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Federal lawyer battling to get paycheque after return from cancer treatment

Kathryn May, The Ottawa Citizen, October 30 2016

Cancer was hard. After nine months, Rosemary Morgan is back but she can't get paid.

The federal lawyer hasn't been paid since she began easing herself back into work Sept. 6 after undergoing nine months of treatment for breast cancer. Now her bank won't give her a line of credit to hold her over because she doesn't have recent pay stubs.

Without the pay stubs for a loan to bridge the cost of going without pay, she also won't have the receipts that Treasury Board requires for claims to cover the out-of-pocket costs Canada's public servants face because they aren't paid by the government's ill-fated switch to the new Phoenix pay system.

"While I will find other alternatives for money in the interim, it is time-consuming, annoying and distressing for someone returning to work from long-term disability," said Morgan.

It's a catch-22 that many public servants have faced when they haven't been paid properly or on time, but the setbacks and frustrations can be magnified for those who are ill or injured.

On top of not being well, they are not at work so they don't have access to the finicky pay system, can't buttonhole managers for help or advocate for themselves. Nearly half of all disability claims are for mental health issues, led by depression and anxiety.

The union, which represents the compensation advisers at the Miramichi, N.B., pay centre, has estimated there could be a backlog of up to 2,000 cases of disability claims sitting in the queue. The holdup is with the pay centre sending the information the government's insurers, Sun Life Financial and Industrial Alliance, need to process claims and pay people.

That means ill and injured employees, who have exhausted their sick leave or employment insurance benefits, have no income. Unlike other employees who don't get paid, they can't seek priority or emergency payments because they are on leave from work. Morgan got her disability payments while on leave but they stopped when she went back to work.

"It is deeply concerning, said Debi Daviau, president of the Professional Institute of the Public Service of Canada.

"People who are already sick and struggling have this bureaucratic red tape process to apply for disability, and then an already cumbersome process gets delayed by months because of Phoenix."

The unions are planning a day of protest Monday over Phoenix — and delays in collective bargaining. Public Services and Procurement Canada set Oct. 31 as its deadline to clear the backlog of pay problems affecting 82,000 public servants.

The department has admitted that it will likely miss the Halloween deadline. That prompted unions to capitalize on the "trick and treat" theme with a rally outside Prime Minister Justin Trudeau's office at noon to pressure the government into fixing the botched pay system once and for all.

Morgan is easing back into her job at the Civilian Review and Complaints Commission for the RCMP with part-time hours. Under the disability plan, Sun Life will top her part-time hours to that of regular salaries.

But Phoenix has problems processing part-time hours, so the information Sun Life needs to pay the top-up isn't getting sent, and Morgan and other similar claimants aren't getting paid.

Morgan said she had lots of family support through her illness and counts herself lucky compared to other patients she met at the cancer centre with "stories that would break your heart." But she didn't expect the anxiety and sleeplessness that can be caused by not getting paid.

She has spent so many hours on the phone "trying to sort everything out that you hardly get a speck of work done.

"It is layers of problems, like peeling an onion, pulling layer after layer, and when you get to into the middle, it's rotten. And it's all about getting paid. … No one thinks about the cost of that to the taxpayer."

Jennifer Carr, an engineer at National Defence, had her surgeries for carpel tunnel before Phoenix, but like Morgan has been caught in the return-to-work quagmire of getting back on payroll. She has been underpaid, overpaid and not paid at all.

"It's the amount of time and energy it sucks from your recovery period. It is so draining. I am lucky to have a physical injury. Can you imagine if someone was recovering from depression or a mental health injury, it would force you to leave the workplace again."

She said the biggest frustration is that, after all the calls, letters and appeals — even to her department's ombudsmen — no one calls back.

"I feel like I spend the 10 to 12 hours I work trying to get paid and getting someone to talk to me. I spent more energy on something that is not my job. I am an engineer, not a compensation adviser."

Public Services said it set up a new dedicated team to work on disability claims at Miramichi.

Several managers told Postmedia the same kind of delays are happening with all kinds of claims from employees in the 46 departments served by what some call the centralized "Miramichi monster" where compensation advisers are overworked and undertrained. Life insurance applications are delayed, as are disability claims and those for the public service health-care plan.

Treasury Board has even issued a bulletin suspending application deadlines for insurance plans because of holdups at the pay centre.

Some of these claims are complex, paper-based and need manual intervention. By all accounts, the 55 departments that still have their own compensation advisers and can deal in person with their clients don't face such delays.

The delays have prompted the government's largest insurer, Sun Life Financial, to set aside an additional $45 million to cover the backlog of disability claims trapped in Miramichi. The extra reserve will cover claims it knows public servants have filed but can't be processed until the pay centre sends the information.

Sun Life needs information from three parties to assess a claim: the employer, the employee and the attending physician. It received "partial information" from employees and physicians but not the information from government, which includes confirmation that applicants work for the government and how much they earn.

Sun Life set aside the $45 million based on its longtime experience as the government's insurer and on the partial information it had already received from the employees and their physicians.

Phénix : un système qui coûte cher en heures supplémentaires

ICI Radio-Canada, le 30 octobre 2016

Depuis avril 2015, la mise en place du système de paye fédéral Phénix a coûté 5 millions de dollars en heures supplémentaires. C'est ce qui ressort des données obtenues par Radio-Canada en vertu de la Loi sur l'accès à l'information.

Alors que le système connaît encore son lot de problèmes, les montants payés pour les heures de travail effectuées au-delà de la semaine de travail ont augmenté de façon considérable.

Sur une période de deux ans, ces montants ont pratiquement triplé dans le cas des employés du secteur de la paye affectés au Centre des services de paye de la fonction publique de Miramichi, au Nouveau-Brunswick.

Le gouvernement fédéral a en effet déboursé près de 3 millions de dollars en heures supplémentaires seulement pour l'année fiscale 2015 - 2016, alors qu'il n'avait dû payer que 948 000 $ en 2014 - 2015.

Cette hausse importante concerne aussi les employés des bureaux satellites, qui ont été engagés spécialement pour régler les problèmes de paye des milliers de fonctionnaires fédéraux.

Les sommes payées en heures supplémentaires à ces travailleurs dépassaient les 700 000 $ pour l'année 2015 - 2016, une augmentation de plus de 300 % comparativement à l'année antérieure.

Au total, les montants des heures supplémentaires pour la mise en place du système de paye et la gestion des problèmes subséquents dépassent les 5,5 millions de dollars depuis avril 2015.

Service public et Approvisionnement Canada a confirmé ces dépenses, mais n'était pas en mesure de les commenter officiellement.

Le gouvernement fédéral avait avancé la date du 31 octobre 2016 comme date butoir, pour arriver à un état de stabilité avec son système de paye.

Mais lors d'une récente mise à jour concernant ce dossier, la sous-ministre de Service public et Approvisionnement Canada, Marie Lemay, avait confirmé qu'il ne serait pas possible de respecter cette échéance.

Une grande manifestation est prévue lundi 31 octobre à midi, sur la colline du Parlement, à l'appel de plusieurs organisations syndicales représentant les employés du gouvernement fédéral.

Pay problems linger for thousands of public servants as Phoenix deadline arrives

Ashley Burke, CBC News, October 31 2016

The federal government's self-imposed Oct. 31 deadline for eliminating the backlog of Phoenix pay problems has arrived, but some public servants say they're still going into debt to pay their bills.

Two weeks ago Marie Lemay, the deputy minister in charge of the system, said the bulk of the 80,000 remaining cases would be solved by today, but warned some of the more complex files may not be resolved in time.

Global Affairs Canada employee Sabrina Arrizza said she can't believe the "magical day" is here, yet she's still owed $4,000 in missing pay.

"I've reached the point of complete hopelessness," said Arrizza, who said she's had to take out a line of credit to pay her bills.

"It's extremely distressing. I was in a better financial situation when I was a student without a job."

Earlier this summer Arrizza was told her file had risen to what the pay centre calls "the war room," where cases go when compensation advisers can't figure out how to solve them.

Managers supportive, but can't help

"It was a little complicated but I'm not sure why I've been left in the backlog," said Arrizza. "I have not received a phone call. So to me, how can you even work on my case when you haven't even called me yet to discuss it?"

Arrizza transitioned from a casual contract to a term position in May but said she wasn't paid for seven weeks. When she finally got a cheque it was for a much lower pay category, she said.

On top of that, Arrizza isn't being reimbursed for dental care. She said her managers have been very supportive, but haven't been able to help solve her problem.

"It's quite sad when it gets to the point when your managers can't even do anything about it," she said.

'It should have been fixed by now'

Dean Ashby, a manager at Measurement Canada, describes himself as a "very patient guy," but said it's "disturbing" that he's waited since April for as much as $18,000 he said he's owed.

'Unfortunately, my kids have suffered probably the most.'- *Dean Ashby*

"I've waited seven months and I think it's time to voice my opinion now," said Ashby from Penticton, B.C. "One hundred per cent it should have fixed by now."

Ashby said he's burned through his savings, has had to cut back on his daughter's dance lessons and son's go-cart racing.

"Unfortunately my kids have suffered probably the most, because they haven't been able to do their sports," said Ashby.

He returned from an 18-month leave on April 1, then went seven pay periods without a cheque. When he finally got paid in June "it was completely wrong," Ashby said.

Even when the cheques started coming, they were $700 short. Ashby is in charge of nearly a dozen staff, and said he recently realized during a team meeting that he was the lowest-paid employee in the room.

"It's unfair," said Ashby. "I'm working and working and I'm not getting paid. You can't do that. It's against the law."

Rally planned for Monday

On Oct. 19 deputy minister Marie Lemay admitted the government is "tracking a bit behind," with 30,000 out of more than 80,000 cases still unresolved.

Updated figures showing how many cases could still be in the government's backlog of Phoenix files are expected at the next technical briefing, which could come as early as this afternoon.

Public servants will hold a rally in front of the prime minister's office at 12:30 p.m. Monday to express their "ongoing frustrations with the dysfunctional Phoenix pay system," according to the Public Service Alliance of Canada.

Phénix: des retraits demandés ne peuvent être accordés

Paul Gaboury, Le Droit, le 30 octobre 2016

Malgré les nombreux problèmes financiers rencontrés par des milliers de fonctionnaires fédéraux en raison des ratés du système de traitement de la paie Phénix, le Fonds de solidarité de la FTQ refuse de leur permettre de retirer de l'argent de leur Régime enregistré d'épargne retraite (REER).

C'est d'ailleurs le cas vécu par une fonctionnaire fédérale qui s'est heurtée au refus du Fonds, elle qui souhaitait retirer de l'argent investi dans son REER pour faire face à un manque à gagner causé par Phénix. « Je reçois ma paye, mais à cause des erreurs et délais, j'ai un manque à gagner d'environ 300 $ net par paye, et ce depuis février 2016, indique cette employée. Je n'ai pas le droit aux avances parce que je reçois un montant », déplore cette fonctionnaire qui s'est tournée vers le Fonds de solidarité, en vain, afin de retirer ses REER pour boucler ses fins de mois.

Au Fonds de solidarité, le porte-parole Patrick McQuilken explique qu'en vertu de la Loi, le ministre des Finances du Québec doit approuver la politique de rachat des actions du Fonds, notamment à cause du crédit d'impôt consenti aux actionnaires. Outre la retraite et la préretraite, il est possible de procéder au rachat d'actions dans 16 circonstances dont la baisse de revenu.

« Dans le cas des fonctionnaires fédéraux et du système de paie Phénix, il ne s'agit pas d'une baisse de revenu mais plutôt d'un délai dans le paiement », justifie M. McQuilken, dans un courriel.

Le Fonds a toutefois une marge de manoeuvre puisqu'il est possible pour un actionnaire d'invoquer le critère « Recours d'un créancier » si l'actionnaire est menacée de perdre un service public, son automobile, ou sa résidence parce que cette actionnaire a éprouvé des difficultés à payer certaines obligations en raison d'un manque à gagner temporaire.

L'actionnaire doit toutefois avoir liquidé ses autres placements avant de pouvoir procéder au rachat de ses actions, a tenu à préciser M. McQuilken.

Quebec lawyers, notaries launch strike with rally in Montreal

Presse Canadienne, Montreal Gazettte, October 24 2016

Working without a contract for more than a year, about 1,100 Quebec government lawyers and notaries began a general unlimited strike Monday with rallies outside courthouses of major cities, including Montreal.

The lawyers and notaries union, LANEQ, blamed “the lack of progress in negotiations with the government” for the strike, which has the support of 84 per cent of their membership.

The professionals work across many provincial departments and agencies. They represent the government in civil, administrative and criminal cases and act as legal counsel for ministers. The strike could slow new bills, judicial rulings and cases currently before the courts.

A main point of tension is the union’s wish to change their negotiation process to binding arbitration from the current mediation process. The union says it is willing to give up its right to strike to make this change.

The request “is simple and does not cost a dime,” said LANEQ president Jean Denis. LANEQ says that negotiation process is in force in Ontario, British Columbia, Manitoba, and Nova Scotia, and that during their last negotiations and subsequent strike in 2011, Quebec recognized the need to reform the process.

LANEQ is made up of more than 1,100 lawyers and notaries in all departments and agencies in the provincial government.

The Quebec Justice Department said in a statement they have insisted the strike not affect judges, crown attorneys and legal support staff, so that the judicial system can stay on track. Citizens who are summoned in a case must show up at court.

The administrative services of the department remain operational.

How Newfoundland judge Malcolm Rowe was chosen for the Supreme Court of Canada

Ian MacLeod, Ottawa Citizen, October 24 2016

The Liberals brought Parliament and Canadians back into to the loop Monday on Supreme Court appointments, revealing new Justice Malcolm Rowe was selected from 31 applicants for his stellar legal experience, deep knowledge and insights about Canada and willingness to work with others.

When an independent advisory board interviewed Rowe, 63, in September, "we immediately thought, 'Whoa, this guy's a superstar,' " Kim Campbell, the former Conservative prime minister who chaired the selection advisory committee, told the House of Commons justice committee.

"The breadth of his understanding of the country …. was important to us. When the members of the Supreme Court are sitting talking about an issue, are there things that are not being said because nobody knows about them?"

Collegiality was another crucial qualification.

"One of the things about the Supreme Court of Canada is that, if you can't work with other people, it's very destructive," said Campbell, who was sitting beside Justice Minister Jody Wilson-Raybould.

"You don't want group-think, you want people who bring a strong point of view, but if in a decision there are a lot of different judgments, that's chaos for the courts and the people below who have to rely on it."

Of the 31 applicants, slightly fewer than half were women and most had some proficiency in French. There was no shortage of strong candidates from Atlantic Canada – two were on the short list – and a "broad diversity" among the others, said Campbell.

Ten people were interviewed, and five made it on to a short list given to Wilson-Raybould. She gave the list and her recommended (and still confidential) pick to Prime Minister Justin Trudeau.

Campbell's praise for the new selection process was exceeded only by her praise for the quality of applicants. 'There was a really wonderful richness," she said.

In briefing the seven-member advisory group, the government emphasized the hunt for a replacement for Justice Thomas Cromwell, seen as occupying Atlantic Canada's seat on the court, should recognize Canadians' social diversity. The stipulation ignited a political uproar in the region, which has traditionally had a representative occupying one of the court's nine seats.

But Campbell believes the government's instructions also sent a message to people thinking of applying, "that they should not be discouraged if they are members of a hitherto unrepresented social category.

You don't want group-think, you want people who bring a strong point of view

"The fact of the matter is, especially in the legal profession, there is a lot of lack of diversity in many aspects of it. So the terms of reference were a clear message to the Canadian legal community that was reflected in the applications."

Rowe is a St. John's native, son of a fisherman, and Newfoundland and Labrador's first Supreme Court justice. He has an eclectic background in government, the foreign service, private law, and was appointed to the bench in 1999. Most recently he has sat on the province's highest court, the court of appeal.

Tuesday, he will answer questions at a joint session of the Commons' justice committee, legal and constitutional affairs committee, as well as from Bloc Québécois and Green Party MPs and members of the public.

Nouveau juge à la Cour suprême - L'opposition déplore avoir été mise à l'écart

Marie Vastel, Le Devoir, le 25 octobre 2016

Les députés de l'opposition à Ottawa ont beau se sentir lésés par le nouveau processus de sélection de juges à la Cour suprême, la ministre de la Justice y tient. Les parlementaires ont bel et bien leur mot à dire, convient la ministre Jody Wilson-Raybould, mais ils continueront d'être consultés en amont plutôt qu'en aval.

Conservateurs et néodémocrates ont fait front commun, en comité parlementaire lundi, pour dénoncer la nouvelle méthode choisie par le gouvernement Trudeau pour choisir son premier magistrat à la Cour suprême. Le juge Malcolm Rowe a été retenu par le premier ministre, après que sa ministre de la Justice eut étudié une liste de cinq noms soumise par un comité

consultatif indépendant. La ministre affirme avoir discuté des candidats avec l'opposition, mais celle-ci déplore qu'elle ne soit plus invitée à dresser la liste de concert avec le gouvernement.

« Madame la Ministre, vous connaissez bien la différence entre consultation et simple notification. […] *Estimez-vous que les députés, en tant que représentants élus des Canadiens, devraient être impliqués dans le coeur du processus ? »*, a demandé le néodémocrate Murray Rankin.

La ministre Wilson-Raybould a voulu se montrer ouverte à toute suggestion sur le nouveau mode de sélection des juges. *« J'apprécie et je reconnais l'importance de s'assurer que les députés soient impliqués dans le processus de sélection*, a-t-elle répliqué aux critiques. *J'estime qu'au coeur de ce nouveau processus de nomination à la Cour suprême du Canada se trouve ce comité indépendant et non partisan*, a-t-elle cependant insisté. *Je sais que nous poursuivrons avec ce processus de comité consultatif. »* Scellée, donc, la participation de l'opposition en aval au choix de ces juges.

Processus antérieurs

Sous les conservateurs de Stephen Harper, le gouvernement soumettait sa liste de candidats à un comité de députés qui, à huis clos, consultait le milieu juridique pour ramener la liste de six à trois noms. Sous les libéraux de Paul Martin, la candidature proposée devait être avalisée, à huis clos aussi, par un comité d'élus de tous les partis qui n'avaient pas droit de veto, mais simplement le droit de poser des questions au ministre de la Justice. Ces processus antérieurs étaient *« souvent* ad hoc *et opaques »*, a argué la ministre Wilson-Raybould.

Le gouvernement Harper avait en outre instauré une comparution publique du juge retenu devant un comité parlementaire (un processus auquel ils ont dérogé à quatre reprises).

Cette fois-ci, le juge Rowe participera ce mardi à une *« séance de questions et réponses »* à l'Université d'Ottawa devant des parlementaires et des étudiants en droit. Députés et sénateurs seront invités à l'interroger. Mais ils auront 14 blocs de cinq minutes à se départager parmi les 10 membres du comité des Communes, les 12 membres du comité sénatorial, ainsi qu'un bloquiste et la chef du Parti vert.

« Tous les trois [députés conservateurs]*, nous aurons droit à deux questions. À quel point pensez-vous qu'on est excités ou motivés si on a 66% de chances de poser une question »*, a reproché l'ex-ministre de la Justice, Rob Nicholson.

La ministre est restée de marbre, en réitérant que ce panel serait *« sans précédent »* et *« historique »*.

Le comité consultatif a reçu 32 candidatures, dont la quasi-totalité étaient *« fonctionnellement bilingues »* comme le stipule l'offre d'emploi.

Rowe's Supreme Court appointment sets bilingualism bar quite a bit higher: Hébert

Newfoundland-and-Labrador jurist's ability to work in either of Canada's official languages a criterion for anyone else interested in vying for a seat on the top court.
Chantal Hébert, The Toronto Star, October 27 2016

As Justice Malcolm Rowe — Prime Minister Justin Trudeau's first appointee to the Supreme Court — fielded a barrage of questions from MPs and senators on Tuesday, there was nothing to suggest that he was not a flesh-and-blood person.

And yet, only a few months ago, a legal creature with Rowe's attributes was widely deemed to not exist.

Trudeau was deluded, some argued, if he thought he could find a Newfoundland-and-Labrador jurist with sterling credentials and the ability to work in either of Canada's official languages.

To read and listen to some of the commentary, one might have thought the prime minister had sent his headhunting committee on a quest for a unicorn. It may be that John Crosbie and Brian Tobin are to blame for that impression. Despite spending decades on Parliament Hill, neither of those famous political sons of N.L. managed to become fluent in French — at a cost to their national leadership aspirations.

And yet, not only does Rowe fit the job description, but in 2016 his status as a functionally bilingual non-Quebec jurist does not necessarily make him all that exceptional.

According to former prime minister Kim Campbell, who oversaw the process that led to the short list Trudeau chose Rowe from, more than a few of the applicants her group considered would have been both valuable additions to the Supreme Court roster and satisfied the language requirement.

And yes, they hailed from every region of the country.

It should not come as a surprise that there is a discrepancy between the actual language proficiency of many non-Quebec judges and lawyers and the perceptions of the politicians and pundits who argue that to appoint Supreme Court justices among the ranks of bilingual applicants is to fish in an overly shallow pool.

After almost two decades at the Star, I still do not know exactly how many of my colleagues can handle an interview in French for we tend to speak to each other in English. Back when I mostly worked for French-language media organizations, the same was true when it came to the other journalists' proficiency in English.

When it comes to requiring fluency in both official languages to sit on the Supreme Court or, for that matter, to lead a federal party, the real question is not whether otherwise qualified candidates will not be considered, but whether those who are would make the short list if French/English bilingualism was not a criterion.

In the case of Justice Rowe, the answer is yes.

Based on his answers to the NDP and the Bloc Québécois Tuesday, a French-speaking lawyer would feel confident that if he or she were to plead in French, Rowe would grasp the nuances of the arguments.

That is not a whim, for nuances and sometimes a bit more than that are often lost in simultaneous translation. Just ask the Senate's French-speaking members. Most of them stuck to English during the debate over medically assisted suicide last spring for fear of not getting their points across.

Just last week, NDP Leader Thomas Mulcair mocked the prime minister, in French, after the latter called him "le membre". In street French, the expression can refer to a male private part. That was lost on Hansard translators. They quoted Mulcair as reprimanding Trudeau for having used the word "deputy."

Rowe's appointment has put flesh on the bone of the Liberal requirement that applicants for a Supreme Court appointment should be functionally bilingual. At one point, Justice Minister Jody Wilson-Raybould suggested it might not be necessary to speak French and English to meet the criteria.

Rowe's appointment sets the bar quite a bit higher. There are contenders currently running for Stephen Harper's succession who could not meet it.

By all indications, the bilingualism criterion for Supreme Court appointments is here to stay. Wilson-Raybould told a parliamentary committee as much this week. It will be hard for future governments to set aside the practice, or for this one to lower the fluency standard it has just set with this appointment.

The next scheduled Supreme Court vacancy is expected to be that of chief justice Beverley McLachlin who will reach the compulsory retirement age of 75 in 2018.

Anyone interested in vying for a seat on the top court should consider that fair warning. He or she has two years to hit the books.

Wilson-Raybould, former PM Kim Campbell defend new process for top court

Joanna Smith, The Canadian press, October 24 2016

Justice Minister Jody Wilson-Raybould says the Liberal government is going to stick with the selection process that led to the nomination of Newfoundland and Labrador justice Malcolm Rowe to the Supreme Court of Canada.

"A modern, dynamic, 21st-century court needed a modern, dynamic, 21st-century selection process," Wilson-Raybould said Monday as she defended the new selection process during an appearance before the House of Commons justice committee.

The Liberal government revealed changes to the way it would appoint Supreme Court justices in August, saying it wanted to bring more openness and transparency to the process, while also encouraging more diversity and requiring functional bilingualism among judges on the high court.

It was also the first time that Canadians were invited to apply for the job.

Wilson-Raybould and former Prime Minister Kim Campbell, who led the non-partisan advisory board tasked with coming up with a shortlist of candidates, appeared before the committee to explain the process and defend the choice of Rowe as one of the contenders.

On Tuesday, MPs, senators and even law students will get the chance to put their questions directly to Rowe when he sits down for a question-and-answer session at the University of Ottawa.

"This is historic and it provides an opportunity to invite Canadians into a process wherein they will have the opportunity to get to know the next Supreme Court of Canada justice," Wilson-Raybould said of the session, which will be moderated by McGill University law professor Daniel Jutras.

However, Conservative and New Democrat MPs on the committee pointed out they would have liked to be involved in the actual creation of a shortlist.

"It has no legal standing," NDP MP Murray Rankin said of the Tuesday event.

Wilson-Raybould said she would take any and all feedback from the justice committee into consideration, but stressed that having an independent, non-partisan advisory board be the one to come up with a shortlist is a central part of the new selection process.

There will be much fodder for questions Tuesday.

The government published the questionnaire Rowe completed as part of the application process, detailing his views on issues such as diversity, the Charter of Rights and Freedoms, aboriginal treaty rights and the role of the court in a constitutional democracy.

"I don't think we've ever had such a document about anyone who's gone to the Supreme Court of Canada," Campbell told the committee.

The fact that Rowe is a judge from the Newfoundland and Labrador Court of Appeal is also likely to be a topic of discussion.

The Liberals had been coming under fire from the opposition for saying their selection process would not necessarily follow the custom of regional representation, which would have ordinarily meant the successor to retired Justice Thomas Cromwell, from Nova Scotia, would be from Atlantic Canada.

Campbell, who said she understood the terms of reference to mean the advisory board needed to come up with at least two candidates from the region, said they had no trouble finding them.

"Atlantic Canada sent us some outstanding candidates, so it wasn't something where we sat around saying, 'Oh my gosh, we better rustle up a couple of Atlantic Canadians,'" Campbell said to laughter from the committee.

"Au contraire," said Campbell, who also noted they had no trouble coming up with candidates who were functionally bilingual.

Campbell acknowledged that Rowe, a white male in his 60s, does not necessarily tick any of the "boxes" associated with diversity, but having that as one of the stated considerations prompted a wide range of candidates to apply.

"The terms of reference were a clear message to the Canadian legal community and that was reflected in the applications," Campbell said.

The previous Conservative government had lifted the curtain — for a time — on the Supreme Court selection process by asking a small group of MPs from all parties to narrow down the short list and then allowing a larger parliamentary committee to grill them during a televised hearing.

After the nomination of Marc Nadon, however, which was ultimately nixed by the Supreme Court, former Prime Minister Stephen Harper took the process back behind closed doors.

Functionally bilingual requirement for Supreme Court justices here to stay, says Wilson-Raybould

Justice Minister Jody Wilson-Raybould and former PM Kim Campbell defend selection process at committee
Peter Zimonjic, CBC News, October 24 2016

The process the Liberal government introduced to craft a short list of possible judges for promotion to the Supreme Court of Canada will remain in place for future appointments.

"I know that we will continue with that independent advisory board process," Justice Minister Jody Wilson-Raybould told a parliamentary committee which is studying the recent appointment of Newfoundland and Labrador justice Malcolm Rowe to the high court.

"I believe that having that independent, nonpartisan advisory board providing the short list is an important aspect of this new selection process," she added.

The Liberal government in August revealed changes to the way it would appoint Supreme Court justices, saying it wanted to bring more openness and transparency to the process, while also

encouraging more diversity and requiring functional bilingualism among judges on the high court.

Wilson-Raybould says a modern and dynamic Supreme Court needs a nomination process to match.

She and former prime minister Kim Campbell, who led the non-partisan advisory board tasked with coming up with a short list of candidates, were appearing before the justice committee Monday to explain the process and defend the place of Rowe among the contenders.

Wilson-Raybould said Rowe, the son of a fisherman, is perfectly suited to his new responsibilities, with experience as a youth mentor and a foreign service officer as well as years of judicial experience in Newfoundland and Labrador's Court of Appeal.

"I can say that I am convinced that Justice Rowe would be an outstanding addition to the court and would continue to serve Canadians with great distinction in that role," she said.

Atlantic Canadian

After the government announced its new selection process for choosing high court judges, it came under fire for refusing to commit beforehand to having an Atlantic Canadian among the nine judges on Canada's highest court. On Monday the minister said that Rowe, as the first from his province to be appointed to the high court, helped meet the government's diversity standard.

"Regional diversity was also an important consideration. Hailing from Newfoundland Justice Rowe brings a unique perspective that has never been present on the Supreme Court of Canada," she said in explaining why Rowe was chosen.

Campbell said that ensuring the court was representative was not a difficult task when faced with the list of possible candidates who applied for the position.

"Atlantic Canada sent us outstanding candidates," Campbell said. "It wasn't something where we sat around saying 'Oh my God, we'd better rustle up a couple of Atlantic Canadians to put on our list.' Au contraire, it was 'Good grief, not another wonderful Atlantic Canadian.'"

A rich field

In total, 31 people applied to fill the vacant Supreme Court seat.

Campbell would not be specific, but said a little under half of the applicants were women. Only 10 candidates were selected for an interview, and then that list was cut to five to create a short list for Trudeau to consider. Of the final five candidates that made the short list, two were from Atlantic Canada.

Campbell said that almost all of the candidates had a working knowledge of French, which she argued was important for understanding the nuance of the law. Some of the candidates failed the French proficiency test.

Wilson-Raybould said the criterion that all potential candidates had to be functionally bilingual is something that unsuccessful applicants, and potential future applicants, should keep in mind considering the current Chief Justice of the Supreme Court, Beverly McLachlin, is due to step down in 2018.

The minister said she wanted "to encourage all of those individuals out there that meet the statutory requirements ... to brush up on their French if they are wanting to apply to be the next Supreme Court justice."

Justice Rowe will be appearing at the University of Ottawa's Tabaret Hall Building at 11:15 a.m. ET Tuesday, where he will be questioned by members of the justice committee, the Senate committee on legal and constitutional affairs, as well as members of the Green Party and Bloc Québécois.

The previous Conservative government had a small group made up of MPs from all parties narrow the short list and then allowed a larger parliamentary committee to grill nominees during a televised hearing, but that process went back behind closed doors after the Supreme Court nixed the appointment of Marc Nadon.

Un avocat conteste l'accord de libre-échange Europe-Canada

La Presse Canadienne, La Presse, le 24 octobre 2016

L'avocat torontois Rocco Galati, connu pour avoir réussi à renverser la nomination de Marc Nadon comme juge à la Cour suprême, a désormais un nouvel objectif: contester devant les tribunaux l'accord de libre-échange entre le Canada et l'Union européenne (UE).

Dans une requête présentée en Cour fédérale, M. Galati clame que l'Accord économique et commercial global (AÉCG) est inconstitutionnel.

La plainte se concentre sur les points controversés du traité que le Canada et l'UE souhaitent signer, notamment ceux qui permettraient aux entreprises de poursuivre, dans certaines circonstances, des gouvernements. L'Accord de libre-échange nord-américain (ALÉNA) comprend aussi de telles clauses.

La requête conteste aussi la tradition du gouvernement canadien de signer et de ratifier des accords internationaux sans demander d'abord l'approbation du Parlement ou des provinces.

«Une fois que c'est signé et ratifié, nous sommes liés», a fait valoir Me Galati lors d'une entrevue, lundi.

«C'est ça le problème. Mais les autres partenaires commerciaux, comme les États-Unis et l'Europe, ne deviennent pas liés de cette façon. Ils doivent le faire approuver par leurs Parlements et leurs assemblées législatives avant qu'ils ne puissent signer et ratifier.»

Me Galati, qui a déposé sa demande au nom de l'ancien ministre libéral Paul Hellyer et de deux autres personnes, a par le passé réussi à défier le gouvernement fédéral devant les tribunaux.

La Cour suprême s'était rangée de son côté, il y a trois ans, quand il avait contesté l'intention du gouvernement de Stephen Harper de nommer Marc Nadon comme juge au plus haut tribunal du pays.

Un expert en droit constitutionnel de l'Université d'Ottawa, Errol Mendes, estime toutefois que Me Galati se heurtera, cette fois-ci, à un résultat tout autre, puisque la Constitution attribue clairement au gouvernement fédéral le pouvoir de signer et de ratifier des accords de libre-échange.

La contestation survient alors que l'accord commercial entre le Canada et l'UE est menacé, en raison de la ferme opposition de la Wallonie, une petite région de la Belgique.

Ses législateurs ont refusé d'approuver l'entente, qui a été négociée pendant sept ans. Parmi leurs préoccupations se trouve le mécanisme de résolution des disputes entre les investisseurs et l'État, l'un des sujets de la contestation de Me Galati.

«C'est ironique de voir que tout le monde blâme les Wallons, a-t-il déclaré. Ils ont une Constitution très similaire à la nôtre, sauf qu'ils respectent la leur. Alors je ne comprends pas pourquoi ils sont critiqués parce qu'ils respectent leur Constitution».

Interrogée quant à savoir si l'entente respecte les exigences de la Constitution canadienne, la ministre du Commerce international, Chrystia Freeland, a rétorqué: «Absolument.» Son bureau n'a pas voulu élaborer.

Le gouvernement fédéral a 30 jours pour répondre à la requête de Me Galati.

Selon M. Mendes, «cela relève du droit constitutionnel 101: le gouvernement fédéral a le droit de signer et de ratifier des traités internationaux en vertu de la prérogative royale».

Me Galati n'est pas le premier à se tourner vers les tribunaux pour tenter de bloquer l'accord.

Plusieurs groupes en Allemagne ont soulevé des préoccupations au sujet de certaines sections de l'AÉCG qui seraient entrées en vigueur dès sa signature, même si le Parlement du pays n'avait pas encore voté à ce moment.

La Cour constitutionnelle d'Allemagne a rejeté la demande d'injonction urgente il y a deux semaines, mais a tranché que le pays devait pouvoir quitter l'AÉCG unilatéralement si celui-ci était jugé inconstitutionnel.

La cour a aussi limité les sections de l'entente qui pouvaient entrer en vigueur immédiatement, sans l'approbation du Parlement allemand. Une autre cause sur la constitutionnalité de l'entente commerciale est toujours pendante devant les tribunaux allemands.

Rocco Galati files constitutional challenge against Canada-EU trade deal

Lawyer who successfully challenged Harper Supreme Court pick goes after CETA
Lee Berthiaume, CBC News, October 24 2016

The Toronto lawyer who successfully challenged the previous Conservative government over one of its Supreme Court judge nominees is setting his sights on a new target: Canada's free trade deal with the European Union.

Rocco Galati has filed a statement of claim in Federal Court arguing that the Comprehensive Economic and Trade Agreement, as the deal is known, is unconstitutional.

The complaint focuses on controversial provisions in the Canada-EU deal, similar to those contained in the North American Free Trade Agreement that would let companies sue the government under certain circumstances.

The statement of claim also takes issue with the federal government's tradition of signing and ratifying free trade deals and other international agreements without prior approval from Parliament or the provinces.

"Once it's signed and ratified, we're bound," Galati said in an interview Monday.

"That's the problem. But other trade partners like the U.S. and Europe, they don't get bound this way. They have to put it through their parliaments and legislative houses before they can sign and ratify."

Galati is developing a reputation for taking on Ottawa. The Supreme Court of Canada sided with him three years ago when he challenged the Harper government's attempt to appoint Justice Marc Nadon to the top court.

The court challenge, filed Friday on behalf former Liberal cabinet minister Paul Hellyer and two other people, comes with the pact between Canada and the EU on life support thanks to a small region of Belgium standing firm in opposition to it.

Lawmakers in the region known as Wallonia have refused to approve the deal, which has been seven years in the making. Among their concerns is the investor-state dispute settlement mechanism, one of the subjects of Galati's court challenge.

"It's ironic that everybody is dumping on the Walloons," Galati said. "They have a very similar constitution to ours except they're respecting theirs. So I don't know why they're being criticized for respecting their constitution."

Asked whether the agreement meets the requirements of Canada's Constitution, International Trade Minister Chrystia Freeland replied, "Absolutely." Her office refused to comment further.

The statement of claim gives the federal government 30 days to respond.

'Royal prerogative'

University of Ottawa constitutional law expert Errol Mendes said it's been long established that the Constitution gives the federal government the power to sign and ratify treaties, just as it can deploy troops overseas without parliamentary approval.

"(Galati) may have won on Nadon, but I think he's going to lose on this," Mendes said. "It's basic 101 constitutional law that the federal government has the right to sign and ratify international treaties under the royal prerogative."

Galati isn't the first to turn to the courts to stop the trade deal. Several groups in Germany raised concerns about parts of it coming into effect once it is signed, even though the country's parliament wouldn't have voted on it yet.

Germany's constitutional court rejected the request for an emergency injunction two weeks ago, but did rule that the country must be allowed to leave unilaterally if the deal is found to be unconstitutional. The court also limited which parts of the deal could come into effect without the German parliament's approval.

Another case on the deal's constitutionality is still before the German courts.

Defence lawyers must show they're not delaying trials of three convicted killers, says judge

Kevin Martin, Calgary Herald, October 24 2016

The judge in the case of three convicted killers who want their charges stayed because of unreasonable delay said Monday their lawyers will have to establish they’re not responsible for any hold-ups in the case.

Defence lawyers for Franz Cabrera, Joch Pouk and Assmar Shlah argued the onus should have been on the Crown to establish if any delays were caused by the defence.

But Justice Glen Poelman said since defence counsel Gavin Wolch, Rame Katrib and Balfour Der are making the stay application the burden is on them to establish an evidentiary basis for it.

The lawyers are relying on a recent Supreme Court decision which set strict timelines on how quickly cases should move through provincial court and Court of Queen’s Bench.

The nation’s top court said provincial court trials should be done within 18 months and hearings in the higher court within 30 months.

If they go over that, it will be presumed the rights of individuals to be tried within a reasonable time have been violated and it will be up to the prosecution to establish the breach was necessary.

Wolch argued the Crown should have to show any parts of the three convicted killers cases were caused by the defence.

He says because the case has already taken more than 30 months, it's now up to the Crown to justify any delay.

"It's now the Crown's application not to be stayed," he said of the charges.

"We are already well over the (Supreme Court) guidelines," Wolch said, noting his client was arrested shortly after the Nov. 23, 2013, beating and stabbing death of Lukas Strasser-Hird.

But Crown prosecutor Marlo MacGregor disagreed with Wolch's assessment of how much time has already lapsed.

MacGregor said from the time of their arrests to the date of their convictions on June 16, Cabrera, Pouk and Shlah are barely over the 30-month mark.

Cabrera, who was arrested the day after Strasser-Hird's death, was convicted of second-degree murder 30 months and 23 days after the killing, she said.

She added Pouk — who was convicted of manslaughter in the slaying — is at 30 months and 18 days, while Shlah, who like Cabrera was found guilty of second-degree murder, is at 30 months and three days.

"That's without looking at any of the transcripts to see if there is a (defence) delay," MacGregor said.

Poelman will hear submissions on the stay application next month.

Supreme Court ruling on whether residential school documents can be destroyed

The Canadian Press, iPolitcs.ca, October 27 2016

The Supreme Court of Canada will decide whether painful, personal accounts from the survivors of residential schools should be destroyed or permanently archived for posterity.

The survivors' stories were used by the independent assessment process, which handled compensation claims under the 2006 Indian Residential Schools Settlement Agreement.

A lower court judge ruled that the material should be destroyed after 15 years, although individuals could consent to have their stories preserved at the National Centre for Truth and Reconciliation in Winnipeg.

In a 2-1 ruling last April, the Ontario Court of Appeal agreed, saying the documents are not government records subject to archiving laws and that their disposition should be at the sole discretion of the survivors.

The federal government is appealing, saying it controls the documents and that they are subject to privacy, access to information and archiving legislation.

As usual, the court gave no reasons for agreeing to hear the case.

New anti-terrorism bill abandons Liberal call for real-time parliamentary 'oversight' into CSIS

Ian MacLeod, Ottawa Citizen, October 30 2016

The cornerstone of the Liberals' promised national security reforms — parliamentary "oversight" of federal spy activities – would not allow lawmakers to scrutinize the most potentially troubling of those actions until after they're completed, if at all.

The criticism is one of several expected to be voiced this week over Bill C-22, which will set up a committee of MPs and senators to monitor the country's spooks.

The panel — whose members will have to pass security checks — is intended to police the Canadian Security Intelligence Service (CSIS) and 16 other federal entities with national security responsibilities, many of which now operate without independent scrutiny.

Its mandate also extends to examining the "legislative, regulatory, policy, administrative and financial framework for national security and intelligence."

The Commons public safety committee begins public hearings on the bill Tuesday.

While national security experts praise C-22 for seeking to make spies more accountable, the New Democratic Party is expected to call for at least five significant amendments, starting with the removal of eight exemptions the government can claim to deny committee requests for information.

They include the seemingly vast category of "special operational information," which critics call a "catch-all" standard to block disclosure. Ministers also can prevent the committee from reviewing any information that "would be injurious to national security."

This is despite the Trudeau government's repeated pledge to give the committee "access to all government information it needs."

A spokesman for Public Safety Minister Ralph Goodale said Friday the minister Goodale is "open to reasonable amendments."

"The goal of the committee of parliamentarians is to ensure that our national security community is working effectively and that they are safeguarding our values, rights and freedoms and the open, inclusive, generous character of our country," press secretary Scott Bardsley said in an email.

Opposition is expected to be led by Murray Rankin, the NDP's public safety critic and former legal counsel to the Security Intelligence Review Committee, the small, independent expert review group watching over CSIS.

The Conservatives, meanwhile, are caught in the middle. As architects of the sweeping counter-terrorism powers bestowed on CSIS, the RCMP and government under 2015's Anti-terrorism Act (C-51), they can't complain the new bill doesn't go far enough to guard against potential abuses of the extraordinary state powers they created. That's especially true since the Tories refused to create commensurate oversight and review mechanisms.

Yet the Liberals have already abandoned what they claimed in opposition was a fundamental and necessary fix for C-51: real-time strategic oversight of CSIS activities, not after the fact, as now set out in C-22.

"The difference between the two is not merely a quibble over language. The two words are not synonymous," then Liberal leader Justin Trudeau told the Commons in February 2015, days after C-51 was tabled.

"An oversight body looks on a continual basis at what is taking place inside an intelligence service and has the mandate to evaluate and guide current actions in 'real time.' That is crucial and must be amended, if we are giving CSIS the new powers proposed in Bill C-51 in its current form."

The word "oversight" does not appear in the text of C-22. "Review" pops up 32 times, most notably to describe the committee's prime mandate.

Michael Nesbitt, a national security law expert at the University of Calgary, says what's needed is real-time operational oversight, something the seven MPs and two senators could never manage.

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- Robyn Urback: Tony Clement's anti-terrorism plan is, in a word, bananas
- Tory public safety critic warns Liberals not to mess with spy agency's new power to disrupt threats

"The best you can get is either oversight of process well after it's taken place or before it's taken place, though ministerial oversight," he said.

But, "the ministerial oversight takes place when you're signing off on what (CSIS is) proposing to do. Whether they actually go and do what they propose is another matter. Nobody is overseeing that in the current context and, frankly, that's where the mistakes happen."

The Liberals have been promising for more than a year to reform the anti-terrorism law by narrowing and clarifying what they characterize as the overly broad scope of some of the new powers.

Most concerning is the provision that changed CSIS from a strictly intelligence-gathering service to one with an offensive remit to physically disrupt real or perceived threats. These include not just terrorism, but threats to economic and financial stability, critical infrastructure and the security of other states.

The Liberals have vowed to rein in the disruption power, but have yet to say how. As the law now stands, if a threat reduction activity (TRA) will violate Criminal Code or Charter of Rights & Freedom rights, CSIS must first secure a Federal Court warrant authorizing the breach.

Some experts argue this judicial control will act as oversight on the potentially dangerous, but important new law-breaking power, one which CSIS has yet to use. (If a TRA does not violate the law or the charter – and stops short of death, bodily harm, obstruction of justice and sexual impropriety — no judicial approval is needed.)

But because the proposed committee will be a review body with no capability for anything close to real-time "oversight," its ability to assess the legality, efficacy and reasonableness of CSIS TRAs will be a post-mortem effort, at best.

Other key opposition concerns include: Prime Minister Trudeau's unusual and unilateral appointment in January of David McGuinty, an Ottawa-area Liberal, as committee chairman; lack of a "whistleblowing" provision that would impose a legal duty on the committee to report suspected wrongdoing; and the PM's power to direct the committee to revise its annual and special reports to him if he believes the disclosure would injure national security, national defence and international relations.