployed, universal health care, housing subsidies, etc. but in the form of block funding to the Treaty group, rather than individual bands, as is the case today. One would have hoped as well that the federal and provincial governments could have devised a resource co-management and revenue-sharing arrangement with Indigenous peoples to provide for "own source" revenues, but given the colonialist mindset prevalent at the time, it's no surprise they did not.

Clearly the tools, and opportunity, existed, 140 years ago to implement the treaties in a manner that would have allowed First Nations to succeed in the modern world just around the corner. Instead, those tools were used in the decades that followed to assimilate Indigenous peoples into mainstream Canada. While that attempt ultimately failed, it left First Nations isolated, and devastated.

Is it possible to turn back the clock, and rebuild the Crown-Indigenous relationship as it should have been, updated for the 21st century? Many would argue no: that we—federal, provincial and Indigenous governments, and Canadian citizens—are too far entrenched in our vested interests and parochial viewpoints to even think about doing things differently. That we're too stuck in our ways to think outside the collective box that has held back progress for 150 years to devise innovative solutions, to make difficult decisions, and to work hard to see them through. But is it not incumbent on all of us to make a sincere and meaningful effort to think and act outside that box, if only to save the lives of children whose suicide or murder would otherwise continue to mount as regrettable statistics? The answer can only be yes.

Eliminating colonialism and its continued harm to Indigenous peoples can be achieved by realizing what we as a society could have become had the historic treaties been implemented in an honourable and equitable manner. It starts with undertaking an assessment of the sustainability of all First Nation communities through comprehensive and holistic community planning, putting all options and scenarios on the table—including access to markets for goods and services, self-government, climate change, treaty and tribal council governance, and the option of shared urban reserves—in a realistic manner. It would mean the federal and provincial governments engaging with treaty groups and tribal councils in discussions around strategic planning in the context of self-government, and involvement in resource co-management and resource revenue sharing. Above all, it would mean shifting the Crown-Indigenous relationship away from government-to-First Nation, to government-to-treaty group.

Granted some Chiefs might fear the loss of influence under such a scenario and balk at this process, but there is no reason their communities' interests, uniqueness and local sovereignty cannot be protected in the process. Similarly, the federal and some provincial governments may have concerns about how this may impact their bottom-line, not to mention their monopoly over resource management and associated revenues. Yet both levels of government are already moving in the direction of greater involvement of Indigenous peoples in resource management and revenue sharing. When viewed as an investment in sustainability and stability, not to mention basic human rights within their borders, I'm confident all those with a vested interest can be brought around. Early gains can be achieved by encouraging treaty and tribal groupings to come forward with sustainability and self-government proposals, but it will be decades before Canada can say that all its Indigenous communities are on a sustainable footing.
Treaties were intended to be the foundation upon which the Crown-Indigenous relationship would be built; the rights they provide for are legally binding, so they'll always be with us in one form or another ─ a constant reminder of the promise of two nations living side-by-side in peace and prosperity, first envisioned in the Royal Proclamation of 1763. Canada's success at

reconciliation with Indigenous peoples will ultimately be judged by our collective ability to realize that promise, and the potential it holds. By all means let the dialogue continue, but we as treaty peoples have an obligation to act immediately, wherever and whenever we can, before more harm is done. As I have argued above, the first step is understanding where we've come from (or could have come from), so that we may fully grasp the possibilities that lay ahead. Failing that, the treaties will instead remain a constant reminder of our collective failure.

Harcèlement au travail : bienvenue dans l'ère de la tolérance zéro
La victime « raisonnable » a un seuil de tolérance réduit et les employeurs doivent en prendre bonne note, dit cette avocate...
Droit Inc
Marianne St-Pierre Plamondon
26 octobre 2017

Les événements des derniers jours nous rappellent la nécessité de s'assurer que nos milieux de travail demeurent exempts de harcèlement, sous quelque forme que ce soit.

Par leur intensité, les récents événements marquent un tournant majeur en diminuant le seuil de tolérance de notre société quant aux comportements inadéquats en milieu de travail. Désormais, tous sont conscientisés à l'importance de tracer une ligne claire entre ce qui est acceptable et ce qui ne l'est pas dans nos milieux de travail.

Le premier élément de la définition du harcèlement est la conduite vexatoire. Celle-ci est, en droit du travail, évaluée selon le critère de ce qui est acceptable pour la victime raisonnable, ce qui revient à déterminer si une personne raisonnable, diligente et prudente placée dans la même situation estimerait faire l'objet d'une conduite correcte, ou non, en milieu de travail.

Or, la tendance actuelle veut que la victime raisonnable ait un seuil de tolérance réduit. C'est ainsi que les comportements limites autrefois tolérés, tels que des commentaires sur l'apparence physique, des avances déplacées, des commentaires à caractère sexuel ou encore tous types de contacts ou de rapprochements physiques, n'ont dorénavant plus leur place dans nos milieux de travail.

Au-delà des questions de responsabilité individuelle soulevées par les événements des derniers jours, les employeurs sont appelés à élever leur degré de vigilance et à s'assurer de mettre en place des mécanismes structurés de tolérance zéro.

Il est vrai que la Loi sur les normes du travail comporte déjà l'obligation pour l'employeur de prévenir le harcèlement et de le faire cesser, lorsque porté à sa connaissance. Cette exigence s'est d'ailleurs traduite chez plusieurs employeurs par l'instauration de bonnes pratiques en ressources humaines, dont l'implantation d'une politique sur le harcèlement encourageant la dénonciation des comportements inadéquats et prévoyant la tenue d'une enquête équitable et sérieuse pour faire la lumière sur les faits allégués.

Cependant, force est de constater que les mesures de prévention seront vaines tant et aussi longtemps que les victimes ne se sentiront pas suffisamment confortables pour dénoncer, sans crainte de représailles. Certes, la Loi sur les normes du travail prévoit, en vertu de son article 122, un mécanisme de protection contre les représailles pour celui ou celle qui porte plainte en créant une présomption contre l'employeur, mais il semble que cette protection n'a pas suffi à établir un climat de confiance suffisamment propice à la dénonciation.

Dans ce contexte, les employeurs et notre législateur devraient investir leurs énergies à mettre en place des mesures propres à assurer un processus d'enquête équitable et impartial favorisant la confiance des victimes. En confiant ce mandat à un professionnel impartial, l'employeur maximise ses chances d'obtenir un portrait juste de la situation, lui permettant ainsi d'agir rapidement et efficacement pour faire cesser le harcèlement, en plus d'envoyer le message clair qu'il ne tolérera pas de comportements déviants au sein de son organisation. De ce fait, il limite le risque de voir sa réputation entachée un événement de harcèlement au travail et démontre qu'il prend ces situations très au sérieux.

L'Ontario a récemment bonifié sa loi pour obliger la tenue d'une enquête sur les incidents et les plaintes de harcèlement au travail, ce qui n'est pas formellement requis par la loi québécoise. Pourtant, et c'est démontré, cette pratique RH, déjà adoptée par plusieurs employeurs, demeure la plus efficace pour contrer le phénomène. Puisque le législateur québécois a annoncé qu'il est actuellement à réviser la Loi sur les normes du travail, ne serait-il pas opportun de saisir l'occasion et de bonifier, à notre tour, les mécanismes de dénonciation en assurant aux victimes une enquête structurée, équitable et impartiale menée par des professionnels compétents? En suivant cette voie, il travaillerait dans l'intérêt du public et assurerait la protection du public.

Les avocats forcés de promouvoir des « valeurs » ?
Des avocats seraient obligés de promouvoir l'équité, la diversité et l'inclusion pour avoir droit de pratique, ce qui provoque un tollé
Droit Inc
Jean-François Parent
26 octobre 2017

Le barreau ontarien veut imposer l'adhésion à une déclaration de principes visant à ce que les avocats s'engagent à mettre ces valeurs en pratique.

Les critiques fusent, alors que certains estiment que le Barreau du Haut-Canada veut jouer les polices de la pensée.
Parce que « tous les avocats et les parajuristes jouent un rôle crucial dans l'accélération du changement de culture », le barreau ontarien veut en effet engager ses assujettis dans un projet de lutte au racisme et à la discrimination.

Obligation

Cette obligation de signer une déclaration de principes fait partie des recommandations émises par un groupe de travail sur les personnes « racisées » dans le milieu juridique, piloté par le Barreau.

« Dans le cadre de cette stratégie, vous êtes tenus de créer et de respecter une déclaration de principes individuelle qui reconnaît votre obligation de promouvoir l'égalité, la diversité et l'inclusion en général, ainsi que dans votre comportement envers vos collègues, vos employés, vos clients et le public », affirme le barreau ontarien.

Tous les avocats et les parajuristes devront signer cette déclaration cette année. Aucune sanction disciplinaire n'est prévue pour l'instant, mais le BHC dit ne pas écarter cette voie pour ceux qui refuseraient d'emboîter le pas et ne s'engageraient pas à respecter l'obligation dans les prochaines années.

Contraire aux valeurs

En entrevue, le plaideur torontois Joseph Groia demande au BHC de rendre l'adhésion à la déclaration volontaire. « Plusieurs avocats disent ne pas pouvoir en toute conscience adhérer à des principes qui vont à l'encontre de leurs valeurs ou de leur foi », dit-il à Droit-Inc.

Il cite la Cour suprême, selon laquelle des contraintes imposées au discours public sont la marque d'un régime totalitaire.

L'associé principal et fondateur du cabinet Groia et Cie a déposé une requête pour demander au BHC de convertir l'obligation en adhésion volontaire.

Joseph Groia n'en est pas à son premier pugilat avec son ordre : l'ex-avocat de la tête dirigeante de Bre-X ferraille maintenant devant la Cour suprême pour faire casser un verdict d'inconduite professionnelle imposé par le conseil de discipline du BHC.

Alors qu'il défendait feu John Felderhof, l'un des architectes de la fraude aurifère de Bre-X, Joseph Groia avait rudoyé verbalement les enquêteurs, ce qui lui avait valu une radiation provisoire de 1 mois et une amende de 200 000 dollars.

Quelle autorité?

Lorsqu'on lui demande en quoi le fait de s'engager à respecter ces principes pose problème, alors qu'ils sont déjà enchâssés dans les règles encadrant le marché du travail par exemple, il riposte : « La question fondamentale, c'est de se demander si le Barreau a l'autorité de forcer les avocats et les parajuristes à promouvoir ces principes », avec lesquels certains ne sont pas d'accord par ailleurs.

« Un régulateur qui m'impose quoi dire et quoi penser, c’est inacceptable, poursuit Joseph Groia. Aucune loi, aucun règlement nulle part au Canada n'oblige personne à promouvoir les droits de la personne. »

Si on veut lutter contre la discrimination et le racisme, ce n'est pas la bonne façon. « On n'impose pas des principes. C'est ce que le gouvernement Couillard semble tenter de faire au Québec avec le projet de loi 62 (sur les signes religieux dans l'espace public), et voyez ce qui arrive. On veut faire la même chose (en Ontario) avec cette obligation », dit-il.
Au nom de la diversité, justement, « la LSUC devrait laisser le choix aux avocats ».

Des obligations existantes

L'un des auteurs de la déclaration, l'avocat Raj Anand, affirme quant à lui au Canadian Lawyer que la nouvelle obligation reflète ce qui est inscrit au code de conduite des avocats, qui impose une responsabilité professionnelle de défense de l'égalité.

À l'Association du barreau ontarien, on est d'avis qu'il est normal que les avocats engagés pour défendre les principes d'équité, de diversité et d'inclusion aient l'obligation de mettre ces principes en pratique, rapporte le Canadian Lawyer.

Ironie

La requête de Groia contre la déclaration de principes sera entendue le même jour que celui où la Cour suprême entendra celle de l'Université Western Trinity, de la Colombie-Britannique, une faculté de droit de confession chrétienne dont les diplômés se voient refuser le titre d'avocat par le barreau de la C.-B.

Les diplômés de l'UWT doivent signer une profession de foi chrétienne pour obtenir leur diplôme de droit, ce qui leur barre l'accès au barreau non seulement en C.-B., mais dans plusieurs provinces. « Il est ironique qu'on veuille interdire à des avocats de pratiquer parce qu'ils affirment leurs croyances religieuses, alors qu'on voudrait forcer d'autres avocats à affirmer leurs croyances dans des principes », conclut Joseph Groia.

Un changement de nom plus conforme aux nouvelles valeurs ?

Par ailleurs, le Barreau du Haut-Canada songe à changer de nom. La décision de bannir le terme « Haut-Canada » a été prise par 38 voix contre 11 lors du conseil qui s’est tenu le 28 septembre. Le nom serait archaïque et porteur du mauvais message, selon Julian Falconer, président du groupe qui pilote ce changement. « Ce n’est pas un secret que le terme « Haut-Canada » comporte une connotation négative pour de nombreux peuples autochtones. »

Law society's inflated view of lawyers' importance leads it to compel speech
The legal profession fosters the myth that lawyers comprise a moral vanguard within society, with uniquely sacred duties
National Post
Jonathan Kay
October 26, 2017

It's been more than a month since the Law Society of Upper Canada (Ontario' bar association) told the province's lawyers that they would have to create "an individual Statement of Principles that acknowledges [their] obligation to promote equality, diversity and inclusion"—both "generally" (i.e., in their everyday lives), and in their "behaviour towards colleagues, employees, clients and the public."

Some Ontario lawyers have already declared their intention to ignore the new rule—a gesture I applaud. Whether or not Ontario's lawyers think their bar association should be acting as a shadow human rights tribunal, the new requirement makes no sense—because it serves as an enforcement mechanism for a non-existent mandate: There is nothing in existing law society rules that requires lawyers to become goodwill ambassadors for some arbitrary grab bag of civic virtues.

Nor should there be. Why "diversity" and not, say, "patriotism," "freedom," or "moral hygiene"? Not so many decades ago, bar associations in the United States tried to make lawyers write out affirmations that they weren't communists. Even many anti-communists were properly disgusted by this. Compelled speech always feels inherently totalitarian—even when the speech that's being compelled reflects values you sincerely believe.

The least that could be said for the old Cold War McCarthyists was that they were sincere in their fear of communism. But in the current climate, one senses the law society is far more interested in signalling the enlightenment of its own staff. The whole exercise seems like a sort of condescending virtue-signalling kabuki. Yes, the vast majority of Ontario lawyers will follow the new edict—because the law society has the bully power to take away a lawyer's ability to feed his or her family. But these lawyers will do so in a spirit of cynical detachment, copying out "model statements" from the Internet the same way casual Catholics mumble out Latin prayers.

It's tempting to write off the whole thing as just another exercise in political correctness. But it's not. Since the days of the Renaissance guilds, the legal profession has always had a puffed up view of itself. It's not just the robes, the wigs, and the gratuitous Latin jargon. It's also the myth that lawyers comprise a moral vanguard within society, with sacred duties that extend beyond the daily humdrum of litigating divorces and drafting contracts.

I should specify that it's the pompous atmospherics and conceits of the legal industry I dislike, not the lawyers themselves—who usually are no more and no less odious than all the rest of us.

For a few years during the late 1990s, I worked as a lawyer in New York—helping Park Avenue clients structure their corporate holdings and transactions. My firm's clients were Christian, Jewish, Arab, black, white, gay, straight. Never once did any of them evince the slightest interest in my ideas about diversity or inclusion. I suspect they would not have cared a whit if I were a full-on bigot, provided I successfully diverted their domestic income streams into low-tax jurisdictions. They didn't want to know about my inner life, nor I theirs. I was a fee-for-service worker plying my trade for a salary, no different from a cook, a tailor or a journalist.

When a relative of mine remodelled her basement a few years ago, she hired a contractor who, a week in, began discussing bizarre theories about 9/11 and the Jews. Not her cup of tea, but the contractor knew his drywall, and finished up ahead of schedule. So no one called the Ontario College of Trades to complain about his worrying failure to support "diversity and inclusion." Much in the same way that I don't interrogate my locksmith about his views on the niqab, or check to ensure that my local funeral director doesn't put his kids in Little Hiawatha costumes on Halloween. That's not how things work in a free society. You don't threaten someone's livelihood because he doesn't wear the right ribbon or use the right hashtags.

Of course, lawyers often are put in positions of trust. They might have to manage funds placed in escrow. Or work at close quarters with emotionally vulnerable mothers who have been separated from their children by social workers. But stealing money from a client (of any race), or going Weinstein on a despondent mother, is illegal behaviour, full stop. You don't need take-home essays to teach people that.

It is in the classroom where the professional hubris first takes root. The Ivy League law school I attended was so focused on the esoteric wonders of my then-profession, in fact, that my professors often didn't bother teaching us much actual law. Instead, we took courses like "Critical Race Theory: A Legal Perspective" and "Situating the Constitution in Philosophical Discourse." My Civil Procedure class consisted almost entirely of a star pro bono litigator telling stories of how he'd forced the U.S. government to admit more refugees. One of my friends wrote a term paper on baseball as criminal-law metaphor. By the time I graduated, I knew less about law than your average Good Wife addict. And I had to spend months cramming at a commercial summer-school course before I could pass the New York State bar.

First-year law students are encouraged to believe they'll spend their careers protecting the indigent from capitalism and inventing novel legal arguments to protect minorities from discrimination. At Yale, we spent a lot of time in loving exegesis of iconic civil-rights cases, such as Brown v. Board of Education, which served to cast the profession in heroic terms. Thus did we internalize professional archetypes that bore almost no relation to the workaday life of a lawyer—the equivalent of a nursing school where students dedicate their attention to the diaries of Florence Nightingale. A week ago, I attended my 20th law school reunion. There were some professors and judges in the mix. But just about everyone else in my class has become some kind of corporate, government or law-firm functionary or business partner. (Which is fine, by the way.)

All of which is to say: the legal profession's age-old tradition of collective hubris isn't new. What is new is the form this hubris now takes—thanks to a breed of hyper-progressive social activists who feel justified in co-opting the prerogatives of a regulatory monopoly as a means to force white-collar workers to lip-sync doctrinaire liberalism. It's creepy. It's coercive. It's presumably unconstitutional. And it's an embarrassment to the law society.

It also invites the question: Why is it that lawyers act in this way—and not, say, accountants or engineers?

My own theory is that it comes back to the necessarily cynical nature of legal practice. The rules of legal ethics generally don't allow lawyers to tell bald-faced lies. But the requirement of "zealous" representation within our adversarial legal model serves to encourage lawyers to shade so many truths, in so many ways, that the final effect usually is indistinct from plain lying. Indeed, any skilled lawyer can argue both sides of a case with equal vigour, a habit of mind that understandably comes off to non-lawyers as moral nihilism. In this climate of distrust, lawyers' high-flown affectations comprise a sort of coping mechanism.

In layman's terms, it's a bunch of people who act like they are all better than us. No doubt, there's a fancy Latin expression for this. But since my legal days are behind me, ordinary English will serve to make my point just fine.

Cour suprême: les juges n'auront pas à être bilingues!
Une majorité de libéraux a voté contre un projet de loi visant à ajouter ce critère à la nomination des juges...
Radio-Canada
26 octobre 2017

Les futurs juges de la Cour suprême n'auront pas l'obligation d'être bilingues. Une majorité de libéraux a voté contre un projet de loi visant à ajouter ce critère à la nomination des juges. Ils avaient pourtant appuyé un projet de loi similaire lorsqu'ils étaient dans l'opposition.

Le projet de loi C-203 du néo-démocrate François Choquette a été défait en deuxième lecture par 224 députés, alors que 65 ont voté pour, mercredi soir, dont des libéraux et des conservateurs. « C'est une déception, bien entendu », a confié le député à sa sortie de la Chambre des communes. « Je pensais que mes collègues libéraux qui ont voté en faveur du projet de loi et qui croient au bilinguisme des juges à la Cour suprême ... allaient travailler très fort pour influencer les réticences qu'il y avait. »

Dix-sept députés libéraux d'arrière-ban ont voté avec le Nouveau Parti démocratique (NPD) et contre leur gouvernement.

Neuf députés conservateurs ont également appuyé le projet de loi qui a été rejeté par le reste du caucus. « Les conservateurs ont toujours voté contre ce projet de loi là et j'ai vu une ouverture », a dit François Choquette.

« On veut défendre le fait français, alors c'était un vote symbolique », a expliqué le conservateur Jacques Gourde après le vote.

Un projet de loi « mal rédigé »

Le projet de loi visait à rendre obligatoire la compréhension du français et de l'anglais sans l'aide d'un interprète comme condition pour la nomination de juges à la Cour suprême.

Les libéraux qui se sont opposés estiment que l'ajout de ce critère nécessiterait un amendement constitutionnel plutôt qu'une simple modification à la Loi sur la Cour suprême.

« C'est un projet de loi qui est mal rédigé dans le sens que ça ne tient pas compte des questions constitutionnelles » a dit le député libéral David Lametti.

Il croit également que le gouvernement doit se garder une marge de manoeuvre pour pouvoir nommer au besoin un juge qui aurait une expertise dans un domaine du droit particulier ou un juge autochtone qui ne maîtriserait pas nécessairement le français.

« Cet argument constitutionnel ne tient pas la route », s'est exclamé le libéral Nicolas di Iorio, qui a voté pour le projet de loi.

« Le gouvernement a décidé d'émettre des directives voulant que les juges de la Cour suprême soient bilingues, a-t-il poursuivi. Alors, si le dernier à être nommé l'a été en vertu de cette directive-là, pourquoi n'a-t-on pas contesté sa nomination? »

Retour à la charge

Le gouvernement Trudeau s'est déjà engagé à nommer des juges bilingues au plus haut tribunal du pays, mais il n'a pas l'obligation de le faire en vertu de la loi.

Le néo-démocrate François Choquette croit tout simplement que les libéraux utilisent l'argument constitutionnel comme excuse. « Si vraiment les libéraux croyaient à ça, pourquoi est-ce qu'ils n'ont pas fait un renvoi à la Cour suprême sur ce dossier-là? C'est qu'ils ne veulent pas aller de l'avant pour le mettre dans un cadre législatif. »

Il songe déjà à une nouvelle façon de revenir à la charge en proposant un amendement à la Loi sur les langues officielles. Cet amendement éliminerait l'exemption accordée aux juges de la Cour suprême pour la compréhension du français et de l'anglais sans interprète.

Bilinguisme des juges : des avocats mécontents
L'annonce du rejet du projet de loi par le Parti libéral sur le bilinguisme des juges à la Cour suprême suscite la grogne chez les avocats
Droit Inc
Julien Vailles
27 octobre 2017

En effet, une majorité de libéraux fédéraux se sont prononcés en défaveur du projet de loi C-203 du député néo-démocrate François Choquette. Ce projet de loi visait à obliger les magistrats de la Cour suprême du Canada à être bilingues.

Cette décision des députés libéraux est d'autant plus surprenante que ceux-ci avaient au contraire vanté les mérites d'un tel projet de loi, alors qu'ils étaient dans l'opposition.

Rappelons que la juge en chef Beverley McLachlin a annoncé au printemps dernier qu'elle prendrait sa retraite en décembre. Il faut donc lui trouver un ou une remplaçante. Or, lors du départ de l'Honorable Thomas Cromwell, le Premier ministre Justin Trudeau avait initialement annoncé son intention de choisir un candidat autochtone. Il a finalement opté pour le juge Malcolm Rowe.

Il semble que cette idée soit demeurée : les députés libéraux justifient leur décision de rejeter le projet de loi en soulevant qu'il serait difficile de la faire respecter si on veut choisir un juge autochtone très spécialisé. Ils pointent aussi la « mauvaise rédaction » du projet de loi.

La tradition veut que la Cour représente adéquatement l'ensemble du Canada. Comme la Très Honorable juge McLachlin vient des provinces de l'Ouest, il faudrait logiquement un juge de l'Ouest pour la remplacer. On comprend donc qu'il serait difficile de nommer un juge autochtone de l'Ouest qui parle français…

Une « trahison » pour le Québec

« Je suis déçu par cette décision parce qu'elle montre la fragilité du français au Canada », croit Me Julius Grey, associé fondateur de Grey Casgrain. « Si on imposait l'obligation de devenir bilingue dans l'espace d'un an, on pourrait en discuter, mais le simple retrait de la proposition constitue une gifle pour ceux (dont je suis) pour qui le français est fondamental. Il ne peut y avoir de Canada sans le français et sans l'égalité des deux langues », martèle-t-il.

Me Pierre-Marc Boyer, qui est connu pour se porter à la défense du français, va plus loin. Questionné par Droit-inc, il voit dans cette décision du gouvernement une « trahison » du Québec. « Quelle hypocrisie! Après la volte-face du Premier ministre sur l'environnement et sur la réforme électorale, c'est la troisième fois qu'il abandonne une promesse importante », s'exclame l'avocat.

« Évidemment, une telle décision ne nous empêche pas de dormir, concède-t-il. Mais quel message est-ce que ça envoie quant à la protection du français? »

Me Boyer conclut en disant qu'il est impossible qu'un juge unilingue francophone soit nommé à ce poste.

Néanmoins, cet avis ne fait pas l'unanimité. Un lecteur de Droit-inc rappelle que les traducteurs de la Cour suprême sont parmi les meilleurs au monde. En requérant un bilinguisme absolu, on élimine des candidats excellents à la simple fin de sauvegarder les apparences, écrit-il. Ce devrait donc être un facteur, mais pas une nécessité, conclut-il.

Department of Justice Canada
Oct 27, 2017

OTTAWA, Oct. 27, 2017 /CNW/ - The Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, remains committed to appointing judges of the highest calibre who are representative of the diversity of Canadian society. That commitment is demonstrated by the Minister's new Judicial Advisory Committee process for assessing applicants to the federal judiciary.

Today, Minister Wilson-Raybould is proud to announce appointments to the Judicial Advisory Committee (JAC) for the Tax Court of Canada. The JAC is composed of five members from across Canada with expertise in taxation.

The committee announced today adds to the existing complement of JACs. Fifteen JACs were previously reconstituted under our Government's new, merit-based assessment process. These JACs have started to provide the Minister of Justice with lists of highly recommended and recommended candidates. Key changes to the assessment process included:

- committees that fully reflect the diversity of Canadian society;
- revised committee mandates to increase the independence of their work;
- an open selection process for the public representatives on each committee – a measure which aims to ensure that all Canadians are properly represented in the appointment process; and
- online training on diversity and unconscious bias for all JAC members.

JACs are independent bodies mandated to provide non-binding, merit-based recommendations to the Minister of Justice on federal judicial appointments. All individuals seeking appointment to the bench must apply under the new judicial appointment process introduced in October 2016.

Quote

"I am grateful to these five Canadians for volunteering their time and energies to the Judicial Advisory Committee for the Tax Court of Canada. The newly announced committee includes tax practitioners, renowned academics, and a justice of the Tax Court of Canada.

Members of the Committee are tasked with ensuring that only the most meritorious candidates are recommended for appointment to the Tax Court of Canada. As such, their work will have a tremendous impact for the Court, for litigants, and ultimately for the Canadian taxpayer."
The Honourable Jody Wilson-Raybould, P.C., Q.C., M.P.
Minister of Justice and Attorney General of Canada

Quick Facts

There are 17 Judicial Advisory Committees (JACs) across Canada, with each province and territory represented.
The Judicial Advisory Committee for the Tax Court of Canada is unique. Unlike the other 16 JACs across Canada, it is composed of five members with expertise in taxation. (The other 16 JACs have seven members each, with members representing the judiciary, the bar, and the general public.)
Committee members are appointed by the federal government by Order in Council for a two-year term.
For the first time, JAC members representing the general public were selected through an open application process. The selection criteria included commitment to public service, knowledge of the judicial system and/or public decision-making processes, subject matter expertise, geographic representation, language abilities, gender and diversity.
The JACs have been given a revised mandate, which will serve to strengthen their independence.
All members receive online training on unconscious bias and online training on the importance of diversity in the judiciary by the Chief Justice of Canada, the Right Honourable Beverley McLachlin, P.C.
The Office of the Commissioner for Federal Judicial Affairs, established in 1978, provides administrative support to the Judicial Advisory Committees. The role of the Commissioner's Office is to safeguard the independence of the judiciary and assess the qualification of lawyers and provincial court judges applying for federal judicial appointment.
Federal judicial appointments are made by the Governor in Council, acting on the recommendations of the Minister of Justice.

Can you really just ignore the constitution if you feel like it? Canada's notwithstanding clause explained

Naturally, much of the free world thinks it's insane to write a constitution that can be violated at will — but not Canada

National Post
Tristin Hopper
October 27, 2017

It's been a big week for Canada's famed notwithstanding clause. Quebec is hinting that it might use the clause to protect their new anti-niqab law from a federal court challenge.

And in Saskatchewan's speech from the throne, outgoing premier Brad Wall again promised to use the clause to override a court order mandating that the provincial government stop paying for non-Catholics to go to Catholic school.

"We will introduce legislation that will protect the right to school choice by invoking the notwithstanding clause of the Canadian Charter of Rights and Freedoms," it read.

The notwithstanding clause (section 33 of the Constitution Act) is exactly as strange as it sounds: It's a magical section of the Canadian constitution that allows provincial governments to simply ignore a key section of the constitution if they don't like it.

The only rule is that the governments have to first announce that they're doing it. Specifically, they have to stand up in their legislature and announce that they're going to pass an act "notwithstanding" whatever it says in the constitution.

What's most surprising about the clause is that it allows provinces to override what are arguably the most important parts of the constitution: The "fundamental freedoms" and "legal rights" of Canadian citizens.

Freedom of religion, freedom of association, freedom of the press, protections from arbitrary imprisonment and search, "the right to life, liberty and security of the person" — all of these can technically be ignored by a provincial government provided they announce it first.

To be sure, the Constitution does insert a time limit on how long a province can get away with this. "A declaration … shall cease to have effect five years after it comes into force," reads the clause.

However, this is easily overridden by the fact that the province can simply "re-enact" their constitution-flouting declaration.

Naturally, other democratic countries don't this. As our own Library of Parliament notes in a summary, the idea of building an escape clause into a human rights code "appears to be a uniquely Canadian development."

The Constitution of Japan specifically states that the document overrides every other "law, ordinance, imperial rescript or other act of government." It's a similar deal in South Africa, where the constitution is held as "supreme" and any other contradictory law is declared "invalid."

The U.S. Constitution, which is taken particularly seriously by its adherents, definitively states that it "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby."

As critics have noted, if the U.S. had a notwithstanding clause, much of the Civil Rights movement might never have happened. Southern states could have simply ignored desegregation rulings such as Brown v. Board of Education.

So the question is: Why did Canada make such a fuss about writing a constitution only to insert a measure allowing any Joe or Jane Premier to ignore it?

The answer, like most weird Canadian legal things, is compromise.

The government of Pierre Trudeau didn't want to repatriate a constitution without broad provincial support, and the only way they could get Western Canada on board was by holding their nose and writing in the clause.

As one Liberal MP said later, the deal forever stained the document with "shenanigans" and "skulduggery."

At the time, skeptics were worried that an activist Supreme Court could suddenly use the new constitution to push them around.

Some future Supreme Court, for instance, could rule that a mandatory vegan breakfast was a fundamental human right — and the likes of Alberta and Saskatchewan wanted an official "safety valve" by which to snub such rulings.

Or take the recent example of Quebec.

A government ban on veiled women using libraries and public buses would likely be slapped down by the Supreme Court of Canada as a violation of freedom of religion.

So, Quebec can legally just decide to ignore any court ruling. "Quebec has the right to legislate on issues which belong to it," the province's justice minister Stéphanie Vallée said this week.

The polite term for this is “legislative override”; the idea that legislatures should always be able to trump a judge.

And while this idea is seen as insane in a lot of the free world, it’s pretty common in Canada.

The Saskatchewan Humans Rights Code has a section entitled “act takes precedence unless expressly excluded.” The section states, in essence, that the Code is nominally the supreme law of the land, unless a government says it isn’t.

Similarly, the Alberta Bill of Rights guarantees all kinds of freedoms … unless Edmonton feels like passing a bill that “operates notwithstanding the Alberta Bill of Rights.”

The disconcerting result of the notwithstanding clause is that Canada doesn’t really have any “guaranteed” rights. Americans can talk about the inviolability of the First Amendment, the French can talk about the sacred doctrine of “liberté, égalité, fraternité,” but Canadians ultimately remain free solely on the discretion of their provincial legislatures.

In the end, the only real check against abuse of the clause is taboo. Technically, there’s nothing really stopping a province from going rogue and enacting a crackdown of tyrannous notwithstanding laws.

The only rule is that they have to tell everyone they’re doing it. And as the constitution’s framers said at the time, it usually looks bad when a Canadian premier has to stand up and tell their people why they need to violate some “fundamental” constitutional freedoms.

Canadians disagree on much, but in polls, support for the Charter of Rights and Freedoms consistently ranks pretty high. Despite the awesome potential of the notwithstanding clause, from the beginning proponents believed that simple Canadian reserve would prevent it from going too far.

Gérard La Forest was a Supreme Court of Canada justice, and at the time of the constitution’s 1982 patriation even he did not seem worried about a nation of legislatures that could simply ignore any decision he handed down from the bench.

“My guess is that this provision will rarely be used,” he said. “The political unpopularity of making declarations contrary to the Charter will militate against this.”

National Prosecution Awards for Top Prosecutors
PRESS RELEASE PR Newswire
October 27, 2017
TORONTO, Oct. 27, 2017 /CNW/ - The outstanding accomplishments of Canadian prosecutors were recognized by the Federal-Provincial-Territorial Heads of Prosecutions Committee at an

awards ceremony held last night. The award program, instituted in 2006, honours professional excellence, exemplary service, and outstanding achievements.

The following prosecutors were chosen for their contributions to advancing and promoting the role of prosecutors within the Canadian criminal justice system:

The Commitment to Justice Award 2017 was awarded to two prosecutors: Ms. Maureen Pecknold, Assistant Crown Attorney with the Ministry of the Attorney General of Ontario and Acting Deputy Director of Reserves in the Canadian Military Prosecution Service, and Mr. Ashley Finlayson, Q.C., prosecutor and Organized Crime Coordinator with the Specialized Prosecutions Branch of Alberta Justice.

Throughout her career as an Assistant Crown Attorney with the Ministry of the Attorney General of Ontario and lately as Acting Deputy Director of Reserves in the Canadian Military Prosecution Service, Ms. Pecknold has distinguished herself in countless ways, handling high-profile cases and mentoring less experienced prosecutors. Recently, she completed the Canadian Forces Joint Command and Staff Programme while retaining a full caseload of major cases, volunteering and participating in high level competitive sporting events.

Mr. Finlayson was recognized for his professional excellence, distinguished service and outstanding achievements as a prosecutor. He has demonstrated tremendous efforts and dedication in prosecuting high profile cases that generated considerable media interest and in subsequently sharing his wide-ranging experience with law enforcement professionals at various learning events and conferences.

The Courage and Perseverance Award 2017 was awarded to Mr. Matthew Ferguson and Ms. Céline Bilodeau, prosecutors with Quebec's Directeur des poursuites criminelles et pénales for their professional excellence and outstanding tenacity. Their determination to complete the longest jury trial in Canadian history, which required them to put their personal and family lives on hold and give up well-deserved holidays, won the admiration of all.

The Humanitarian Award 2017 was awarded to Mr. Hafeez S. Amarshi, Crown Counsel with the Ontario Regional Office, Public Prosecution Service of Canada, for his high level of dedication to the ideals of justice and leadership in inspiring excellence among colleagues. This award recognizes his professional excellence and exemplary service in the legal profession and his outstanding contributions in the charitable and community sectors, both locally and internationally.

The FPT Heads of Prosecutions Committee brings together the leaders of Canada's prosecution services to promote assistance and cooperation on operational issues relating to criminal prosecutions. The Committee also provides the prosecution perspective to Federal-Provincial-Territorial Ministers and Deputy Ministers Responsible for Justice.

Why prosecutors pursued Sudbury bribery charges, despite weak case
'Politics get in the way of making decisions about charging,' says defence lawyer
CBC News
Mike Crawley
October 28, 2017

After a judge absolutely shredded the prosecution's lack of evidence in the bribery trial of two top Ontario Liberals, questions are lingering about why the case was pursued.

Premier Kathleen Wynne's former deputy chief of staff, Pat Sorbara, and a Liberal organizer in Sudbury, Gerry Lougheed Jr., were cleared of all charges, before the defence called any witnesses.

"Nothing that occurred ... could, would or should be characterized as bribery," declared Justice Howard Borenstein, tossing the case in what's called a "directed verdict" of not guilty on all counts.

Veteran defence lawyer Brian Greenspan, who represented Sorbara, called the judge's ruling a "total demonstration that these charges ought never have been brought." Greenspan told reporters in Sudbury he's seen only a handful of directed verdicts in his 44-year career. "They occur when prosecutions ought not to have been brought at the outset."

Lougheed's lawyer Michael Lacy slammed what he called a "misguided decision by the Crown to carry through with the prosecution" and said the verdict "raises questions about why they prosecuted this matter to begin with."

So, given the case was so weak a judge dismissed it, why did the Crown pursue it? Lacy offered his own answer.

"There was a lot of political pressure," he said. "Sometimes that happens, unfortunately, when politics get in the way of making decisions about charging, making decisions about prosecuting."

Media commentators are also criticizing the prosecution as a "waste of time" and a "desultory shambles of a case."

But it's possible that the prosecutors felt they had to pursue the case to the fullest possible extent to avoid even the slightest whiff of public perception that they were "going easy" on the two Ontario Liberals.

Given all the publicity about the bribery allegations, in a case involving one of the premier's closest political advisers, one can imagine there might have been a public outcry had the Crown had dropped the charges before they even got to a judge.

In any prosecution, the Crown must make an objective, impartial analysis of the evidence to decide if a case should go ahead. The key test for proceeding is whether there is a "reasonable prospect of conviction." This is a judgment call.

Lawyers who know the system suggest that in certain high-profile cases, it may be rather difficult for the Crown to make that judgment call without being influenced by public pressure.

"I am sure, absolutely, that some concerns about public perception and the optics in the public realm played into their assessment," said Joseph Neuberger, a criminal defence lawyer in Toronto

Neuberger said Crown attorneys will sometimes decide it's better to pursue a weak case and end up with the judge issuing an acquittal, rather than dropping the charges and potentially facing criticism for letting off the accused.

"There`s an informal legal principle that all lawyers — Crown and defence — know called, 'Let the judge decide,'" said Alan Gold, a criminal defence lawyer in Toronto. "Whether that's your explanation or not is pure speculation."

Gold said there may be good justifications for allowing a weak case to go all the way to court. "The public will respect a decision by a judge; they'll feel a decision by a judge is fairer than a decision by a Crown prosecutor," he said.

The questions swirling about the handling of the Sudbury case this week even prompted the federal Crown to issue a statement defending its decision to prosecute, insisting it is immune from outside pressure.

"The Public Prosecution Service of Canada is an independent and non-partisan prosecution authority, responsible for prosecuting offences in a manner that is free of any improper influence and that respects the public interest," said the statement.

The federal Crown prosecuted the case, as the provincial Attorney General's office stepped aside because of its connections to Ontario government officials.

The Crown's pursuit of this case no doubt put Sorbara and Lougheed through an awful personal experience, with charges hanging over their heads, their reputations sullied by the accusations. That ought to be repaired by the judge's sweeping rejection of the Crown's case, what Greenspan calls "a total vindication, a total exoneration."

After the verdicts, the Ontario PCs stopped airing their attack ad against Wynne that mentioned the bribery trial, said party leader Patrick Brown.

Justice not only needs to be done, it needs to be seen to be done. Perhaps it's best for people's faith in the system that such a highly politically charged case actually went all the way to trial, so that an independent judge could weigh in with a decision that puts the whole controversy to rest.

But politically speaking, the controversy may linger in the minds of voters.

In a poll conducted by Forum Research after the acquittals, 39 per cent of respondents said what they had heard or seen about the bribery case made them less likely to vote Liberal in the next election.

"The Ontario Liberals could not have asked for a better outcome from the Sudbury trial, but what's clear from the data is that, overall, the result doesn't matter much," said Lorne Bozinoff, presdient of Forum Research . "The damage to the Liberals' brand may already be done."

Allowing the destruction of residential school records – how the Supreme Court missed a chance to help in reconciliation
Ottawa Citizen
Lev Marder
October 30, 2017

In early October, the Supreme Court of Canada passed a unanimous decision in Canada v Fontaine, in extraordinarily ordinary fashion. The judgment upholds the decisions of lower courts to destroy what are called Independent Assessment Process (IAP) documents after a 15-year retention period.

The documents contain testimonies and evidence of the more than 37,000 residential school survivors who shared their experiences during the IAP, which collected the evidence to distribute compensation to survivors of the Residential School system. Some argued that the documents have invaluable historical significance and that survivors would want them preserved. Others insisted that those who shared their stories did so under the condition of strict confidentiality and never wanted these document to see the light of day.

Citing the letter of the law on confidentiality and breaches of confidence, the judges passed a well-grounded, if not an appropriate, judgment. It raises a host of pressing questions going forward that should concern all Canadians.

Should the Supreme Court have made an exception?

The case was treated as an ordinary case in front of the court— as if the Truth and Reconciliation Commission (TRC) did not recommend that the Canadian justice system take steps to recognize and integrate Aboriginal Peoples' perspectives in the judicial process. Relying on precedents and existing laws, the judges re-affirmed that they will not proactively pursue some of the TRC recommendations. They signalled that significance of the documents, the interest of future

generations in what happened to their ancestors, intergenerational justice, the historical import of these documents for researchers, are all trumped by Canadian legal precedents.

Over three years ago, when word spread about the push to destroy the records, the National Research Centre was "flooded with calls from residential school survivors" concerned that their records would be destroyed. Yet, the Court ruled that all IAP records detailing the suffering of residential school victims will be destroyed in 15 years unless the victims give explicit consent to make them public.

Can the dead consent to document preservation?

Some of the victims whose consent is necessary to preserve the documents are no longer alive. The testimonies they gave will be destroyed. The judges recognized that "while this order may be inconsistent with the wishes of deceased claimants who were never given the option to preserve their records, the destruction of records that some claimants would have preferred to have preserved works a lesser injustice than the disclosure of records that most expected never to be shared." Justice, whatever it means for those who wanted to preserve confidentiality, outweighs justice for those who did not live to decide today if they wish to make the documents public — perhaps parts of the record, perhaps heavily redacted or anonymized. Not all victims are like Jane Doe whose affidavit indicated that she comes from such a small community that she could be identified against her wishes even if her name were redacted.

But who is asking?

"I think we need to be asked, not told" explained Vivian Ketchum, one of the residential school survivors who participated in the IAP. "A little bit of courtesy and respect to survivors that we be asked if we want this or not. All my life I've been told to do stuff, never asked … and now I am in my 50s, a little respect to be asked. I am tired of being told what to do," she added in a 2015 interview with CBC Radio. The court order does not take the step to stipulate that each individual be approached, and asked, with respect, if they would want to somehow preserve the evidence. In fact, the silence in this regard speaks volumes.

The court ordered that the chief adjudicator of the IAP is tasked with notifying survivors about the Supreme Court decision. In theory, this makes perfect sense. Only someone in the IAP already has confidential information and it does not have to be shared with other bodies, such as the Truth and Reconciliation Commission, which would breach confidentiality. Immediately after the court order became public, the CBC reported that Dan Shapiro, the chief adjudicator of the IAP, will take the lead in a "massive" campaign to contact the residential school survivors.

Dan Shapiro, for at least three years, has actively advocated for destroying the records. According to the CBC, he told them that he could use "paid advertisements, Facebook and other

social media notifications, and community meetings." Is this the sort of asking, with respect, courtesy and individual attention, that Vivian Ketchum had in mind?

Must the advocate for the destruction of the records lead the campaign to notify survivors? Is he the right person to ask and will survivors be asked to consent to the preservation of at least some of the records? Perhaps for the benefit of future generations? Perhaps just heavily redacted evidence for the purposes of those who write history, so we do not forget and repeat the past? Or will survivors just be told that they have to decide if all their words should become public?

Lev Marder holds a PhD. in political science from the University of California-Irvine and is a sessional lecturer in the Arts and Sciences Program at the University of Guelph.

Chief Justice Beverley McLachlin on sex assault cases: 'No one has the right to a particular verdict'
Globe and mail
Sean Fine
October 30, 207

Supreme Court Chief Justice Beverley McLachlin has waded into the national debate on sexual-assault trials, telling complainants that while they have a right to be treated fairly and with dignity, they also need to be realistic in their expectations of a justice system that needs to protect against wrongful convictions.

"Complainants and witnesses need to understand what is required of them in a trial and what they can realistically expect from it," she told an audience of about 200 lawyers and judges, during her acceptance of the G. Arthur Martin Medal for lifetime achievement from the Criminal Lawyers' Association in Toronto on Saturday. "No one has the right to a particular verdict but only to a fair trial on the evidence."

The Chief Justice's comments come as Canada continues to be roiled by controversy over fairness to all sides in sexual-assault trials. In some cases, judges have been the subject of disciplinary complaints over how they talked to, or about, the complainants. In others, judges have acquitted high-profile accused men while accusing complainants of trying to purposely mislead the court. On social media, public campaigns have urged that victims be believed.

Meanwhile, federal legislation on mandatory training in sexual-assault law for candidates for the federal bench, and for a redrawing of certain trial rules, is before Parliament. Allegations of sexual harassment and assault are swirling around powerful men such as Gilbert Rozon, founder of Montreal's Just for Laughs comedy festival, and U.S. film producer Harvey Weinstein. And more than 50 police forces in Canada have announced they are reopening sexual-assault cases previously deemed "unfounded," after an investigation by The Globe and Mail.

Chief Justice McLachlin, 74, who is set to retire in December, is no stranger to controversy over the law of sexual assault. In 1991, not long after joining the court, she wrote the majority ruling striking down a federal rape-shield law that, with narrow exceptions, barred questions about a complainant's past sexual behaviour. (The federal government rewrote the shield law, broadening the exceptions.)

Canada's longest-serving chief justice reminded the lawyers' group that while the system seems focused on the accused, "complainants and victims are also part of the process," and the integrity of the system demands that they be taken seriously and that their interests be reconciled with the rights of the accused.

But she also stressed the importance of protecting the accused individual's rights. "Because of the Draconian consequences, the criminal law has long demanded high standards for conviction for a crime. If convicted a person may be in prison for a very long time and lose that most precious thing without which everything else is worthless: his or her liberty. The potential for wrongful conviction always waits in the wings.

"So the law for centuries has rightly insisted on credible evidence, a vigorous defence right of cross-examination and proof beyond a reasonable doubt. There is an obvious tension between the rights that are essential to a fair criminal trial and the expectations that may sometimes arise on the part of complainants. And the criminal law must navigate this tension."

She also said that the national debate is too polarized and hostile to be productive. The justice system can achieve a "fine but crucial balance" between protecting the right of the accused and the dignity of complainants, but "we must not divide ourselves into warring camps shouting at each other over an abyss of misunderstanding. We have to talk to each other, we have to sit down with each other, we have to make our criminal-justice system for everybody."

The Globe sent a transcript of the Chief Justice's remarks to Isabel Grant, a professor at the University of British Columbia's Allard School of Law, who specializes in criminal law and violence against women. She replied that the Chief Justice appears to be setting up a false dichotomy between rights of the accused and expectations of the complainant.

"Once you set up the framework this way, it is pretty clear what the outcome will be. Rights trump expectations," she said in an e-mail. "This way of asking the question assumes complainants themselves are not rights bearers and that the right to equal protection and benefit of the law under section 15 of the Charter [the equality clause] is irrelevant to sexual-assault prosecutions."

Toronto criminal defence lawyer and vice-president of the Criminal Lawyers' Association Breese Davies, who attended the address, said she believes the Chief Justice was responding to the #Ibelievesurvivors phenomenon on social media, "which appears to want the criminal-justice system to ensure a conviction in every case by starting from the presumption that complainants

are credible and reliable witnesses and the accused is guilty. Chief Justice McLachlin's comments are an important reminder that, because of the devastating consequences of a criminal conviction and the risk of wrongful convictions, an accused's right to a fair trial must not yield to social pressures."

Another lawyer who attended, Michael Edelson of Ottawa, said the Chief Justice was trying to lower expectations among complainants. "She's saying, 'Look, the criminal-justice process is a difficult one and because of the consequences, and the very high standard of proof required constitutionally, many witnesses and complainants are not going to be satisfied.' And I think she's quite correct."

Hilla Kerner, a spokeswoman for the Vancouver Rape Relief and Crisis Centre, disputed the Chief Justice's assertion that complainants' expectations are unrealistic.

"Complainants expect nothing but a fair trial, and too often they do not get it."