Richard Wagner sworn in as chief justice of Supreme Court of Canada
The Globe and Mail
The Canadian Press
December 18, 2017

Richard Wagner has officially taken the helm at Canada's highest court.

The Quebec jurist was sworn in today as chief justice of the Supreme Court of Canada at a short ceremony at Rideau Hall.

Wagner takes over from Beverley McLachlin, who retired Friday after serving for 17 years as chief and a total of 28 years on the court.

Wagner was also sworn in as a member of the privy council in front of an audience which included his family, McLachlin, Gov. Gen. Julie Payette and Prime Minister Justin Trudeau.

Appointed to the Supreme Court by former prime minister Stephen Harper, the 60-year-old Wagner could hold the chief justice role for 15 years, should he opt to remain until the mandatory retirement age of 75.

Also today, Alberta judge Sheilah Martin was formally appointed to the high court.

Canada's solitary-confinement laws are unconstitutional, Ontario judge rules
The Globe and Mail
Patrick White
December 18, 2017

An Ontario Superior Court judge has given Ottawa one year to overhaul the laws governing solitary confinement after finding existing statutes unconstitutional during a landmark case launched by the Canadian Civil Liberties Association nearly three years ago.

The ruling gives the rights group a major victory on one component of its multipronged assault on the legality of solitary confinement – the lack of independent oversight – but falls short of the outright repeal of prolonged prisoner isolation that its lawyers had been asking for.

The CCLA will have 30 days to appeal aspects of the decision, something it is strongly considering.

"Independent oversight of the placement of prisoners in solitary confinement, and a recognition of the real harm caused by the practice are critical to bringing the rule of law into our prisons," said Jonathan Lisus, who argued the CCLA's case in court with Michael Rosenberg. "The court's decision is thorough and thoughtful and the CCLA is closely reviewing it."

Dan Brien, a spokesman for Public Safety Minister Ralph Goodale, did not offer Ottawa's interpretation, saying only that the government is "examining the decision closely." In its original application filed in January, 2015, the CCLA sought to have administrative segregation laws struck down and rewritten along five distinct lines.

The association launched the constitutional application just a month after The Globe and Mail began a long-term examination of solitary-confinement practices in the country, starting with an investigation into the 2010 death of Eddie Snowshoe in prison after 162 days in solitary confinement.

In the court case, lawyers for the CCLA argued for a 15-day limit on segregation placements, a prohibition on the isolation of mentally ill inmates, a rule barring prisoners aged 18 to 21 from solitary cells, a ban on segregation being used as a form of protective custody and an independent oversight system for all segregation decisions.

In the end, Ontario Superior Court Associate Chief Justice Frank Marrocco agreed to the last request only.

Under the current review system, prison wardens act as both the investigator and adjudicator. They are responsible both for the initial decision to place an inmate in solitary and the internal tribunal assembled five days later to study and adjudicate that decision. Justice Marrocco wrote that such an arbitrary and potentially biased form of oversight is unacceptable considering the severe deprivation of liberty and security – two protections guaranteed under section 7 of the Charter of Rights and Freedoms – that takes place when an inmate is sent to solitary.

"I am satisfied that the statutory review of the decision to segregate is procedurally unfair," he wrote, "and contrary to the principles of fundamental justice because the procedure chosen provides that the Institutional Head is the final decision maker for admission, maintenance and release from administrative segregation and is the final institutional decision-maker of required reviews and hearings which occur immediately after an inmate is segregated."

He didn't agree with the CCLA, however, that an independent reviewer must come from outside the Correctional Service of Canada (CSC), a caveat that disappointed some rights advocates.

"Given the culture of CSC, I do not believe that another person within CSC making the fifth-working-day decision whether or not to continue segregation will make any difference to prisoners' liberty rights," said Jennifer Metcalfe, executive director of Prisoners' Legal Services, a Vancouver-based legal aid clinic for prisoners.

Much of the rest of the CCLA's case rested on section 12 of the Charter, ensuring freedom from cruel and unusual punishment. On this front, Mr. Marrocco concurred with many of the CCLA submissions. Based on extensive expert testimony in the case, he wrote that "placing an inmate

in administrative segregation imposes a psychological stress, quite capable of producing serious permanent observable negative mental health effects."

He further agreed that "the harmful effects of sensory deprivation caused by solitary confinement could occur as early as 48 hours after segregation."

But these harms do not meet the threshold of "cruel and unusual punishment," he found, largely because CSC staff closely monitor inmates for potential harms.

Mr. Rosenberg, the CCLA lawyer, said the admission of harm is still crucial.

"This is an important step towards addressing a system that has harmed vulnerable people for far too long," he said. "The court has recognized that decisions about solitary confinement are too dangerous to be left in the hands of jailers."

Justice Marrocco also sided with the CCLA in ruling that Canada does use solitary confinement as defined by the United Nations – isolation for "22 hours or more a day without meaningful human contact." Federal lawyers had debated the point, saying that Canadian prisons don't technically employ solitary confinement because a recent rule change allows inmates in segregation two hours a day outside of their cell plus a shower.

The Canadian Civil Liberties Association CCLA launched the constitutional application shortly after the British Columbia Civil Liberties Association (BCLA) and the John Howard Society of Canada filed a similar but unrelated lawsuit in Vancouver.

Together, the two cases have exposed the internal workings of a prison policy called administrative segregation to the public.

Administrative segregation is roughly analogous to solitary confinement, the controversial practice of isolating inmates in bathroom-sized cells for up to 23 hours a day with little meaningful human contact.

In June, the Liberal government introduced a bill proposing changes to the country's solitary-confinement regime. Government lawyers tried to derail both the CCLA and BCLA cases, saying the legislation would address key concerns raised in the lawsuits. Judges in both provinces tossed out those arguments, however, ruling that key issues in the lawsuits remained despite the proposed legislation.

A ruling in the B.C. case is expected within the next three months.

Ontario judge rules that lack of safeguards make solitary confinement unconstitutional

Correctional services data indicate that in any given year, about 4,500 inmates are placed in administrative segregation — as opposed to those isolated for disciplinary reasons — some more than once, for an average of 24 days.

Toronto Star
Colin Perkel
The Canadian Press
December 18, 2017

Isolating a prisoner for more than five days in a process known as administrative segregation is unconstitutional because the system lacks proper safeguards, an Ontario judge ruled Monday.

However, Superior Court Justice Frank Marrocco said banning the practice immediately could be disruptive and dangerous, so he suspended his ruling for one year to give Parliament a chance to fix the problem with a law he said was otherwise sound.

At issue are sections 31 to 37 of the Corrections and Conditional Release Act, which allow a warden to order solitary confinement when an inmate is at risk of harm from others, or poses a risk to the security of the prison. Inmates spend 22 hours a day in a cell without any meaningful human contact.

The provisions require the warden to have the placement decision reviewed within five days but only the warden can change the decision. Marrocco, in his 38-page ruling, said that isn't good enough.

"The fifth working day review fails to provide the procedural safeguards required by the principles of fundamental justice," the associate chief justice said in his ruling. "The lack of an independent review means that there is virtually no accountability for the decision to segregate."

Nevertheless, Marrocco did find administrative segregation itself to be constitutional, even when applied to inmates aged 18 to 21 or the mentally ill. He rejected arguments from the Canadian Civil Liberties Association that the practice amounts to punishing a prisoner twice or to cruel and unusual punishment.

The justice also refused to declare placement in segregation for more than 15 days to be unconstitutional, saying proper monitoring of an inmate by a health professional is "sufficient to negate the potential cruelty of indefinite segregation."

The civil liberties group said Marrocco clearly agreed with many of its submissions but didn't go far enough in his ruling.

“While the regime has been struck down on one ground, its limited conclusions could still prolong the suffering of those vulnerable persons who are currently held in solitary confinement in Canada’s prisons,” the association said in a statement.

Correctional services data indicate that in any given year, about 4,500 inmates are placed in administrative segregation — as opposed to those isolated for disciplinary reasons — some more than once, for an average of 24 days. Correctional Service Canada maintains segregation is an appropriate last resort for managing a difficult and dangerous prison population.

The association, which maintains that extreme isolation can cause severe psychological harm in as little as two days, challenged the provisions on the grounds that, among other things, they allow a warden to segregate prisoners then leave it to the warden to review his or her decision.

In response, the federal government argued that any rights violations were the result of poor implementation of the law, not the law itself.

Marrocco disagreed, saying the law is lacking because it does not mandate an effective and independent review of segregation decisions. However, he did accept the government’s argument that striking down the provisions immediately could cause serious problems for prison authorities and prisoners alike.

“Prisons are dangerous places and the inability to resort to administrative segregation, without an appropriate timeline to implement changes, creates unacceptable risks for Correctional Service of Canada personnel and inmates,” Marrocco noted in his ruling.

Given that it is up to Parliament to address the situation, Marrocco said putting his declaration on hold for a year was reasonable time frame to allow that to happen.

Lawyer Michael Rosenberg, who represented the association, said independent review of segregation placements was long overdue and its time for Canada to act.

“The court has recognized that decisions about solitary confinement are too dangerous to be left in the hands of jailers,” Rosenberg said.

The federal government did not immediately respond to a request for comment.

Marrocco wrote that isolating inmates was seen as a progressive development when first introduced 200 years ago. The aim was to help rehabilitate inmates and spare them the death penalty or limb amputations.

“The idea was that the prisoners would spend their entire day alone, mostly within the confines of their cells, and reflect on their transgressions,” Marrocco said. “(But) I am satisfied that there

is no serious question the practice of keeping an inmate in administrative segregation for a prolonged period is harmful."

'Everybody is getting older:' Aging population challenges justice system
The National Post
Lauren Krugel
The Canadian Press
December 19, 2017

CALGARY — Fred van Zuiden turned 87 last month at a secure psychiatric hospital.

Visitors sang "Happy Birthday" in Dutch, as his English is fading. Cake was allowed, but it had to be served with plastic cutlery and without candles.

Van Zuiden has dementia. In October 2016, Calgary police charged him with second-degree murder in the death of his wife of nearly six decades, Audrey. Loved ones have described them as soulmates.

They say he doesn't understand why he's at the Southern Alberta Forensic Psychiatry Centre, which he sometimes mistakes for a homeless shelter or a fancy resort.

He occasionally asks if he has ever been married. Valerie Walker, a longtime friend who grew up with Audrey in the United Kingdom, tells him he did have a spouse, but she died. When he asks how, Walker simply tells him his wife's heart gave out.

He'll ask again five minutes later.

"Nothing stays with him for very long."

Van Zuiden was found unfit to stand trial earlier this year. It's left him in a state of limbo as the charge remains outstanding.

Alberta Justice says the Crown hasn't ruled out a stay of proceedings, but won't do that without a plan to ensure public safety and van Zuiden's well-being.

"This is such a unique case and it tests both the health system and the justice system significantly," said Walker's son, Vince, the van Zuidens' godson.

It also highlights some of the challenges courts face as Canada's population ages. Statistics Canada conservatively projects almost one-quarter of Canadians will be over 65 by 2030 compared with 15 per cent in 2013.

“Our entire criminal justice system needs to come to grips with the fact that everybody is getting older,” said Laura Tamblyn Watts, staff lawyer and senior fellow at the Canadian Centre for Elder Law.

“What works for somebody who may be 25 years old just doesn’t work for somebody who’s 85 years old.”

The challenge is broader than just dementia.

“It’s hard to have a right to a fair trial if older people can’t hear the proceedings, can’t see the evidence, are having a hard time remembering the issues against them or are having a hard time accessing services,” she said.

When people are found unfit to stand trial, the assumption normally is that with treatment they will eventually be well enough to face the accusations in court, said Patrick Baillie, a lawyer and forensic psychologist.

“And yet dementia is not going to get better. There is not going to be some time in the future when this individual is able to now understand at a level sufficient to be able to participate in the process,” he said.

“And then you end up with the health-care system saying, ‘Well, but is he some level of risk?”‘

The van Zuidens met in Calgary and ran a sailboat business together. They had no children.

Van Zuiden chronicled his experience as a Jewish boy in Nazi-occupied Holland in his book “Call Me Mom: A Dutch Boy’s WWII Survival Story.” As his family separated and went into hiding, he was shuttled between strangers’ homes and lived in a chicken coop for a time.

Van Zuiden dialled 911 himself in the early morning of Oct. 4, 2016.

A detective broke the news to Walker that her friend was dead.

“All he said was ‘blunt instrument.’ He said, ‘You don’t want to go and see her. I wouldn’t advise it.”‘

Walker said it’s possible van Zuiden thought he was under attack.

“When the police talked to him he thought they were Nazis, so he might well have gone back into his previous life.”

She said the officers handled the situation well.

“They treated him kindly and with respect.”

Walker and her son were part of a large contingent that came to court for each of van Zuiden’s appearances.

“Certainly seeing him in court that first time, it was heartbreaking,” said Vince Walker. “So lost.”

People at the hospital where van Zuiden is being housed tend to stay short term for court-ordered psychiatric assessments or long term if they have been found not criminally responsible for an offence.

The first visits to the psychiatry centre were tough.

At first, visitors were only able to interact with van Zuiden through a pane of glass and speaking through a phone. Now at least they can sit together in the dining room. Vince Walker said he wishes he could see his godfather play chess or basketball instead of hearing about it second-hand from staff.

Van Zuiden has been cleared by the Alberta Review Board to be moved to a secure seniors home in Calgary, but there were about a dozen people ahead of him on the waiting list in late November.

Loved ones want the charge to be stayed so that he isn’t remembered as an accused murderer. But if that were to happen, he would no longer be the province’s responsibility and they would be left on their own. Staying at the psychiatry centre may be the best option for him.

“We want what’s best for Fred,” said Valerie Walker.

Class actions provide access to justice for historical sexual assault and abuse
The benefits of class actions have enabled thousands of survivors to benefit who otherwise may never have come forward.
Toronto Star
Jonathan Ptak and Garth Myers
December 18, 2017

In response to the opinion piece published last week, entitled “Class action lawsuits not always best in historical sexual abuse cases,” the author unfairly criticized the role of class actions in achieving access to justice for vulnerable victims of historical sexual abuse.

Class actions arising from historical sexual abuse have the ability to overcome psychological, social and economic barriers presented by individual lawsuits and indeed, are repeatedly

endorsed by courts across Canada as providing meaningful access to justice and fair settlements for large groups of people.

Many survivors of abuse are elderly or in a frail emotional state. Others may not be able to devote the time and expense required to seek individual relief in the legal system, or may not even be aware that they could file a claim. Filing an individual lawsuit requires the survivor to publicly disclose details of their abuse and may require them to be cross-examined in court.

These psychological, social, and economic barriers may make it difficult or impossible for many survivors to come forward and commence lawsuits for historic sexual abuse.

Class actions are an important means of access to justice for survivors of abuse. Class actions are commenced by one individual who represents an entire group of survivors. This representative plaintiff becomes the face of the class action, who conducts the litigation on behalf of a whole group of survivors. This representative plaintiff becomes the face of the class action, and other class members may anonymously shelter under the representative plaintiff's umbrella. Only if the class action is successful must class members come forward and submit claims.

Finally, a class action settlement are scrutinized by judges to ensure that they are fair, failing which they will not be approved.

Individual lawsuit settlements also often contain terms preventing the parties from disclosing the settlement. These secret settlements have the effect of ensuring that other survivors are not aware of the settlements and therefore, they do not come forward. In contrast, settlements in class actions require robust notice to the class to encourage survivors to come forward and submit claims.

Finally, while settlements in individual lawsuits are typically limited to providing compensation to the individual, class actions have the capacity to provide broad based healing and reconciliation measures aimed at restorative justice.

Take for example the Indian Residential Schools settlement for damages arising from historical abuse. The number of eligible class members who submitted claims was far in excess of what was expected. One of the reasons for this high take up was that the application for the common experience payment component of the settlement was streamlined, paper-based, and private, eliminating many of the barriers faced by individual lawsuits. In addition, the settlement established the Truth and Reconciliation Commission to contribute to truth, healing and reconciliation between Canada and Indigenous peoples.

The benefits of class actions have enabled thousands of survivors to benefit who otherwise may never have come forward. They are an essential component of our justice system that provide access to justice to vulnerable groups.

Jonathan Ptak and Garth Myers are lawyers at Koskie Minsky LLP who represent abuse survivors as well as many other types of groups in class actions against governments and corporations.

Prison guards win big raises in new contract
iPolitics
Kathryn May
December 18, 2017
Canada's prison guards have overwhelmingly accepted a new contract that gives them bigger raises than the rest of the federal public service and keeps the existing sick leave regime intact.

The Union of Canadian Correctional Officers (UCCO), one of the biggest holdouts in the last round of collective bargaining, negotiated a 7.3 per cent raise over four years and is the only federal union that maintained the status quo with sick leave.

The tentative settlement, reached last month after 42 weeks of rocky contract talks, was accepted by 88 per cent of those who voted during ratification. UCCO President Jason Godin described the deal as the "envy" of other federal unions.

As part of the deal, the government also agreed to roll a $1,750 yearly allowance into base salary. That will put the salaries of senior corrections officer within six per cent of those earned by third class RCMP constable officers, said Godin. A top corrections officer would now earn a base salary of $83,000 a year.

Most public servants got a four-year-contract with a five per cent raise, in addition to some kind of wage adjustment. Their unions also signed one of two memoranda of agreements to discuss changes to sick leave.

Godin said the next big question is whether the accident-prone Phoenix pay system can process the raises and retroactive pay owed to 7,400 prison guards. The agreement won't formally be signed until late February and the government has 120 days after that to implement it. The Phoenix system is swamped with a growing backlog of pay problems — partly because of the work involved in implementing previously signed collective agreements.

The backlog of Phoenix cases and inquiries hit about 619,000 by the end of November.

The union argued from the start that the work of corrections officers is unlike those of most public servants and their pay should be comparable to the RCMP.

"We are first responders, which is why we maintained that comparability — we are police officers, firefighters and paramedics behind the walls," said Godin.

Last year, corrections officers made 2,000 medical interventions, used force 1,800 times, extinguished 400 fires and reported 1,800 contraband seizures. Godin said about 30 per cent of corrections officers, like other first responders, have suffered from post-traumatic stress disorder.

Godin said the union's recent lobbying campaign with MPs and senators, which included the release of a powerful documentary about the day-to-day life of correctional officers working in Canada's prisons, drove home the risks of the job.

Corrections officers have been pressing for parity with the RCMP since a milestone study in 1999 that compared pay, duties and working conditions between prison guards and police. The first contract to significantly narrow the gap between police and corrections officers to six per cent took effect in 2006 — a gap the union has since tried to maintain.

The corrections officers are one of the last groups to reach a deal with Treasury Board. The remaining holdouts include the border guards, ships officers, diplomats, lawyers and university teachers. The executives have yet to hear whether they will be getting raises.

This has been an unusual round of collective bargaining. It began under the previous Conservative government in 2014 — which wanted to scrap the existing sick leave regime, replace it with a new short-term disability plan and book the savings.

Few issues galvanized federal unions like sick leave. Unions held firm in an historic solidarity pact not to make any concessions on the existing sick leave scheme.

UCCO was the only federal union that didn't sign the solidarity pact. Corrections officers are among the top users of sick leave.

Public servants get 15 days of paid sick leave a year and corrections officers get 17 days. Sick leave can be banked but any unused sick leave disappears on retirement.

The Liberals took over bargaining when they were elected and last year reached agreements with the two largest unions — the Public Service Alliance of Canada and the Professional Institute of the Public Service of Canada — to take sick leave off the table. They each signed different memoranda of understanding to discuss sick leave. All other unions were left to choose whether to sign the PSAC or PIPSC memorandum, except for UCCO; Godin said the union refused to budge on sick leave and the government eventually let it keep the status quo.

Supreme Advocacy: Tips And Traps On Your Way To The Supreme Court Of Canada
Mondaq.com
David Debenham, JD, LLM, DIFA, CMA, CPA, CFE
December 19 2017
McMillan LLP

Appeals to the highest court in the land require a unique approach to advocacy. The Americans recognize this fact and have a highly specialized "Supreme Court Bar," of whom the "elite eight" are the best known. Canadian barristers have not quite cottoned on to this approach and choose, to a large degree, to do it themselves. Fair enough. Here are some guidelines that do-it-yourself advocates should consider when they come to argue before our Supreme Court of Canada.

Test for leave employed by the Supreme Court of Canada The Supreme Court of Canada grants leave where, with respect to "the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, ..."

Lawyers read this passage, but rarely believe it. There are more leave applications that delve into the facts and, by so doing, narrow the case into one that turns on minutiae rather than one decided on broad issues of policy. "This is a case that involves the competition for air space between traditional aircraft and drones." Perfect. Move on to the law.

The next most common mistake made by counsel seeking leave is to attempt to extrapolate from their legal arguments in the lower courts. The leave application requires counsel to look at their matter with entirely fresh eyes and in a new light. The leave court is not a court of error, no matter how egregious the error. Error is a matter entirely between the parties, but the leave court is interested in cases that create an important precedent across Canada.

There have been many attempts to define what this means. Ask yourself two questions: (1) What questions in this case would be of interest to a law review in the applicable area of law? (2) What questions in this case impact on the everyday lives of Canadians, either as a whole or as a particular group, industry or profession? Obviously, if there have been case comments, blogs, or newspaper or trade articles about your case, they will be helpful. Put them in your leave application, front and centre.

If your case has involved an area of law that has attracted academic comment or conflicting appellate decisions, that is important, too. Highlight this point.

If your case has raised issues of the proper role of an appellate court as (1) a court of appeal or (2) a court of judicial review which can be answered only by the Supreme Court of Canada, that is of considerable interest to the leave court.

The key is to find an interesting policy issue that needs to be decided bv the highest court in the land; or to find something about the case that attracts the popular imagination; or is of crucial interest to a particular industry or group. In this regard, look not only at common-law principles or legislation that needs interpretation but also at the larger social, political and legal milieus in which the question arises. If necessary, you can submit what is known as a "Brandeis brief," a compilation of extrinsic evidence that illustrates how the decision in question impacts a particular group or the public as a whole. Demonstrate that your case involves an important question of law that is relevant to a particular industry or profession on a day-to-day basis, has led to a conflict between courts of appeal of different provinces, involves the application of federal statutes or has been the subject of international disputes.

The key, then, is to abstract beyond the facts of your case and the interests of the litigants and establish the precedential value of the broad issues implicated by the case to determine if it is important to Canadians, or particular groups of Canadians. If you are responding, focus on the facts, emphasize recent Supreme Court of Canada authorities and stress the need to let a provincial precedent percolate through other provincial appellate courts to see if a consensus or divergence of opinion emerges. Arguing the appeal

Never change a winning game but always change a losing game. One cannot count the number of times an appellant lost in the lower courts, often unanimously, then obtained leave with novel arguments based on academic literature or foreign jurisprudence, and then proceeded to lose before the Supreme Court of Canada by reverting to the same arguments that were unsuccessful in the lower courts. Isn't madness defined as doing the same thing over and over again, expecting a different result? If you won previously, trust in your argument but consider others that could be made.

A fox knows many strategies, but the hedgehog knows one all-purpose course of action, or so we are told. Does this mean we put all our eggs in one basket? Or do we sling as much pasta as we can against the wall, and see what sticks? The answer is simple: Know your judges. If one or more have a favourite theory that might apply to your case, you'd best ensure it is part of your written argument. So, too, if one or more judges have previously rejected your pet argument, you'd better have an alternative one in hand. How can you find this out? Research everything the judge has written, in judgments and articles.

Finally, oral argument is for the purpose of addressing the other party's - and the intervenors' - arguments. Proceed as if everything you have to say has been said in your factum, and that it has been understood. When there is only an hour to argue, you need to get all your counter-arguments out of the way first, before you revert to anything you said in your factum.

Conclusion: The Mike Tyson principle
Boxer Mike Tyson famously said, "Everybody has a plan until they get punched in the mouth." So too, those who argue before the court are composed until their first hard question from the bench, which then can turn into a melee as one answer leads to a new question or five. The best

approach is to have bullet points on a cue card and be sure you make these points on opening, on closing - or on both - before the verbal barrage from the bench begins. Having made the points you wanted to make, everything else said thereafter is simply gravy - you can relax and enjoy being a "poor player that struts and frets his hour upon the stage. And then is heard no more."

Reference

1 The eight US lawyers are Carter Phillips, Paul Clement, Ted Olson, David Boies, Seth Waxman, Gregory Garre, David Frederick and Lisa Blatt.

2. Supreme Court Act, RSC 1985, c S-26, s 40(1) [emphasis added].

3. R v Turpin [1989] 1 SCR 1296 at 1331.

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The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

Editorial: McLachlin changed top court for the better
Winnipeg Free Press
December 19, 2017

Beverley McLachlin kept the Supreme Court of Canada in touch with the intellectual currents in the country in ways that Canada's chief justices have not usually done. As a result, the court enjoys a high profile and high public esteem. Justice Richard Wagner, who took over as Chief Justice of Canada this week upon Justice McLachlin's retirement, may lead the court in a different way, but he should aim to preserve the level of public confidence that Justice McLachlin has bequeathed to him.

The role of chief justice can isolate a person from the man in the street and the woman at the hockey rink. The court's immediate audience is the lawyers who appear before it and the judges across the land who must shape their work around the court's decisions. This puts constant pressure on the chief justice to speak in impenetrable legalese that means nothing to the wider world.

Public appearances can be difficult for a chief justice: the workload is extremely heavy already, plus there is always the danger of saying something in public that creates an appearance of bias on some question the court has to decide.

Chief Justice McLachlin made it her business, despite these constraints, to go out and meet Canadians wherever she was invited and speak to them in plain terms about the work of the court and other topics of interest. She also brought interesting guests, including all the living former prime ministers, to have lunch with the justices and talk about anything that interested them.

She arrived at the court with a knack for clear expression. Constant contact with the broader public helped anchor her thinking in the lives and experiences of the people beyond the judicial world.

Chief Justice McLachlin had to steer the court through the Stephen Harper era, when the ruling Conservative party was chronically impatient with the law. From her roots in Pincher Creek, Alta., she understood very well the populist view that the majority will of the people should always prevail — regardless of the law — and that courts should get out of the government's way. Having her own direct relationship with a broad public, she was sure of her ground in upholding the law in defiance of the government's will.

Under her leadership, the court ruled against the Harper government on a series of issues, including mandatory minimum sentences for gun crimes, prostitution and assisted dying. Mr. Harper tried to pick a public quarrel with her over the appointment of Justice Marc Nadon to the court; he lost that one first when it became clear he was falsely accusing her of meddling in the appointment process and he lost again when the eight other judges found Justice Nadon was not eligible and kicked him off the court.

A chief justice socially bottled up within the Ottawa bubble and the judicial culture might have hesitated to tangle so often with a prime minister so openly contemptuous of the law. Chief Justice McLachlin, however, was holding herself accountable to the country and to the framework of law within which Canadians live as governments come and go.

Chief Justice McLachlin leaves the court stronger than she found it because of her courage, her openness and her personal connection with the public.

She leaves it with a tradition of plain language that makes its rulings intelligible to anyone who cares to read them.

Government of Canada announces judicial appointments in the province of Alberta
Canadian Newswire
Department of Justice Canada
December 19, 2017

OTTAWA, Dec. 19, 2017 /CNW/ - The Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, today announced the following appointments under the new judicial application process announced on October 20, 2016. The new process emphasizes

transparency, merit, and diversity, and will continue to ensure the appointment of jurists who meet the highest standards of excellence and integrity.

Michael J. Lema, General Counsel with the Department of Justice Canada, is appointed a justice of the Court of Queen's Bench of Alberta in Edmonton. He replaces Madam Justice M. Moreau, who was appointed Chief Justice of the Court of Queen's Bench of Alberta effective October 12, 2017.

Grant S. Dunlop, Q.C., a partner at Ogilvie LLP, is appointed a justice of the Court of Queen's Bench of Alberta in Edmonton. He fills a new position authorized under Bill C-44, the Budget Implementation Act, 2017, No. 1.

Biographies

Justice Michael J. Lema holds degrees in commerce (1983) and law (1986) from the University of Alberta. After articling with Bryan & Company in Edmonton, he was admitted to the Alberta Bar in 1987. He practised commercial law with Duncan Collins (later Blake Cassels & Graydon) in Calgary, before joining the Department of Justice Canada in Edmonton in 1992. At the Department, he focused largely on litigation and advisory matters for the Canada Revenue Agency and the Office of the Superintendent of Bankruptcy, making appearances before all levels of court, including the Supreme Court of Canada. He was appointed General Counsel in 2016.

Justice Lema was a member of departmental committees responsible for reviewing and approving factums in a wide range of practice areas, risk assessments, and recommendations on appealing adverse decisions. He provided advice on creditors' rights and tax issues to Department colleagues across Canada. He was a frequent contributor to professional development events, both inside the Department and for external organizations. He was a guest lecturer at the University of Alberta Faculty of Law and Department of Civil Engineering on such topics as creditors' rights, taxation, and construction-contract issues, appellate advocacy, and effective legal writing.

Justice Lema served on the board of directors of the Canadian Cancer Society (Alberta and Northwest Territories Division) in Edmonton and Calgary, helped raise funds for the United Way and Sign of Hope campaigns in Edmonton for many years, and helped launch the Expo Science Katherine O'Connell (school science fair) at École Notre Dame in Edmonton.

Justice Lema lives in Edmonton with his partner, their children, and a large collection of backpacks, lunch kits, ski gear, soccer balls, and hockey sticks.

Excerpts from Justice Lema's judicial application will be available shortly.

Justice Grant S. Dunlop holds a B.A. (1985) and an LL.B. (1988), both from the University of Alberta. Prior to his appointment, he had spent his entire legal career at Ogilvie LLP in Edmonton, where he was an articling student, an associate, and since 1999, a partner. Justice Dunlop maintained a litigation practice that included directors' and officers' liability, employment, construction, banking regulation, professional liability, estates, patents, public utilities, schools, elections, and airports. In addition, Justice Dunlop drafted agreements for insurance reciprocals and engaged on his clients' behalf with provincial insurance regulators across Canada.

From 1993 to 2011, Justice Dunlop was a member of the Joint Legislative Review Subcommittee established by the Canadian Bar Association and the Law Society of Alberta, drafting comments on bills under consideration by the Legislative Assembly of Alberta. He has lectured on board governance and directors' and officers' duties for a variety of audiences, including the University of Alberta and subsections of the Canadian Bar Association. In 2005, he taught a course in business law in the Faculty of Professional Education at Concordia University College of Alberta. Justice Dunlop was appointed Queen's Counsel in 2016.

Justice Dunlop has volunteered as the Chair of the Legal Division of the United Way of the Alberta Capital Region Campaign, President of Northern Light Theatre, member of the Edmonton Community Lottery Board, workshop facilitator with the Board Development Program of Alberta Community Development, and board member of the Comedy Arts Festival.

Excerpts from Justice Dunlop's judicial application will be available shortly.

Pair convicted of sexually assaulting girl latest to walk free due to court backlogs
CTVNews.ca Staff
December 18, 2017

A Manitoba girl is the latest victim of Canada’s backlogged court systems. The man and woman convicted of sexually assaulting her are now free after a judge ruled that a nearly four-year delay in the legal proceedings was unreasonable.

“At just over 45 months, this straightforward case took longer than it reasonably should have,” Justice Sandra Zinchuk ruled. “Although the accused in this case did not push for earlier dates, or drive the case forward, neither accused was responsible for delay.”

The man and woman convicted in a Portage la Prairie courtroom cannot be named in order to protect the victim’s identity.

Last year, a Supreme Court of Canada ruling aimed at easing the backlog set out a new 30-month time frame for superior courts and an 18-month timeframe for provincial courts, in what has become known as the Jordan decision.

Hundreds of motions have been filed across Canada, and dozens of cases have been stayed, though they are often appealed. The Crown is reviewing this most recent case in Manitoba.

“I think it’s outrageous that you have a situation where certainly children deserve a higher threshold of protection,” said Signy Arnason, the associate executive director at the Canadian Centre for Child Protection. “In this particular instance, we have completely failed children.”

The head of the Manitoba’s Criminal Defence Lawyers Association said while decisions like this are often unpopular, it is important that justice be delivered in a timely manner. Scott Newman hopes such cases convince lawmakers to push for improved judicial efficiency.

“We are telling people to correct the system,” he said. “We are sending a message to those in power that says if you don’t fix this, there are going to be more people like this girl.”

Manitoba Justice said it is working to address backlogs by reducing the number of preliminary hearings and moving cases straight to trial. Those who work in the courts, however, argue the problem is a lack of judges, clerks, and lawyers.

With a report from CTV’s Manitoba Bureau Chief Jill Macyshon

Minister Wilson-Raybould Appoints Deputy Judges to the Territories
Canadian News Wire/CNW
Department of Justice Canada
December 19, 2017

The Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, today announced 17 appointments of Deputy Judges of the Supreme Court of the Northwest Territories, the Supreme Court of Yukon, and the Nunavut Court of Justice.

These appointees are all jurists of the highest calibre from a variety of backgrounds across the country. Together, they will help Canada's Territories continue their history of judicial excellence.

Quote

"The appointment of these Deputy Judges will help to provide access to justice in the North. I am also pleased that, through their experience as Deputy Judges, members of the judiciary will gain knowledge of Canada's diversity and of the challenges faced by people living in remote communities."

The Honourable Jody Wilson-Raybould, P.C., Q.C., M.P.
Minister of Justice and Attorney General of Canada

Quick Facts

- Sitting, supernumerary, and retired superior court judges, as well as lawyers with more than ten years of experience, can be appointed Deputy Judges of the Supreme Court of the Northwest Territories, the Supreme Court of Yukon, and the Nunavut Court of Justice.

- While in office, a Deputy Judge has all the powers, duties and functions of a resident judge.

- Deputy Judges are called upon to preside over matters in accordance with the needs of the courts.

- The Northern courts are thereby able to benefit from the expertise, skills, and language abilities of a roster of Deputy Judges from across Canada.

- The Minister of Justice identifies candidates for appointment as Deputy Judges in consultation with the Chief Justices of the three Northern courts and with the Chief Justices of the candidates' "home" courts.

The Minister of Justice and Attorney General of Canada, Jody Wilson-Raybould, has made the following appointments to the Supreme Court of the Northwest Territories, the Supreme Court of Yukon and the Nunavut Court of Justice:

Deputy Judge Appointments for the Supreme Court of the Northwest Territories

The Honourable Justice Thomas A. Heeney, Ontario Superior Court of Justice (Southwest Region)
The Honourable Justice Patricia C. Hennessy, Ontario Superior Court of Justice (Northeast Region)
The Honourable Justice Nancy L. Backhouse, Ontario Superior Court of Justice (Toronto)
The Honourable Justice Paul S. Rouleau, Ontario Court of Appeal (Toronto)
The Honourable Justice Paul R. Jeffrey, Court of Queen's Bench of Alberta (Calgary)

Deputy Judge Appointments for the Supreme Court of Yukon

The Honourable Justice Malcolm D. Macaulay, Supreme Court of British Columbia (retired)
The Honourable Justice Bryan E. Mahoney, Court of Queen's Bench of Alberta (Calgary)
The Honourable Justice Paul B. Kane, Ontario Superior Court of Justice (East Region)
The Honourable Justice Gregory M. Mulligan, Ontario Superior Court of Justice (Central East Region)
The Honourable Justice John S. Little, Court of Queen's Bench of Alberta (Edmonton)

Deputy Judge Appointments for the Nunavut Court of Justice

The Honourable Justice Nancy L. Backhouse, Ontario Superior Court of Justice (Toronto)
The Honourable Justice Paul S. Rouleau, Ontario Court of Appeal (Toronto)
The Honourable Justice Brian J. Scherman, Court of Queen's Bench for Saskatchewan (Saskatoon)
The Honourable Justice Dale F. Fitzpatrick, Ontario Superior Court of Justice (Central West Region)
The Honourable Justice Irving W. André, Ontario Superior Court of Justice (Central West Region)
The Honourable Justice Victoria R. Chiappetta, Ontario Superior Court of Justice (Toronto)
The Honourable Justice Adriana Doyle, Ontario Superior Court of Justice (East Region)

Judicial appointments made for Alberta
Lawyer's Daily
Carolyn Gruske
December 20, 2017

Two lawyers have been appointed justices of the Court of Queen's Bench of Alberta in Edmonton.

Justice Michael J. Lema has served as general counsel with the Department of Justice Canada, where he has been a member of departmental committees responsible for reviewing and approving factums in a wide range of practice areas, risk assessments and recommendations on appealing adverse decisions. He also provided advice on creditors' rights and tax issues. Prior to joining the civil service, Justice Lema practised commercial law with Duncan Collins (later Blake Cassels & Graydon LLP) in Calgary.

Justice Lema has been a guest lecturer at the University of Alberta faculty of law and department of civil engineering on topics such as creditors' rights, taxation and construction-contract issues, appellate advocacy and effective legal writing. He replaces Justice Mary Moreau, who was appointed chief justice of the Court of Queen's Bench of Alberta effective Oct. 12, 2017.

Justice Grant S. Dunlop is a partner at Ogilvie LLP. He has been with the firm since he joined as an articling student. Justice Dunlop's litigation practice dealt with directors' and officers' liability, employment, construction, banking regulation, professional liability, estates, patents, public utilities, schools, elections and airports. Additionally, he drafted agreements for insurance reciprocals and engaged on his clients' behalf with provincial insurance regulators across Canada.

Justice Dunlop was formerly a member of the joint legislative review subcommittee established by the Canadian Bar Association (CBA) and the Law Society of Alberta, which was tasked with drafting comments on bills under consideration by the Legislative Assembly of Alberta.

He has lectured at the University of Alberta and the CBA on the topic of board governance and directors' and officers' duties and has taught a business law course in the faculty of professional education at Concordia University College of Alberta. Justice Dunlop fills a new position on the bench.

Supreme Court of Canada Expands Workplace Discrimination Protection to Cover Non-Employees
Lexology
Canadian Labour and Employment Law Blog
Jennifer Bernardo @ Baker McKenzie
December 19, 2017

As stories of workplace harassment and discrimination permeate the news and social media accounts, the Supreme Court of Canada ("SCC") has expanded the scope of provincial human rights legislation to impose liability on co-workers – even when those co-workers have different employers. In British Columbia Human Rights Tribunal v. Schrenk, 2017 SCC 62 ("Schrenk"), the majority of the SCC advocated for a broad contextual approach to determining whether discriminatory conduct is subject to penalties under British Columbia's Human Rights Code (the "Code"). The Schrenk decision illustrates a growing legal and social awareness of the seriousness of workplace discrimination and a desire to eliminate any sense of impunity for perpetrators. For employers, the decision heralds a new stage in the movement against workplace discrimination, in which employers may be expected to work together to address potential human rights violations.

Key Takeaways

In the Schrenk decision, the SCC has reinforced the broad reach of remedial human rights legislation. Employers must be more cautious than ever about preventing and remedying discriminatory and harassing behaviour in the workplace. In particular, employers should be mindful of situations where their employees work in close proximity with the employees of other businesses. Following Schrenk, employers may face a greater risk of liability for human rights violations, involving a wider range of potential complainants, if their employees are "integral" to the work or workplace of other individuals. Therefore, greater cooperation between employers may be required to implement effective discrimination and harassment policies.

Background

The Applicant, Mohammadreza Sheikzadeh-Mashgoul, worked as a civil engineer for Omega and Associates Engineering Ltd. ("Omega") on a road project commissioned by the municipal

government in Delta, British Columbia ("B.C."). As the civil engineer, the Applicant was tasked with supervising the employees of Clemas Contracting Ltd. ("Clemas"), the government's primary construction contractor.

While on the job, the Applicant was repeatedly subjected to derogatory comments concerning religion, race, and sexual orientation. The perpetrator was Edward Schrenk ("Schrenk"), a site foreman and superintendent employed by Clemas. Following intervention by Omega and the government, Clemas removed Schrenk from the site. However, Schrenk continued to send unsolicited and discriminatory emails to the Applicant, with copies to Clemas supervisors. Clemas terminated Schrenk's employment approximately six months after the first incident involving the Applicant.

The Applicant filed a human rights complaint with the B.C. Human Rights Tribunal ("Tribunal"), alleging discrimination by Clemas and Schrenk (the "Respondents"). The Respondents brought an application to dismiss the complaint, arguing that the Tribunal did not have jurisdiction to hear the claim because there was no employment relationship between the parties. Both the Tribunal and the Supreme Court of British Columbia concluded that Schrenk could be liable under the Code because the Applicant claimed that he was negatively impacted in his employment by Schrenk's discriminatory conduct. The B.C. Court of Appeal sided with Schrenk and dismissed the claim because Schrenk was not in a supervisory or otherwise more powerful position in relation to the Applicant.

Decision

The majority of the SCC concluded that the Code prohibits discrimination against employees – regardless of who their employer is and who the perpetrator is – whenever that discrimination has a sufficient nexus with the employment context. The majority noted three non-exhaustive factors that could inform this contextual analysis:

whether the respondent was integral to the claimant's workplace;
whether the impugned conduct occurred in the claimant's workplace; and
whether the claimant's work performance or work environment was negatively affected.
Ultimately, the majority agreed with the Tribunal that Schrenk's conduct was covered by the Code, meaning that Schrenk (and potentially Clemas) could be liable.

Three judges disagreed with the majority's opinion and argued for a narrower interpretation of the Code, which focuses on the employment relationship instead of the employment context. While these dissenting judges' opinion did not prevail, their perspective highlights the breadth of the majority's contextual approach. According to the dissenting judges, although the Code's workplace protections prohibit all forms of workplace discrimination – including discrimination from co-workers, customers or other individuals with whom an employee interacts – the onus is on employers to intervene and halt the behaviour. Therefore, the Code is only engaged by an employer's (or supervisor's) actions or inaction and it is the employer, rather than other

perpetrators, who may be held liable. The dissenting judges were mindful of concerns about absolving perpetrators from direct responsibility or limiting recourse for victims of covert workplace discrimination, but suggested that employees advise their employer or supervisor of any discriminatory behaviour and bring a claim if the employer fails to take appropriate action.

Thirty years after Morgentaler ruling on abortion rights, Canada 'still dealing with the same issues'

Only one in six hospitals in Canada performs abortions and some provinces have no standalone abortion clinics at all. New Brunswick, meanwhile, continues to refuse to fund abortions at the province's only clinic.

Toronto Star
Brett Bundale
The Canadian Press
December 20, 2017

It's 1979. A 20-year-old student misses her period.

"I was in my third year of university. I used oral contraceptives but I got pregnant," the woman, now in her late 50s, said in a recent interview from Montreal. "I hadn't finished my degree. I wasn't ready for a family."

She avoided the French-language Catholic hospital where she lived in Moncton, N.B., and instead booked an appointment with a gynecologist at the city's English-language hospital.

"If you were early enough, I heard he would perform an abortion. It's where all the French girls went," she says.

But there was a catch: she was told she had to be suicidal to obtain the procedure.

"I had to say I would kill myself. It had to be a life-or-death situation," she recalls.

She declared herself mentally ill, but says now she felt lucky considering the difficulty some women had getting abortion services at the time.

"I was in a safe environment in a hospital. It wasn't a back-alley office somewhere," she says. "I didn't die and I wasn't left infertile."

This January marks 30 years since the Supreme Court of Canada struck down the country's abortion law as unconstitutional.

The Jan. 28, 1988, Morgentaler decision overturned a law that criminalized abortions unless a panel of doctors agreed a woman's life or health was threatened by the pregnancy — likely the

rule that compelled a Moncton gynecologist in the 1970s to require a woman to declare herself suicidal.

The country's highest court found the criminal law violated the Charter of Rights and Freedoms' guarantee of life, liberty and security of the person.

"Bravo for the women of Canada!" Henry Morgentaler, doctor and abortion rights advocate, said outside the Supreme Court chambers. "Justice for the women of Canada has finally arrived!"

Three decades later, the landmark abortion ruling still stands as the country's touchstone on abortion rights.

But the issue continues to be a source of polarizing debate, and voices on both sides have called for legislation: Anti-abortion groups want a criminal law banning or restricting abortion, while advocates of women's right to choose say legislation is needed to improve abortion access and curb harassment against doctors and patients.

"Even though 30 years have passed since the abortion law was struck down in Canada, we unfortunately are still dealing with the same issues," says Arlene Leibovitch, Morgentaler's widow and owner of the Toronto and Ottawa Morgentaler clinics.

Anti-abortion groups rally outside abortion clinics, wielding graphic placards and intimidating doctors and patients, she says.

"The Morgentaler clinic in Ottawa has been subjected to some of the most vicious protesting in the province and women's rights to privacy have been grossly compromised," Leibovitch says. "It's extremely stressful for both the staff and the patients to get basically attacked by a barrage of very vivid posters and signs and people yelling at them as they're coming into the clinic."

Ontario's so-called bubble zone legislation — aimed at creating safe access zones outside abortion clinics — is expected to take effect soon. But she questions why it's taken three decades for the province to act.

"How could this still be happening in this day and age when abortion has been legal for 30 years?"

The Supreme Court's watershed 1988 decision made Canada one of a handful of countries without a law either restricting or ensuring access to abortion.

It's a legislative void some anti-abortion politicians and advocates have tried hard to fill. They argue that the intention of the court was not to remove all limits on abortion, but rather to ensure those limits didn't violate a pregnant woman's right under the charter.

But attempts to re-criminalize abortion have failed.

As justice minister in Brian Mulroney's Progressive Conservative government, Kim Campbell introduced a bill in the late 1980s that would have made abortion a criminal offence unless performed by a doctor who believed the health or life of the woman was threatened.

The bill, which replaced the opinion of a hospital committee with one physician, was approved by the House of Commons only to be defeated in the Senate following a tied vote in 1991.

Since then, successive federal governments have sidestepped attempts to criminalize abortion. Several private members' bills have attempted, and failed, to make aspects of abortion illegal, including a bill to criminalize inducing an abortion after 20 weeks gestation and a bill to make it an offence to injure an unborn child while committing an offence against the mother.

Abortion rights advocate Joyce Arthur argues that granting legal rights to a fetus is a slippery slope that could lead to restricting the rights of pregnant women in the future.

"We need to make sure anti-choice (advocates) have no grounds to build on," says Arthur, executive director of the Abortion Rights Coalition of Canada. "Without any restrictions, they don't have a framework to build on."

In other countries, Arthur says criminal laws that make abortions illegal after certain gestational ages are used as a foothold by anti-abortion activists to try to further limit abortion access.

Yet abortion opponents argue the Supreme Court's Morgentaler decision left the fetus unprotected.

"We literally are a lawless nation with respect to abortion," says Jack Fonseca with Campaign Life Coalition, a group that opposes abortion. "A woman could legally abort her unborn child at any point before going into labour, right up to the moment of birth."

The Toronto-based organization wants an outright ban on abortion with few exceptions.

Natalie Sonnen with LifeCanada, an anti-abortion group, says "any law at this point would be better than the current situation where abortion can be obtained throughout all nine months for any reason."

But Joanna Erdman, Dalhousie University's MacBain Chair in Health Law and Policy, says those claims are false.

"It's really a red herring. It's a total falsehood that someone just walks into a clinic in Canada and asks for a late-term abortion and gets it," says Erdman, an associate professor at the university's Schulich School of Law.

While there is no criminal law restricting abortion, she says it's treated like any other medical procedure and is regulated by medical policies, codes of ethics and protocols.

"We have no unique criminal law provision on abortion because there are lots of laws that regulate abortion as a medical procedure," Erdman says. "Suggesting that women are regularly accessing late abortions just doesn't at all reflect the reality of abortion practice."

In 2015, the Canadian Institute for Health Information recorded a total of 100,104 abortions across Canada in both clinics and hospitals.

Only hospitals, where about one-third of abortions are performed, report gestational age. About 2.5 per cent of abortions were induced at a gestation over 20 weeks, according to the federal agency's figures.

However, Arthur says hospitals do the vast majority of late-term abortions. As most clinics only do abortions up to 12 or 16 weeks, she estimates just over 0.5 per cent of abortions are done after 20 weeks.

"In practice, almost all abortions over 20 weeks are done for lethal fetal abnormalities. The fetus is not viable and won't survive after birth," Arthur says. "A small minority are done for other compelling reasons, such as a girl abused by her stepfather."

Erdman adds that for the most part, late-term abortions are "absolutely tragic cases of wanted pregnancies in which there is a diagnosis. It's absolutely cruel to force a woman to carry a stillbirth to term and not have a way to intervene."

Meanwhile, finding a physician who is trained and willing to perform late-stage abortions makes them largely inaccessible.

Lianne Yoshida, medical co-director of the Termination of Pregnancy Unit at the QEII Hospital in Halifax, says abortions later in pregnancy are limited for many reasons.

"The main one is surgical expertise. The procedure is more complicated and requires different equipment and skill set for the doctor to be able to do them safely," she says.

The recurring anti-abortion stance that the lack of a criminal law will lead to women aborting a nine-month-old fetus is one Arthur calls "misogynistic and insulting."

"It's been refuted over and over again but they keep saying it," she says. "It's based on the assumption that women are so stupid and callous that they are going to have an abortion at nine months for any trivial reason and a doctors will do it. It's nonsense and it's infuriating, and it's a form of hate speech against women and doctors."

Arthur adds: “We’ve had no restrictions on abortion for 29 years so that itself is proof we don’t need any.”

Early in his career, Morgentaler turned women seeking abortions away. It was illegal, and he didn’t want to break the law.

But it gnawed at his conscience, Leibovitch says, and in 1969 he opened his first abortion clinic.

“For Henry, the fact that women were dying was wrong and unnecessary. It’s a very simple procedure,” she says, noting that abortions up to 12 weeks take about two to three minutes.

Morgentaler was repeatedly arrested and thrown in jail for performing abortions. But juries repeatedly acquitted him, refusing to enforce a law perceived to be unjust.

Even after the landmark 1988 ruling, Morgentaler continued to advocate for abortion funding and access across the country despite death threats and the bombing of his Toronto clinic.

“Young people today have a hard time understanding how incredibly hard the fight was to achieve the rights that they have,” Leibovitch says. “Women were trying to self-induce abortions from unqualified doctors with devastating results. They were often subjected to perforation and a lot of them bled out or ended up with massive infections unable to have children in the future.”

While access to abortion has improved significantly since the Morgentaler decision, women in rural areas are often forced to travel some distance for the service.

“I think access has absolutely made huge strides but there are still barriers,” says Sarah Hobbs Blyth, executive director of Planned Parenthood Toronto.

Only one in six hospitals in Canada performs abortions and some provinces have no standalone abortion clinics at all. New Brunswick, meanwhile, continues to refuse to fund abortions at the province’s only clinic.

“We have had a significant and long-standing lack of leadership within executive branches of government to actually make access to abortion a barrier-free reality,” says Sandeep Prasad, an Ottawa-based lawyer and activist with Action Canada for Sexual Health and Rights.

For example, Mifegymiso, the two-step abortion pill, became available in France and China in 1988 — the same year Canada decriminalized abortion.

Health Canada didn’t approve Mifegymiso until July 2015, and barriers still remain to its use — it can only be prescribed up to nine weeks, and can be subject to a requirement for an ultrasound.

“It’s been available for 30 years and it’s just reaching the Canadian market now,” Prasad says, noting that while an ultrasound is recommended, there are other safe methods to rule out ectopic pregnancy and confirm gestational age.

“In many areas of sexual reproductive rights, we have a long way to go as a country.”

It’s been almost 30 years since that cold January day when the country’s highest court struck down the criminal law against abortion.

While there continues to be opposition to abortion, multiple polls in recent years suggest Canadian attitudes have shifted towards a woman’s right to choose.

Leibovitch credits much of the progress in the area of women’s reproductive rights to Morgentaler, who passed away in 2013.

“Henry Morgentaler was an extremely brave and courageous man who fought for what he believed in and for the rights of the people of Canada,” she says.

“He suffered through the Holocaust, lost almost his entire family, pursued a medical degree despite anti-Semitic climates that were still ongoing in Europe and he arrived in this country as an immigrant and struggled for decades so others could have rights.”

Payroll system causing pain for public servants
Winipeg Free Press
Daniel Blaikie
December 20, 2017

Can you imagine going into work day after day not knowing when you’ll be paid, or how much?

As unlikely as it sounds, this is the situation facing tens of thousands of Canada’s public servants, many of whom live right here in northeast Winnipeg.

This payroll disaster is a result of the government’s ill-fated Phoenix Pay System. It was conceived by the previous government then rushed into implementation by the current government, despite warnings that it was not ready.

The federal government has a large number of workplaces throughout Winnipeg that employ Elmwood-Transcona residents. The largest example close to home is Canada Revenue Agency’s Winnipeg Tax Centre by Kildonan Place, where over 2,000 people work, but not all are being paid as they should.

In one case brought to my attention, an employee took his family in for dental work and was told he did not have insurance. Phoenix had been deducting the premiums from his paycheques, but not remitting the money to the insurance company.

Another case involves a constituent who has not been paid for overtime and has not received two raises because the system cannot properly compute his years of service. He's followed all the steps he was told to follow, but 20 months later he's still not been properly compensated.

In numerous cases, maternity leave is a common cause for compounding errors in pay and benefits. We've seen young working mothers struggling to make ends meet because of shortfalls that have still not been reconciled months after they've returned to work.

Until recently, the federal government was gearing up to add even more people to the failed payroll system; namely, several thousand civilian RCMP members who the government plans to deem into the public service.

I met with some of these folks in my constituency office and brought their concern to Ottawa. At committee in November, I was able to pressure president of the treasury board, Scott Brison, into halting the transfer until the Phoenix debacle is resolved. Since then, we've heard from civilian RCMP members that they've been told the transfer has been suspended indefinitely; a ray of common sense in a fog of political mismanagement.

Pheonix is another example of how out-sourcing to big corporations, in this case IBM, can lead to big profits for corporations and high costs to taxpayers. The auditor general now expects the government will spend $1 billion or more to fix the problem while public servants go without pay and IBM continues to make money.

People in our community will continue to suffer until the government starts listening to the public servants who warned about the problem before it happened. They now have ideas about how to move forward. Working with them seems like a far better idea than continuing to throw money at IBM.

Supreme Court upholds dangerous offender provisions in Criminal Code
CTV News
Jim Bronskill
The Canadian Press
December 21, 2017

The Supreme Court of Canada has affirmed the constitutionality of Criminal Code provisions for declaring someone a dangerous offender who can be held indefinitely.

The 8-1 high court ruling came Thursday in the case of Donald Joseph Boutilier, who was branded a dangerous offender and sentenced to an indeterminate prison term.

Boutilier had pleaded guilty to six offences arising out of an armed robbery of a drug store and subsequent car chase in Vancouver seven years ago. A drug addict who was abused as a child, he had a long criminal record for offences including assault and kidnapping.

The Criminal Code's dangerous offender provisions have been on the books for decades, but were amended by the Liberals in 1997 and, more recently, as part of a 2008 omnibus anti-crime bill introduced by the Harper Conservatives.

The dangerous offender scheme is a two-stage process: the designation, then the penalty.

At the designation stage, if a sentencing judge is satisfied that certain criteria have been met -- such as a pattern of unrestrained, violent behaviour posing a threat -- the person is declared a dangerous offender. At the penalty stage, the judge must impose an indeterminate sentence unless there is a reasonable expectation a lesser measure will protect the public.

Boutilier argued the Criminal Code sections dealing with both stages were inconsistent with the Charter of Rights and Freedoms.

A sentencing judge found the designation section to be overly broad, and therefore unconstitutional, because it did not allow an offender's treatment prospects to be considered at the outset of the process. He suspended this declaration of invalidity for one year.

Still, the judge designated Boutilier a dangerous offender and rejected his charter argument that the penalty stage of the law heavily curtails judicial discretion at sentencing in favour of keeping the offender behind bars indefinitely.

An appeal court disagreed with the judge's finding of unconstitutionality as to the designation stage, and Boutilier then took his arguments to the Supreme Court.

In its ruling Thursday, the court found the designation section of the law does not preclude a sentencing judge from considering future treatment prospects before designating an offender as dangerous. It said the question of whether an offender can be treated helps inform a judge's decision as to the threat the person poses.

In her reasons for the majority, Justice Suzanne Cote wrote that "a prospective assessment of dangerousness ensures that only offenders who pose a tremendous future risk are designated as dangerous and face the possibility of being sentenced to an indeterminate detention."

"This necessarily involves the consideration of future treatment prospects."

The court also concluded the penalty section of the law does not violate the charter by leading to grossly disproportionate sentences. Rather, an indefinite stay behind bars is just one sentencing option among a full spectrum available under the section.

"Every sentence must be imposed after an individualized assessment of all of the relevant factors and circumstances," Cote wrote.

Finally, the court upheld Boutilier's designation as a dangerous offender.

Top court upholds Harper-era law on dangerous offenders
The Globe and Mail
Sean Fine
December 21, 2017

The Supreme Court has upheld a dangerous offender law passed by the former Conservative government.

In an 8-1 ruling, the Supreme Court of Canada said the law passes constitutional muster because it maintains judges' discretion over whether an individual is declared a dangerous offender.

Under the law, judges are required to consider the treatment prospects of an offender before imposing a dangerous-offender designation, Justice Suzanne Côté wrote for the majority. Justice Andromache Karakatsanis dissented, saying the law has the potential to impose grossly disproportionate sentences on offenders.

In 2008, the government of Stephen Harper rewrote the country's dangerous-offender law that had been previously been upheld by the Supreme Court. The new law changed how dangerous-offender hearings are conducted. And some judges interpreted the changes to mean they had no discretion at the first phase of the hearing – the designation phase, when they declare an individual a dangerous offender if they meet certain criteria for violence and recidivism.

The case involved Donald Boutilier, 47, of British Columbia. He pleaded guilty to six offences committed in 2010 in Vancouver, including a $300 robbery of a pharmacy, using an imitation firearm and leading police on a car chase. He also has a criminal record from the United States.

In a dangerous-offender hearing, a judge must decide what sentence the offender should receive: a fixed sentence, as in most criminal cases; a long-term supervision order of up to 10 years, after a jail term; or an indeterminate sentence. An indeterminate sentence means the court considers the offender beyond rehabilitating, and could be held for life. However, dangerous offenders who receive indeterminate sentences are still eligible for parole after seven years.

The trial judge who heard Mr. Boutilier's case declared him a dangerous offender, and sentenced him to an indeterminate sentence.
But the judge also declared part of the 2008 dangerous-offender law unconstitutional under Section 7 of the Charter of Rights and Freedoms, which protects life, liberty and security of the person. The judge said the law removes a judge's discretion at the "designation" phase of the

process (where an offender may be labelled a dangerous offender), and that designation follows an offender for life, even if he receives a fixed sentence.

The B.C. Court of Appeal reversed that ruling, and said the law is a reasonable way of protecting public safety.

The Criminal Lawyers' Association intervened in the case to argue the law should be struck down. However, Catriona Verner, a lawyer representing the group, said Thursday there was much to like in the ruling.

"In essence, they did what we were looking for, which is to give trial judges a lot of discretion before imposing an indeterminate sentence," for the purpose of ensuring that only a very small group of offenders receive such an extreme sentence.

An Indigenous group, Aboriginal Legal Services, intervened to argue the law should be declared unconstitutional because it has a harsh impact on Indigenous offenders; 31.5 per cent of dangerous offenders are aboriginal.

The rule of law still matters
The Globe and Mail
William A. Macdonald
December 21, 2017

William A. Macdonald is a corporate lawyer turned consultant with a long history of public service and social engagement.

The great Western achievements of the past six centuries rest on two fundamentals: the rule of law and democratic governance – both under growing stresses. Politics and the rule of law matter to the economy, to a functioning society and to security. If lost, a great deal will be undermined or destroyed.

Canada's fundamental freedom under law was strengthened in two recent celebrity trials – one about political power (Mike Duffy), the other about male sexual behaviour (Jian Ghomeshi). The Duffy verdict withstood the power of the prime minister and his office. The Ghomeshi verdict withstood powerful public opinion about how best to address abusive behaviour against women. A trustworthy criminal justice system is central to freedom and to our liberal democracy. It needs to be understood to survive.

The Duffy and Ghomeshi trials and verdicts generated much media and public interest. Federal politics changed after the Duffy trial. And the Ghomeshi trial started a national conversation about the reporting of sexual assault.

Criminal trials may change the world – but it is never their goal. Most are entirely about what happens to a particular individual. The only issue is proving guilt beyond a reasonable doubt. This confinement is fundamental.

No due process in the Senate

The Duffy case raised big concerns. The Senate suspended three senators without due process – telling Canadians, in effect, that the only place affecting individual rights that does not require due process is Parliament. This absence of due process was not primarily about depriving the dismissed senators of their rights. It was about avoiding unwanted evidence of what the prime minister and his PMO had been up to and the Senate's own lax policies. Due process could have brought a "political show trial" in reverse – hurting the representatives of the state more than the accused.

The power of the state is awesome, even in a free society operating under the rule of law. My wake-up call came from Peter Mansbridge's interview on March 29, 2016, with Marie Henein, the lawyer representing Mr. Ghomeshi.

Ms. Henein was compelling. She passionately conveyed her belief in how fortunate Canadians are to have the protection of the rule of law and how few countries really possess it. She also conveyed how heavy the weight of the state can be on anyone charged with a crime. She said every person who enters her office charged with a crime is changed forever, no matter the outcome. No one is guaranteed a desired outcome – only a fair trial based on tested evidence.

The Duffy and Ghomeshi trials showed that our justice system still works against the raw force of both political power and public opinion – even that of a public with strong and justifiable feelings about the sexual abuse of women.

People can have different views about the alleged behaviour of Mr.Duffy and Mr. Ghomeshi, but only one about a criminal justice system that can deprive accused individuals of their liberty: Convictions must come from credible-beyond-a-reasonable-doubt evidence independent of the accused. This accommodates two great societal purposes: the protection of society from criminal behaviour and the protection of individuals from loss of liberty unless proven guilty.

John Henry Wigmore, the great Northwestern University dean of law who wrote Wigmore on Evidence, made clear that the rule that convictions must be based on independent credible evidence may protect the guilty more than the innocent. But it protects something greater: the kind of society we live in.

Our criminal justice system is not perfect, but no other is better. Ours is not a "truth" or "absolute justice" system. It is a human construct – a system based on the fair and independent assessment of testimony tested by cross-examination.

How far should the criminal law reach?

Every society needs behaviour controls. History has seen a variety of them: the raw force of authoritarian regimes, tribal customs, social norms, religion. In the West today, we have five broad sources of control: the criminal law, the civil law, societal control, mutual accommodation and self-control. We must rely on all of them to achieve our goals. If we can lessen our dependence on enforced legal control and rely more on societal control, mutual accommodation and self-control, the freer and stronger society will be.

Former Supreme Court chief justice Beverley McLachlin, in her Aga Khan Global Centre for Pluralism lecture in Toronto in 2015, said the law should tolerate as much difference as it reasonably can. The stakes in criminal justice are very high, affecting an individual's freedom. What we choose to make criminal is a big issue. It changes over time, as in legalizing marijuana and medical assistance in dying. Our criminal law involves the Charter of Rights and Freedoms and raises issues of effective reach and alternatives. The Charter, Canada's ultimate law, is based on perhaps the biggest mutual accommodation of all: the balance of individual rights and freedoms against the needs of society to govern itself.

Not a system for accusers

Canada's justice system is based on one fundamental idea: The greatest threat to a free and democratic society almost always comes from a too-powerful and self-protective state – authoritarianism in all its guises. Bad individuals are ranked a lesser threat, unless organized crime or general corruption co-opts the state. Our justice system does not encourage accusers – either individuals or the state. Nor does it normally clear the names of the accused.

The Ghomeshi trial did not find out what happened. Nor did it clear him. It found only that he was not guilty beyond a reasonable doubt on the evidence before the court, which the judge found lacked credibility.

The Duffy case was a rare exception. The judge cleared Mr. Duffy of criminal, but not every kind of, wrongdoing. In effect, he found the previous Prime Minister's Office to be wrongful accusers for improper political purposes.

The limits to the criminal law

The widespread disappointment following the Ghomeshi verdict came primarily from wrong expectations about what the criminal justice system can properly deliver. Ms. Henein was castigated as a traitor to women because she took on Mr. Ghomeshi's defence. The heart of the justice system stands against any predetermination that a particular kind of alleged offence should not get the best defence. It is fine for those upset about such alleged offences to stand together. It is not fine to do so in ways that could subvert the justice system itself.

The criticism that complainants were cross-examined on their evidence while the accused was not demonstrated a misunderstanding of the fundamental rule against self-incrimination. Exceptions to this rule would subvert the entire justice system. So, in many situations involving sexual assault or abuse, the criminal law will likely disappoint.

One positive outcome of the Ghomeshi trial would be if Canadians examined the root nature of the relationships and behaviours on the sexual-abuse front and which means of control have the best chance of making things better. The criminal law will always be needed for clear-cut cases. But many troubled sexual situations may require something different.

One could emerge from the groundwork being laid by Ralph Goodale, the Minister of Public Safety, for a national strategy to deal with sexual-assault cases to ensure that police and prosecutors are dealing with victims of sexual assault.

Lessons learned

The Ghomeshi trial revealed that sexual-relationship challenges can go beyond what the criminal law normally handles well. The needed controls for abuse are far more likely to be found in a wide range of self-control and social-control measures.

The Duffy trial showed that, even in Canada, high-ranking individuals can use state power to protect themselves, not society. It was our criminal law system, not our politics, that protected our society.

If we wonder why we need to pay attention to how well our criminal justice system is working, take a look at Turkey; what is happening to the Pakistani bar; the disappearances in China; the President of the United States undermining its justice system by attacking an American judge of Latin American origin by referring to him as a "so-called" judge. All this undermines the rule of law. In a political world where facts seem to matter less, a world of fake news and demonstrably outrageous lies, Canadians must become more alert to the foundations and importance of their criminal justice system.

The criminal justice system must always be able to withstand political power and the pressure of public opinion. The state or public opinion may sometimes be right. But a strong justice system that protects the freedom of the subject must always override that.

10 cadeaux de Noël pour les avocats!

Ça y est, les fêtes approchent et le Père Noël se demande ce qu'il pourra bien mettre dans sa hotte pour les avocats et avocates. Droit-inc lui a soufflé quelques idées…

Droit Inc

Delphine Jung

21 décembre 2017

1. Une aide à la décision

Une aide à la décision Lorsque vous ne pouvez pas vous décider, laissez cet amusant gadget le faire pour vous ! Une fois qu'une décision a été prise, cet objet multitâche sert également de presse-papier. Un cadeau deux en un à commander !

2. La BD "Terms and conditions"

Cette BD de Robert Sikoryak vous a été présentée sur Droit-inc en juin. Ce caricaturiste américain a mis en images les quelque 20 000 mots -indigestes- du contrat de licence de iTunes. Ça change des éditions du Code civil...

3. Une nouvelle machine à café pour le bureau

Vous n'en pouvez plus de descendre au Tim ou au Starbucks chercher votre café qui en plus ne sera pas meilleur qu'un jus de chaussette ? Optez pour une vraie machine à café. Certaines vous permettent de faire espresso, cappuccino et latte sans avoir à mettre le nez dehors.

4. Une tasse à votre image

Êtes-vous un mercenaire avare, un moralisateur ou encore un fanatique des règles ? Trouvez votre bonheur sur ce site Zazzle.com qui reverse tous les profits à un cabinet sans but lucratif qui dessert des personnes à revenu faible ou modeste.

5. Un bon cadeau pour une cure de désintox

Être avocat, c'est tout de même très stressant. Faire face aux juges, aux clients mécontents ou exigeants, à vos boss qui en veulent toujours plus... Vous avez connu une année difficile, durant laquelle vous avez fini par sombrer dans l'alcool et la drogue. Prenez donc soin de vous avant d'entamer 2018… qui risque fort de ressembler à 2017 !

6. Une carte-cadeau (bien fournie) de la SAQ

Pour se donner du courage pour 2018 justement...

7. Une pochette de protection étanche pour votre cellulaire

C’est bien connu, l’avocat se doit d’être joignable en toutes circonstances, donc également en pleine journée de rafting, de plongée sous-marine ou simplement lorsqu’il se détend au spa. Voici une pochette étanche qui va vous permettre de garder au sec votre cellulaire et donc de l’emmener vraiment partout avec vous. Plus qu’un cadeau pour vous, c’est surtout un cadeau pour vos clients !

8. Une boîte surprise

Elles sont nombreuses, pratiques et originales. Le concept: on vous envoie une boîte qui contient un repas (la boîte du Chef de Jérôme Ferrer ou Cook it), de quoi préparer une recette innovante (Missfresh), des tenues vestimentaires à tester (Chic Marie), du thé (MileTea) ou même des accessoires de mode faits au Canada et des cosmétiques (Artibox). Ludique, pratique, gourmand!

9. Un kit de voyage

Parce que c’est bien connu que lorsqu’on baisse la tablette dans l’avion, on perd forcément un peu de place. Mais pas avec ce fameux kit de voyage qui vous permet de maintenir votre cannette et de regarder un film sur votre tablette. Et que se passe-t-il quand votre voisin de devant incline son siège ? Pas de panique, le kit s’ajuste pour vous donner le meilleur angle de vue.

10. Des boutons de manchette

Offrez-vous des boutons de manchette en argent plaqué représentant la balance, l’un des symboles de la justice. Original et tout le monde devinera votre statut en un regard !

Les événements juridiques marquants de 2017
Droit-inc - Radio-Canada
21 décembre 2017

Conflits juridiques, nominations spectaculaires, actions collectives et un nouveau bâtonnier… Voici les événements marquants des six premiers mois de l’année...

<u>Janvier</u>

<u>Kim Thomassin passe à la CDPQ</u>

La nouvelle a eu l’effet d’une bombe dans le milieu: Kim Thomassin, la patronne de McCarthy Tétrault au Québec quitte le cabinet pour devenir première vice-présidente, Affaires juridiques et Secrétariat, à la Caisse de dépôt et placement du Québec.

Me David E. Leonard, chef de la direction chez McCarthy Tétrault, avoue être passé par tout un cocktail d'émotions lorsque Me Thomassin lui a annoncé la nouvelle! La décision a été annoncée le 11 janvier aux associés.

« En effet, nous sommes très heureux pour elle », a-t-il dit au sujet de Me Thomassin, avec qui il travaillait depuis près de huit ans.

Mais il ne s'agit pas vraiment d'adieux. « La Caisse de dépôt et placement est une cliente de McCarthy, et à cet égard, nous espérons pouvoir continuer à côtoyer Me Thomassin de manière régulière », indique-t-il.

Défendre l'indéfendable

Le 29 janvier, la terreur frappe Québec. Alexandre Bissonnette, jeune homme de 27 ans, tue six personnes réunies pour la prière dans une mosquée de Québec. Si dans un premier temps c'est le criminaliste Jean Petit qui le représente, Mes Charles-Olivier Gosselin et Jean-Claude Gingras, du bureau de l'aide juridique, sont désormais chargés de la défense. À l'époque, Droit-inc se demandait ce qu'allait bien pouvoir plaider la défense...

Février

Fin du plus long conflit des juristes… par loi spéciale

Après des négociations infructueuses suivies de plusieurs mois de grève, les 1100 avocats et notaires de l'État du Québec se voient imposer, le 28 février, par loi spéciale, un retour au travail dès le lendemain et, sous réserve d'une entente d'ici deux mois, des conditions de travail pour une durée de cinq ans.

Quelques semaines plus tard, LANEQ dépose une requête en Cour supérieure, contestant la loi spéciale du gouvernement Couillard. La question a même été à savoir si cette loi était, ou pas, constitutionnelle…

Les juges doivent-ils suivre des cours sur les agressions sexuelles ?

C'est la bataille de Rona Ambrose: les magistrats ne sont pas assez « sensibles » aux causes d'agression sexuelle et la chef conservatrice souhaite les obliger à suivre des cours pour qu'ils en comprennent mieux les enjeux. Disant n'avoir réalisé que récemment l'existence de lacunes en cette matière, Mme Ambrose a déposé le 23 février un projet de loi en ce sens. La leader intérimaire conservatrice (qui a depuis quitté la politique) veut plus d'imputabilité de la part des juges. Cette croisade survient au lendemain d'une affaire qui fait grand bruit au pays: le juge de Calgary, Robin Camp, qui a reproché, lors d'un procès, à une présumée victime de viol de ne pas avoir serré les genoux, veut plaider à nouveau sa cause devant le Conseil canadien de la magistrature, qui doit statuer sur son cas.

En mars, la Chambre des communes a convenu à l'unanimité d'accélérer l'adoption du projet de loi C-377. Il restreindrait l'admissibilité pour une nomination aux candidats qui ont suivi avec succès une formation globale sur le droit en matière d'agression sexuelle.

Mars

Louise Arbour de retour à l'ONU

Le 9 mars, Louise Arbour est nommée représentante spéciale de l'ONU pour les migrations internationales. C'est Antonio Guterrez, le secrétaire général des Nations-Unies, qui a demandé à celle qui pratique au cabinet BLG de reprendre du service sur cette épineuse question. « Nous voulons organiser une migration sûre et ordonnée, car elle aura lieu, peu importe ce que certains disent, les mouvements de population sont inévitables », a-t-elle dit à Droit-inc, lors d'une entrevue en novembre, alors qu'elle était de passage à Montréal.

La question des migrants occupera une place prépondérante dans l'actualité juridique en 2017. Selon un avocat en droit civil, le terme même est à utiliser avec parcimonie, car il reflète mal la complexité juridique.

Une tempête conduit à une pluie d'action collective

Une demande d'action collective est déposée en Cour supérieure le 16 mars, au lendemain de « la tempête du siècle » qui s'est abattue sur le Québec, au nom de tous ceux qui sont restés pris sur l'autoroute 13 pendant toute une nuit.

Une semaine plus tard, la demande d'action collective déposée au nom de centaines de personnes coincées prend de l'ampleur: elle s'étend désormais à tous ceux qui sont demeurés bloqués sur un tronçon de la 520 Est et réclame plus d'argent pour ses victimes.

La poursuite vise la Sûreté du Québec, le gouvernement du Québec et la Ville de Montréal, dans le but de compenser les membres du groupe pour les « préjudices qu'ils ont subis en raison de ce cafouillage inexcusable » des autorités.

Le 14 novembre, la cour supérieure, sous la plume du juge Donald Bisson, a autorisé cette action collective, réclamant 2500 dollars par victime de la « négligence grossière » des autorités publiques quant à leur gestion des événements du 14 mars.

Avril

La bâtonnière Prémont se retire de la course

Coup de tonnerre dans la campagne pour l'élection au Barreau du Québec: la bâtonnière sortante, Claudia F. Prémont, se retire de la course et donne son appui au candidat Paul-Matthieu Grondin. Elle mentionne qu'elle se retire « par amour du Barreau » et afin d'éviter que quelqu'un se faufile dans cette lutte à trois candidats, visant clairement Me Lu Chan Khuong. Les deux avocates sont à couteaux tirés depuis le début de la course, en février.

Le projet de loi sur le pot déposé

L'une des promesses électorales des libéraux se concrétise: la légalisation de la marijuana… Les ministres canadiens de la Justice, de la Santé et de la Sécurité publique - respectivement Jody Wilson-Raybould, Jane Philpott et Ralph Goodale - présentent le 13 avril les projets de loi sur le cannabis - il devrait y en avoir plusieurs -. Ils comprendront des mesures pour faire face aux différents enjeux: limites autorisées pour possession, restrictions liées à l'âge et aux fournisseurs, règles en matière de marketing et d'emballage, etc.

Cette légalisation fera énormément jaser dans le milieu juridique tout au long de l’année: le Canada viole-t-il les traités internationaux en légalisant ainsi une substance interdite? Comment mesurer légalement la tolérance zéro au volant?

En attendant, le 8 novembre, le projet de loi sur la conduite avec facultés affaiblies prend la direction du Sénat. La mesure législative C-46, qui resserre également les lois en matière de conduite en état d'ébriété, a été adoptée en troisième lecture avec 186 votes pour et 126 contre à la Chambre des commune.

Mai

Recours contre le rodéo… et autres histoires d’animaux

Plaidant la maltraitance des animaux, le professeur de droit de l’Université de Montréal, Alain Roy, a déposé une demande en injonction pour empêcher la tenue du rodéo qui devait avoir lieu à Montréal, à l’occasion du 375e anniversaire de la ville. Après plusieurs jours de négociation, les parties en arrivent à une entente : le rodéo aura bien lieu, mais sous certaines conditions. C’est la firme Davies qui représentait les organisateurs du rodéo.

Globalement, 2017 aura été l’année des animaux: les pitbulls sont bannis par le maire Denis Coderre, mais cette décision est suspendue par la Cour supérieure, puis prise en délibérée par des juges de la Cour d’appel… avant que la nouvelle mairesse, Valérie Plante, ne décide de tout simplement suspendre ce règlement. Cette année encore, l’avocate Anne-France Goldwater s’est impliquée avec fougue dans le dossier.

C’est d’ailleurs son cabinet qui défend trois chiens Labrador menacés d’euthanasie par la Ville de Montréal, qui les considèrent un danger pour la sécurité publique. En novembre, on apprenait, dans des témoignages soumis au dossier en Cour, que les chiennes Awqa, Luna et Onyxia auraient un comportement exemplaire…

Le Barreau du Québec a un nouveau - et jeune- bâtonnier

Le 12 mai, les jeux sont faits: Paul-Matthieu Grondin est élu, à 33 ans, à la tête du Barreau du Québec. Il a récolté 71.7% des votes exprimées contre 28,3% pour Lu Chan Khuong. Seulement 11788 avocats sur les 26 223 membres de l'Ordre se sont prévalus de leur droit de vote, soit moins de 45% de l'électorat. « Nous avons gagné », a déclaré le bâtonnier élu. « Aujourd'hui, les avocat(e)s du Québec ont eu l'audace de voter pour des réformes majeures et, du même souffle, d'élire un bâtonnier de 33 ans. Je les en remercie du fond du coeur. »

Juin

McLachlin prend sa retraite!

Beverley McLachlin, la plus ancienne juge qui siège à la Cour suprême, annonce qu'elle quittera le tribunal le 15 décembre après y avoir passé 28 ans, dont 17 ans en tant que présidente. Il s’agit du plus long règne à la tête du plus haut tribunal du pays.

La juriste de 74 ans, nommée par l'ancien premier ministre Brian Mulroney en 1989, a été la première femme à devenir juge en chef de la Cour suprême. Beverley McLachlin a déclaré que ce fut un « grand privilège » d'y servir pendant tant d'années. Les rumeurs à sa succession sont parties!

Juillet

Un accusé de meurtre libre grâce à Jordan
Commotion au Québec en ce mois de juillet: un procès pour meurtre avorte en raison des délais judiciaires. Le Sri-Lankais Sivaloganathan Thanabalasingam est le premier accusé de meurtre au pays à obtenir un arrêt des procédures en raison de l'arrêt Jordan de la Cour suprême.

C'est ainsi qu'après avoir passé 56 mois derrière les barreaux en attente de son procès pour le meurtre sordide de sa femme, Anuja Baskaran, il est un homme libre.

C'est le juge Alexandre Boucher, de la Cour supérieure, qui a ainsi écrit une page de l'histoire… Le Directeur des poursuites criminelles et pénales estime que le juge Boucher a «erré» dans sa décision, et que le présumé meurtrier n'aurait jamais dû être libéré.

L'arrêt Jordan a fait couler beaucoup d'encre au cours de l'année 2017. Droit-inc révélait, le 22 mars, que les requêtes pour arrêt de procédures avaient triplé en quatre mois au Québec.

De son côté, Thanabalasingam a finalement été extradé vers son pays d'origine. Le DPCP avait demandé au ministre de l'Immigration, des Réfugiés et de la Citoyenneté du Canada, d'empêcher cette expulsion, le temps que la Cour d'appel statue sur son cas, en septembre, mais en vain.

Compensation de 10 millions $ pour Omar Khadr

Me Huguette Gagnon L'ex-enfant-soldat Omar Khadr a reçu 10,5 millions $ d'Ottawa et des excuses officielles de la part du gouvernement canadien. Il a reconnu sans ambiguïté que les droits de cet ancien détenu de la prison américaine de Guantanamo ont été bafoués. Les réactions vives que l'annonce avait suscité ont même poussé une avocate à publier une chronique sur Droit-inc. Me Huguette Gagnon estimait que le réactions négatives étaient dues à la méconnaissance de la situation.

La Cour supérieure poursuit les gouvernements

Dépossédés de leur compétence rationae materiae, les juges de la Cour supérieure contestent celle de la Cour du Québec et réclament un jugement déclaratoire… Les pouvoirs attribués par le gouvernement provincial à la Cour du Québec violent-ils la Loi constitutionnelle de 1867? C'est en effet la question qui tue, car on la pose depuis près de 100 ans. Les juges de la Cour supérieure, l'Honorable juge en chef Jacques R. Fournier en tête, poursuivent, en Cour supérieure, la Procureure générale du Québec et la Procureure générale du Canada, en quête d'un jugement déclaratoire pour enfin trancher l'affaire.

Cette affaire a fait vivement réagir la communauté juridique, au moment où l'arrêt Jordan provoque la libération sans procès d'accusés de meurtres… Le bâtonnier du Québec, Paul-Matthieu Grondin, estime que « le moment est loin d'être idéal pour une telle procédure ».

Août

Le franglais de Brian Mitchell sème l'émoi

La manière du bâtonnier de Montréal, Me Brian Mitchell, de rédiger l'infolettre en a dérangé plusieurs, dont Me Pierre-Marc Boyer. Le 8 août, il est tombé de sa chaise lorsqu'il a lu le mot de Me Mitchell écrit en « franglais ».

« Je constate avec une certaine déception en lisant votre mot du bâtonnier qu'il contrevient à la Charte de la langue française (chapitre C-11, RLRQ) », avait-t-il envoyé dans un courrier adressé à Me Mitchell.

Dans ce texte, figure des passages en français et d'autres en anglais. Cette forme d'écriture aurait été, d'après Me Boyer, « popularisée par le premier ministre actuel du Canada ».

Finalement, Me Mitchell a reculé. « En aucun temps, je n'ai voulu me soustraire à la Loi ou provoquer un débat sur la question linguistique. Cela dit, en réponse à la demande d'un confrère et aux commentaires reçus depuis, le Conseil s'est réuni et, après avoir examiné les faits et nos traditions, il a été décidé que le « Mot du bâtonnier » sera dorénavant diffusé en français, avec une version anglaise disponible en ligne », peut-on lire.

Il s'agit ici, en cette année de «Bonjour-Hi», de l'un des articles les plus commenté sur Droit-inc!

Septembre

Petite révolution à l'École du Barreau!

Depuis l'automne, les nouveaux étudiants ne vont en cours que la moitié du temps, alors que leurs autres séances sont en ligne…

Le virage numérique, amorcé à l'automne 2016, gagne en importance cette année, alors que huit des 16 sujets étudiés le sont en ligne.

Les étudiants pourront donc rester chez eux pour étudier les cours de responsabilité civile, de droit du travail et de l'emploi, de santé et de sécurité du travail, de droit de la faillite, de priorités et hypothèques, de preuve civile, de droit de la famille et de procédure civile.

Me Étienne Dubreuil, porte-parole de l'École du Barreau justifiait cette mesure en expliquant qu'«il y avait de nombreuses critiques à l'égard des cours préparatoires, considérés trop théoriques. L'École n'a pas pour rôle d'offrir une quatrième année de baccalauréat aux étudiants».

Le procès de la tragédie de Lac-Mégantic s'ouvre

Plus de quatre ans après l'explosion d'un train rempli de pétrole au centre-ville de Lac-Mégantic, le procès des trois accusés et anciens employés de la compagnie de chemin de fer Montreal, Maine & Atlantic Railway (MMA) s'ouvre au palais de justice de Sherbrooke.

Tom Harding, Richard Labrie et Jean Demaître ont tous plaidé non coupable à l'accusation de négligence criminelle ayant causé la mort de 47 personnes.

Les avocats des trois anciens employés ont décidé en décembre de ne pas de présenter de témoins au procès.

Il devait se terminer le 21 décembre. Mais pour éviter toute pression indue sur le jury, qui pourrait être tenté de prononcer un verdict avant Noël, les parties ont convenu de faire entendre leurs plaidoiries finales après les Fêtes.

Octobre

Vers une association pour les avocats

La dissolution de l'Association des avocats et avocates de province (AAP) au bénéfice d'une fédération nationale a été décidé en octobre.

Il faut dire que le sujet de la création d'une éventuelle association des avocats a été l'un des sujets de la campagne du Barreau.

Le président de l'AAP, le criminaliste Maxime Bernatchez, avait expliqué que la nouvelle fédération - dont on ne connaît pas encore le nom - verrait le jour en avril prochain.

Cette nouvelle fédération vise une meilleure représentation des avocats, afin de prendre le relais du Barreau du Québec dont la mission première est la protection du public. Pour le bâtonnier Paul-Matthieu Grondin, la mise sur pied d'une association vouée à la défense des intérêts des avocats est nécessaire. S'il estime que « ce n'est pas au Barreau de réaliser un tel projet », il se dit néanmoins prêt « à discuter avec toute association crédible qui voudra lancer l'initiative ».

Mais tout le monde n'a pas semblé enchanté par l'idée, notamment Stéphane Lacoste, l'ancien président de l'Association du Barreau canadien, division Québec.

Dans une longue diatribe publiée un peu plus tôt dans l'année, il assurait comprendre la démarche et que celle-ci serait principalement motivée par un besoin de clarification des attentes des juristes face au Barreau du Québec.

« Ceci dit, avant d'envisager la création d'une nouvelle entité, il ne faudrait pas oublier qu'il existe, actuellement, plusieurs associations d'avocat(e)s au Québec, dont l'Association du Barreau canadien (ABC) qui a célébré en 2016 ses 120 ans à l'échelle nationale et ses 65 ans au Québec », avait-t-il ajouté en rappelant la vocation rassembleuse de l'ABC division Québec.

L'affaire est donc à suivre...

Novembre

Paradise Papers: des avocats dans la tourmente

Une nouvelle fuite de plus de 13 millions de documents, rendue publique en novembre, a permis d'en apprendre plus sur les liens entre les paradis fiscaux et quelque 120 politiciens et leaders mondiaux.

Et cette fois, les Canadiens sont particulièrement concernés. Près de 3300 compagnies, fondations, fiducies et gens d'ici sont nommés dans les documents du cabinet d'avocats

Appleby, obtenus par le quotidien allemand Süddeutsche Zeitung et partagés avec le Consortium international des journalistes d'enquête (ICIJ) et ses partenaires, dont fait partie Radio-Canada.

D'un géant de l'alimentation à une équipe de hockey, en passant par un multimilliardaire : les documents mettent en lumière des centaines de compagnies et de personnalités bien connues qui font, ou ont fait, des affaires dans des paradis fiscaux.

Que peut faire le Canada? Droit-inc avait posé la question à des avocats spécialisés en fiscalité. « Son pouvoir est limité, nous avait dit Marie-Pierre Allard, professeure de droit fiscal à l'Université de Sherbrooke. Il faut rappeler que le plus souvent, les professionnels mettent tout en œuvre pour que les lois fiscales soient respectées... »

Recours collectif des « Courageuses »

Le mois de novembre a été chamboulé par une série d'allégations d'agressions sexuelles voire de viol, qui visaient des hommes de pouvoir. Tout a commencé avec Harvey Weinstein, le réalisateur américain.

Par la suite, l'actrice Alyssa Milano a lancé sur les réseaux sociaux le mouvement #MeToo, invitant toutes les victimes à dénoncer publiquement les agressions dont elles auraient été victimes.

Le Québec n'a pas été épargné, puisque Gilbert Rozon et Éric Salvail ont été visés par une série d'allégations, entraînant leur disgrâce.

C'est ainsi qu'un recours collectif a été déposé par des présumés victimes de M. Rozon, la comédienne Patricia Tulasne en tête. Regroupées au sein de l'association Les Courageuses, elles sont représentées par les cabinets Trudel Johnston Lespérance et Kugler Kandestin qui ont pris ce dossier en charge.

Le milieu juridique n'était pas en reste. Certains ont posté leurs anecdotes sur les réseaux sociaux. Une adjointe juridique nous avait à l'époque fait part de son expérience personnelle dans un petit cabinet d'avocat.

Conséquences, des avocats et des avocates se sont mobilisés: certains ont décidé d'informer, comme Juripop, qui a tenu une clinique juridique éphémère à Montréal pour informer les citoyens et citoyennes sur la manière de procéder, d'autres d'offrir des services de consultations gratuites, comme Me Wolfgang Mercier Giguère, cet avocat de la Beauce. D'autres encore ont tenu à informer sur la différence juridique entre le harcèlement ou le simple comportement déplacé.

Décembre

Richard Wagner devient juge en chef de la Cour suprême

Cela faisait des mois que les paris étaient lancés quant à l'identité du nouveau juge en chef de la Cour suprême.

C’est finalement le 12 décembre que le nom de Richard Wagner, un Québécois, est sorti. Il remplace donc Beverly McLachlin qui a été juge en chef pendant 17 ans.

Le premier ministre Justin Trudeau a choisi de respecter la tradition qui veut qu’il y ait une alternance common law et civiliste à la tête du plus haut tribunal du pays. Plusieurs voix québécoises s’étaient élevées tout au long de l’année en ce sens, comme le bâtonnier de Montréal, Brian Mitchell.

La nouvelle a en tout cas été bien accueillie par la communauté juridique, le juge Wagner recevant les félicitations du bâtonnier du Québec, Paul-Matthieu Grondin, et de plusieurs autres.

Ce Montréalais de 60 ans, qui a fait ses études de droit à l’Université d’Ottawa et pratiqué toute sa carrière d’avocat au sein du cabinet Lavery, a été assermenté le 18 décembre.

Terrorisme: deux procès, deux verdicts

Soupirs de soulagement en cette fin d’année pour El Mahdi Jamali, âgé de 20 ans, et Sabrine Djermane, âgée de 21 ans: ils ont été acquittés des quatre chefs d’accusation qui pesaient contre eux: avoir tenté de quitter le Canada en vue de commettre un acte terroriste à l'étranger, possession d'une substance explosive dans un dessein dangereux, avoir facilité un acte terroriste et avoir commis un acte au profit ou sous la direction d'un groupe terroriste.

Ils avaient plaidé non coupables aux quatre chefs d'accusation.

Leur procès avait commencé le 12 septembre à Montréal. Ils n'ont pas fait entendre de témoins en défense et n'ont pas témoigné. Pour certains spécialistes, cette stratégie a été gagnante. De son côté, la poursuite a appelé à la barre 31 témoins et a produit de nombreuses preuves matérielles.

Le 19 décembre, le verdict est tombé. Sabrine Djermane a été totalement blanchie tandis que El Mahdi Jamali a été reconnu coupable d’un chef réduit sur la question des explosifs.

Plus tôt dans l’année, le Québécois Ismaël Habib avait été trouvé coupable d'avoir tenté de quitter le Canada afin de participer aux activités d'un groupe terroriste, soit le groupe armé État islamique. Il était alors devenu le premier adulte canadien à être condamné au terme d'un procès en vertu de l'article 83.181 du Code criminel.

JURIST project strengthens justice system
Jamaican Observer
December 22, 2017

KINGSTON, Jamaica — Jamaica is among several regional countries benefiting from implementation of the Government of Canada-funded Judicial Reform and Institutional Strengthening (JURIST) Project, at a cost of Can$90 million.

The initiative, being implemented by the Caribbean Court of Justice (CCJ) on behalf of the Conference of Heads of the Judiciary of the Caribbean Community (CARICOM), is designed to facilitate improved court administration and support services, resulting in more efficient and effective trial proceedings and disposal of cases.

Project Director, Dr Penny Reedie, says ongoing work aims to modernise and strengthen the region's court systems, processes and services as well as equip judicial officers and court staff with the requisite skills and competencies necessary to deliver justice in a “fair, predictable and timely manner”.

“The ultimate goal of the JURIST Project is to develop a regional judicial system that is more responsive to the needs of women, men, youth and the poor,” Reedie explained.

She was speaking at the recent launch of the 'Model Guidelines for Sexual Offence Cases in the Caribbean' document, held at The Jamaica Pegasus hotel in New Kingston.

Reedie noted that “great strides” have been made in undertaking a number of initiatives, particularly in relation to gender affairs.

These include roll-out of the 'Model Guidelines for Sexual Offence Cases', and development of the accompanying Survivor's Rights Charter; the production of Gender Equality Protocols for magistrates and judges in Barbados, and Trinidad and Tobago, with others being developed for Jamaica, Guyana and Belize; preparation of gender and sexual harassment policies for the CCJ; and assistance with the development of civil procedure rules in Guyana.

Additionally, Reedie said training sessions on gender equality and access to justice have been undertaken for CCJ staff, a sexual offences baseline study was conducted in five CARICOM member States, while a gender and judicial decision making survey was carried out in 14 CARICOM countries.

Other engagements that have either been completed or are in progress are disaster recovery and business continuity planning for the Barbados High Court; training in court administration and adjudication that is gender-responsive and customer-focused; re-engineering of business processes in selected courts, to identify delays and facilitate introduction of the requisite technology designed to address factors such as case backlogs; and the training of personnel for more efficient administration of justice.

The Project Director further advised that a regional training needs assessment has also been completed. This, she pointed out, includes a regional training plan for the next two years for personnel at all levels of the justice system.

“We have (also) supported courts to develop tools to deliver public education programmes, and to reassure customer feedback and satisfaction,” she added.

Activities that Reedie said are slated to come on stream include the establishment of a knowledge-based management system to house the Project's data as well as information on other judicial reform initiatives undertaken regionally and globally.

“We are (also) establishing a business model for regional information and communications technology solutions, with specific focus on case-management systems, and, very importantly, we are establishing specialised courts,” she added.

Reedie said the focus on gender equality, which is a “cross-cutting” theme in the JURIST Project, means that “every initiative that we consider must be viewed through gender lenses”.

“We must integrate gender equality throughout the court process from the filing of cases to the disposition of cases. It is my view, having been in this job (Project Director) for just over a year, that the work we do in this area of gender equality will be key to determining whether or not the JURIST Project is a successful regional project. I think we are on course to prove that,” she said.

Canada's High Commissioner to Jamaica, Laurie Peters, who also spoke at the Model Guidelines launch, noted that the JURIST Project is part of a larger Can$600-million regional development programme being spearheaded by Global Affairs Canada.

“Its aim is to build a more prosperous and integrated Caribbean Community that allows us all to have sustainable economic growth and provide opportunities and security for all citizens of the Caribbean,” she said.

Young Bar of Montreal hands out awards
Lawyer’s Daily
Carolyn Gruske
December 22, 2017

Seven lawyers were honoured at the 11th annual Young Bar of Montreal “Leaders of Tomorrow” gala for their excellent records, their social involvement and their personal and professional achievement.

Kadiatou Sow of Fasken Martineau DuMoulin LLP won in the corporate law category. She specializes mainly in mergers and acquisitions, reorganizations of private companies, venture capital, equity financing and joint ventures. Sow has a strong understanding of African markets and maintains a large network in the region.

Sara Gauthier who works at the Department of Justice Canada, took home the award in the government category. A litigator for the Attorney General of Canada, she specializes in administrative law, constitutional law and civil litigation.

Isabelle Duval of Lavery, de Billy took home the award in the family law category. A member of the firm’s family, personal and estate group, she practises all aspects of family law including divorce, separation, relocation, child custody and spousal support.

Leslie Ning, executive director of the Mile End Legal Clinic, won in the alternative career category. In addition to acting as a lawyer at the clinic, she is responsible for recruiting and overseeing law students, volunteer lawyers, managing the clinic’s finances and developing access to justice initiatives.

Sonia Labranche of Dannet J-Robert, Avocats was named the recipient of the pro bono/community involvement category. President of Quebec Lawyers Abroad, she previously worked with an NGO to fight human trafficking in Southeast Asia.

Jean-Michel Boudreau of IMK Advocates was given the civil and commercial litigation award. He practises commercial litigation with a focus on class actions, information technology, product liability and securities litigation.

Nicholas St-Jacques of Desrosiers Joncas Nouraie Massicotte was named winner in the criminal law category. He has appeared before the Supreme Court seven times, including four times as senior counsel, and is vice-president and treasurer of Innocence Quebec.

More civil servants may see 'low pay or no pay' after new glitch found in Phoenix pay system: official

A new glitch was discovered in processing pay requests for the final payday of the year, Dec. 27.

Toronto Star
Terry Pedwell
The Canadian Press
December 22, 2017

OTTAWA—Federal government managers were warned this week of a possible surge in emergency pay requests from civil servants over the holidays after new issues were discovered with the troubled Phoenix pay system.

Managers were to receive lists of "low pay or no pay employees" by Friday, and were being encouraged to reach out to those who might need help.

"We would encourage you to reach out to employees on this list to determine if an emergency salary advance (ESA) or priority payment may be required on December 27th, and if any special measures to provide the payment may be needed given the holiday season and related absences and travel," said a memo from Les Linklater, an associate deputy minister at Public Works and Government Services Canada, made public Friday.

The memo was issued Wednesday after problems were discovered in processing of pay requests for the final payday of the year, Dec. 27.

Officials said some transactions entered into the pay system in early November weren't processed, creating a new backlog of problem files.

"The Phoenix pay system encountered technical and administrative issues with a module that affected performance of the system, in particular with a program in Phoenix that processes employee-submitted transactions," Public Services and Procurement Canada said in a statement.

“Some transactions entered in Phoenix as of November 1, such as overtime and timesheets, were not processed, which created an accumulation of transactions. This led to processing challenges for the December 27 pay run.”

Public Services said the problem, which it blamed on both technical and human errors, had been resolved by Dec. 17, but some civil servants reported receiving pay stubs after that date that were short of what they were owed.

The Public Service Alliance of Canada, which represents some 180,000 civil servants, said it sought and received assurances from the government that any employee facing year-end pay issues could request emergency funds.

PSAC and other unions said they were also continuing to offer emergency pay services to their members.

The auditor general last month reported more than 150,000 government workers — or about half the federal civil service — had been affected by the Phoenix fiasco that began nearly two years ago, either by being underpaid, overpaid or not paid at all.

The government has warned it could cost upwards of $1 billion to stabilize the pay system and fix it.

Public Service Minister Carla Qualtrough predicted earlier this month that it could take until the end of 2018 or beyond to eliminate a backlog of problem pay files that had reached 335,000 as of Nov. 29.

B.C.'s 'Supreme' shortage of judges courts public concern
Vancouver Sun
Keith Fraser
December 22, 2017

The shortage of judges on the B.C. Supreme Court remains persistently high, creating ongoing concerns about access to justice.

There are 10 vacancies on the province’s top trial court, the second highest vacancy rate for a superior court in Canada. Only Alberta’s Court of Queen’s Bench, with 13 vacancies, is higher. Ontario’s Superior Court of Justice, with eight vacancies, stands third highest.

Eight vacancies have arisen since Aug. 31, despite the fact that federal Justice Minister Jody Wilson-Raybould has made 19 appointments to date this year in B.C., including 14 since April.

“The minister of justice and attorney-general have been working closely with the chief justices in British Columbia to fill vacancies created by the spike in retirements and supernumerary elections this fall,” David Taylor, director of communications for the justice ministry, said in a recent e-mail.

Supernumerary elections are where judges elect to become part-time jurists.

Vacancies have remained high over the past year, since the Liberal government announced it was reforming the judicial appointment process in a bid to make it more merit-based, transparent and diverse.

Judicial committees that were in place to vet candidates were replaced with new committees and a new criteria for selection was implemented.

But the delays in filling the vacancies have created a situation where nearly every week at the B.C. Supreme Court, there are cases that get bumped.

Jennifer Brun, a Vancouver lawyer, was frustrated that a case of hers got put over recently and wrote a letter to Wilson-Raybould asking that the government move “as expeditiously as possible” to restore timely access to justice in B.C.

In her letter Brun, who works for a civil litigation boutique firm with 12 lawyers, said that the case she brought to court, after being advised it had been placed onto the “overflow” list along with seven other trials, was a complicated personal injury matter with 12 expert witnesses.

But upon arriving at the courthouse, with 10 bankers boxes of documents in tow, she and the other lawyers who appeared before Chief Justice Christopher Hinkson were advised there may not be a judge available for them. Hinkson apologized and urged them to write a letter to their member of Parliament about the judge shortage.

Instead of contacting her MP, Brun wrote the letter to the minister.

“A trial being adjourned due only to the lack of an available judge is a frustrating access to justice issue,” Brun said in her letter.

She added that several other lawyers in her firm had gone through the same process of having a matter adjourned.

“This reflects poorly on our system of justice,” said Brun. “The necessary time and resources that we have spent preparing for these trials has come at great financial expense to our clients and great personal expense to us in the currency of time spent away from our loved ones on evenings and weekends without an end having been achieved.”

Brun said that B.C. is losing hundreds of hours of judicial time each month due to lingering vacancies on the superior court bench.

“The hundreds of thousands of dollars, if not millions of dollars, lost due to these delays causes an overly heavy burden that is shouldered by private litigants, institutional litigants and taxpayers of the province alike.”

Asked whether her case had been rescheduled, Brun said the courthouse registry was able to provide available dates fairly quickly, within months, but due to conflicting schedules of counsel they are still canvassing possible dates.

Taylor said that the minister is committed to ensuring that the most meritorious judges are appointed to the bench in order to meet the needs of British Columbians.

A judicial advisory committee, which vets candidates for judges in B.C., met in November and evaluated a number of applications, he added.

“The minister is processing the applications at this time and consulting with the Chief Justices to determine who is capable of meeting the courts’ needs.”

But asked when the vacancies will finally be filled, he said only: “They will happen in due course.”

Analysis: Phoenix Christmas glitch raises deeper questions about federal administration
iPolitics
Kathryn May
December 23, 2017

The federal government pulled out all the stops – including bypassing its own procedures – to fix the Phoenix pay glitch that almost stole Christmas for thousands of public servants.

Public Service and Procurement Canada (PSPC) officials say they are confident the “technical and administrative” problems that could have left nearly 50,000 people without some or all of their pay on the Dec. 27 pay day have been fixed and the pay run was successfully processed last weekend.

As a precaution, the government sent a memo to departments Friday reminding them to consult their pay lists and ensure any employees receiving ‘no pay or low pay ‘on the Dec. 27 pay day are offered emergency advance salary or priority payments for the holidays. Departments had earlier received lists of ‘no pay or low pay employees.”

The glitch couldn’t come at a worst time. The Dec. 27 pay day is smack dab in the middle of Christmas holidays and the last pay cheque of the year. Not only could public servants find

themselves short of money at Christmas but errors on the year's last pay cheque could have tax implications and botch up employees' T4 slips.

PSPC has provided few details on the nature of the glitch that created what some called a near 'crisis' and 'catastrophe.' PSPC Spokesperson Jean-Francois Letourneau said there were some 'human and technical errors" that caused problems but they were fixed.

"PSPC acted immediately to correct the problem, which has now been addressed, and pay was successfully processed over the December 16-17 weekend," he said.

Others say the incident shows how unfixable Phoenix is when new problems keep cropping up after nearly two years after the pay system was first rolled out. They question whether the glitch was fixed or PSPC simply found a way to work around the issues, which could surface again.

"We still don't know why this occurred or whether it could happen again," said one senior bureaucrat.

"This was a catastrophe averted by finding a fix, but we don't know the root of the problem … So fine, we averted a disaster but why are we still so close to disasters after two years."

PSPC's assurances that the problems are fixed belie the panic that set in more than week ago when it discovered problems with a module that affected the 'time and labour' program in the Phoenix pay system, which processes pay transactions submitted by employees.

The department realized some transactions sent to Phoenix since Nov. 1, such as overtime, time-sheets and some allowances, had not been processed, creating a backlog of transactions that would have affected the Dec. 27 pay run for about 50,000 employees.

For 43,000 of those employees, they would have received their regular pay but would miss any 'extra duty payments,' such as overtime or allowances owed to them. For the remaining 7,000, however, their regular pay was at stake.

Stephane Aubry, vice-president of the Professional Institute of the Public Service of Canada, called the incident a 'big scare' particularly because it came at Christmas. He said unions were notified and he was satisfied with the efforts taken to resolve the problems.

"They had a big scare about the processing of the last pay of the year," he said. "We heard about the concerns and were afraid but overall it seems to have been resolved with some isolated cases of (pay) problems."

That scare became evident Dec. 15, when late Friday afternoon – after 4 p.m. – an emergency notice was fired off to all deputy ministers, heads of human resources, and chief financial

officers asking for rush and blanket approvals of all their departments' pay transactions as required under sections 33 and 34 of the Financial Administration Act.

The government's approval system for pay transactions is complicated requiring two approvals from managers – not always the same person – to trigger payments. Departments were assured this blanket authorization for section 33 and 34 approvals was a one-time request and would not be "used for any other purpose."

Without it, "PSPC will not be able to process outstanding transactions for your department" for the Dec. 27 pay day, said the notice.

Departments had a 5 p.m. deadline, giving them about 45 minutes to issue the blanket approvals for the outstanding transactions. By all accounts most complied on time.

The Financial Administration Act (FAA) is the government's bible for financial management and accountability. Under the FAA, only mangers with delegated authorities can approve "extra duty pay," such as overtime. Those approvals are needed to trigger payments.

For example, an employee enters an overtime claim into Phoenix. The manager with section 34 authority must approve the time worked and another one with section 33 authority approves the payment.

According to the notice, PSCP asked departments for permission to authorize the necessary FAA approvals for extra duty pay transactions for the Dec. 27 pay day. PSPC would reflect the approvals "as electronic authorizations in the Phoenix pay system for the purposes of processing outstanding transactions."

The emergency notice was signed by Rock Huppe, Canada's comptroller-general and Les Linklater, PSPC's associate deputy minister who oversees the HR-to-Pay approach the government is taking to fix Phoenix.

"In order to ensure that employees receive their pay, we are requesting that CFOs or heads of HR with functional s.34 and s.33 authorities over the department please advise PSPC by close of business today … of your approval to process any outstanding time and labour transactions on behalf of your department for this pay cycle."

The departments were also told they must also conduct a "post payment verification," to later validate the payments.

For some, the glitch drives home how the government pay processes and 80,000 rules should have been streamlined before Phoenix was ever built. Phoenix was built on PeopleSoft, Oracle's off-the-shelf software, and had to be extensively customized to handle the complexities of the federal pay regime.

Phoenix has been plagued by delays from the start caused by managers not submitting the required FAA approvals on time or in the right sequence. Without that, Phoenix can't process the transactions and employees go unpaid.

It appears many of those transactions in the backlog, which contributed to the problem, couldn't be processed because they had not received the proper approvals.

Some say this raises the question whether the government overrode its own oversight rules by getting blanket approvals for those transactions or whether those approvals are perfunctory and unneeded.

One official argued approvals and oversight "introduced during the quill and ink" era could be streamlined and questioned if both layers are approval are needed today.

"These reason for these approvals is to provide some kind of oversight or due diligence and they bypassed that oversight in the interests of paying people accurately? How paradoxical is that."

With pay day falling on Dec. 27, the government took extra steps to make sure anyone who were underpaid or not paid at all could get money for Christmas.

Letters were sent departments urging them to have their employees check their pay stubs which were made available early so if they had pay problems they could request emergency funds before Christmas. Pay stubs are typically available two days before pay day, which falls on Christmas Day and Boxing Day.

PSPC sent out its regular pay day reports of "low pay and no pay employees' early, urging departments to "reach out to employees on this list" to determine whether an advance, priority payment or any other payment was needed for the holidays.

The Phoenix contact centre will also be open Dec. 27 as a regular business day to help get funds for any employees who find 'no pay or low pay' on their pay cheques.