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THE CRISIS OF DELAYS IN THE FAMILY COURT SYSTEM: JUSTICE DELAYED IS JUSTICE DENIED

By Steve Benmor,
(Originally published on Law360 Canada, formerly, *The Lawyer's Daily*,

Timely resolution of legal disputes is not merely an ideal in family law, it is a vital necessity for families who are undergoing the traumatic process of divorce.

In Ontario, the increasing delays in the court system are wreaking havoc on separating spouses, particularly when it comes to critical issues like parenting arrangements, child support and the division of property. The ideal of swift justice is slipping further out of reach as court backlogs continue to mount, undermining the ability of families to move forward and rebuild their lives following a breakup.

The delays within Ontario's family courts have reached crisis levels, with mounting evidence that justice is not being served in a timely manner. For many separating spouses, the legal system is supposed to provide clarity, closure and a pathway forward.

However, when divorce proceedings drag on for years due to a strained judicial system, it only exacerbates the emotional and financial toll on families. Parents are left in limbo, uncertain about childcare arrangements and support obligations. Spouses remain trapped in their home together because their marital assets are in dispute, and they cannot access a judge to settle their affairs and move on with their lives.

Recent data on court backlogs following the COVID-19 pandemic underscores the scale of the crisis. For instance, in Ontario, the courts faced over 67,000 cases pending resolution in 2021-22, creating a significant delay in the family law sector. These delays mean separating families have to endure prolonged uncertainty, often leading to heightened stress, prolonged financial strain and more conflict between parties.

The legal principle "justice delayed is justice denied" resonates particularly strongly in the context of divorce. When couples cannot resolve their issues it can have profound consequences for all involved — especially children. Parents may face a situation where they are unable to fully plan for their children's future, secure new housing, choose schools, purchase a new home or begin a new chapter in their lives because of the extreme court delays.

Without a prompt resolution, parents and children experience unnecessary hardship that could have been avoided if Ontario's legal process were more responsive and accessible.

Furthermore, unresolved legal disputes can exacerbate — not reduce — the pre-existing conflict between spouses. When there are significant delays in finalizing parenting arrangements or setting

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up financial support structures, couples often engage in prolonged disputes that can be damaging to both the parents and children involved. What should be a process of summarily establishing new boundaries and responsibilities instead becomes a drawn-out battle that harms everyone.

The frustration that arises from protracted legal proceedings often leads to a loss of faith in and abandonment of the judicial system, resulting in some spouses reaching for extralegal means to address their issues. This is not a hypothetical concern; it has real-world implications. When couples are forced to wait for years for court resolutions, some take matters into their own hands in ways that do not align with the law.

This kind of behaviour poses serious risks, especially when it involves the well-being of children, support or the equitable division of assets. This may manifest as unfair and improvident agreements, verbal commitments that are not legally binding or even the unilateral imposition of new parenting and financial regimes that would never have occurred if the court system were accessible.

This leaves many individuals without the protections of the legal system and undermines the very principles of fairness and justice.

There is an urgent need for reform. It is critical to address the backlogs in the family court system and introduce measures that can expedite proceedings. This would not only provide a fairer and more efficient resolution for divorcing couples but would also restore faith in a system that is struggling to meet the needs of its citizens.

It is critical that the province increase the capacity of courts to handle family law cases by allocating more resources such as increasing the appointment of judges, mediators and triage clerks. By early triage, diversion out of court and mandating family mediation will help relieve pressure on the court, and those cases that require an adjudication by a judge can be handled quickly and efficiently.

The delays plaguing the family court system are not just an inconvenience, they are an injustice to those who are already undergoing one of the most challenging times in their lives. For divorcing couples, the inability to quickly resolve disputes like parenting, support and property division undermine the foundation of their lives and, more importantly, the well-being of their children. By reforming the system to reduce delays and enhance access to timely justice, Ontario can work to restore public confidence in the family justice system and ensure that all families receive the prompt and fair resolutions they deserve.

The stakes are high. In divorce law, as in all areas of the legal system, justice delayed is not just inconvenient — it is justice denied.

QUEBEC FAILED 'HONOUR OF THE CROWN' OBLIGATIONS IN RENEWAL OF INDIGENOUS POLICING AGREEMENTS: SCC

By Terry Davidson, (Originally published on Law360 Canada, formerly, *The Lawyer's Daily*, © LexisNexis Canada Inc.)

The Supreme Court has ordered that Quebec pay a local Indigenous group hundreds of thousands for deficits the latter incurred running its community-based police force, finding the province failed to act in good faith and maintain the "honour of the Crown" during contract renewal talks.

The Nov. 27 Supreme Court of Canada ruling in ***Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan, 2024 SCC 39***, involved successive trilateral agreements between Canada's government, Quebec's government and the Pekuakamiulnuatsh Takuhikan band council, in which the two governments would fund Indigenous-based policing in the community of Mashteuiatsh, in southeast Quebec.

The purpose of the yearly agreements was threefold: to establish the Sécurité publique de Mashteuiatsh (SPM) police force in the community, to set the maximum contribution Canada and Quebec would provide for SPM operations and to entrust management of the police force to the band council.

But between 2013 and 2017, the yearly funding from the two governments proved to be inadequate, resulting in an operating deficit at the end of each fiscal year. In all, the band council suffered a deficit of almost $1.6 million in its running of the SPM.

Given the deficit was not the result of mismanagement or "extraordinary expenses," the band council brought a legal action against Ottawa and Quebec in efforts to recoup the money lost to deficit. The council's claim was two-pronged: one, there was a private contractual element grounded in Quebec's civil code; two, there was a public element anchored by principles of Aboriginal law.

With this, the band council alleged that Canada and Quebec refused to "genuinely" renegotiate the funding aspect of the contract agreements, resulting in a breach of good faith on the private end and a failure to maintain the "honour of the Crown" on the public end.

A trial judge dismissed the band council's application, finding that the contract was between the parties and that the honour of the Crown did not apply.

Quebec's appeal court, however, set aside that judgment and ordered Canada and Quebec to pay $832,724.37 and $767,745.58, respectively, which represented the accumulated deficits.

Ottawa decided to pay up and not appeal the case further. But Quebec turned to the Supreme Court of Canada to continue the fight.

The question before the court: Do contract obligations between Quebec and the Indigenous group engage the legal principles of good faith and the honour of the Crown?

In the end, the High Court decided 8-1 that they did and, thus, dismissed Quebec's application.

Writing for the majority, Justice Nicholas Kasirer found that Quebec's refusal to renegotiate its financial contributions during contract renewal talks with the band council ran contrary to what is considered good faith in such things and that the province had breached an obligation to act in a way that is consistent in honour of the Crown — a public law obligation Quebec had to fulfill as part of the trilateral agreements.

On that latter point, Justice Kasirer found that while the "honour of the Crown" does not apply to every contract case, it does kick in when it comes to those involving the unique relationship between government and Indigenous people.

"[...] while the "honour of the Crown" does not apply to every contract case, it does kick in when it comes to those involving the unique relationship between government and Indigenous people."

"The principle of the honour of the Crown, which imposes a high standard of conduct on the State, is one such public law rule that may, in some contexts, broaden the scope of state liability," writes Justice Kasirer. "Unlike good faith, the honour of the Crown does not apply to the performance of every contract and is not an implied contractual obligation. As a

common law rule originating in the *sui generis* relationship between the Crown and Indigenous peoples, the principle of the honour of the Crown is itself anchored to the goal of reconciliation."

Kasirer explained that this "applies only in the performance of contracts between the State and Indigenous groups that are intended to foster the modern-day reconciliation of pre-existing Indigenous societies with the Crown's historic assertion of sovereignty."

As for the good faith element, Justice Kasirer found that Quebec's "refusal to renegotiate its financial contribution when the agreements were renewed … was not in keeping with the requirements of good faith." Quebec's government, he said, knew the SPM force was underfunded and that a return to having Quebec's provincial police enforce the law in the community would involve "risks" for those living there.

The ruling means Quebec must pay $767,745.58 — its share of the deficits.

The lone dissenting voice amongst the nine judges was Justice Suzanne Côté, who would have allowed Quebec's appeal.

Comment from lawyers representing the Pekuakamiulnuatsh Takuhikan band council and the Government of Quebec was not available by press time.

FEDERAL COURT CERTIFIES CLASS ACTION OVER ALLEGED ILLEGAL INTERCEPTIONS OF PRISONER COMMUNICATIONS

By Karunjit Singh, (Originally published on Law360 Canada, formerly, *The Lawyer's Daily*, © LexisNexis Canada Inc.)

The Federal Court has certified a class action against the government over allegations that the Correctional Service of Canada (CSC) illegally intercepted private communications of incarcerated people, including those protected by solicitor-client privilege.

In ***Philip v. Canada (Attorney General)*, 2024 FC 1907**, released on Nov. 27, Justice Simon Fothergill held that the plaintiffs' statement of claim pleaded sufficient material facts to disclose reasonable causes of action under s. 8 of the Charter and under the *Crown Liability and Proceedings Act (CLPA)*.

Under s. 94 of the *Corrections and Conditional Release Regulations* (CCRR), the institutional head or a member designated by the institutional head may authorize, in writing, that communications between an incarcerated person and a member of the public be intercepted in certain circumstances.

Such authorization may be issued where there are reasonable grounds to believe that the communication contains or will contain evidence of an act that would jeopardize the security of the penitentiary or a person or of a criminal offence or of a plan to commit a criminal offence.

Under Commissioner's Directive [CD] 568-10, which deals with the interception of incarcerated people's communications, an institutional head may only authorize such an interception after a security information officer (SIO) completes an authorization to intercept incarcerated people's communications form containing sufficient information to demonstrate "reasonable grounds to

believe" that requirements of the CCRR have been met.

The plaintiffs, Adrian Philip and Blake Wright, are incarcerated in federal penitentiaries operated by the CSC. Philip has been incarcerated since February 2016. In April 2016, he was charged with additional offences, including possession of marijuana and heroin for the purposes of trafficking, which he allegedly committed while incarcerated.

In August 2017, Philip was informed by his legal counsel that CSC had listened to and recorded his personal conversations before the additional charges were laid.

CSC has also intercepted his privileged conversations and disclosed their content to third parties, including for the purpose of charging him in April 2016.

The warden of a CSC penitentiary acknowledged in an affidavit that at least some of Philip's communications with his counsel were improperly intercepted by CSC.

The plaintiff, Blake Wright, learned in 2022 that CSC had made copies of his fax correspondence with legal counsel, and these had been retained on his case management file. The CSC noted that only the cover pages of Wright's faxes were retained, as these confirmed the faxes had been sent.

In some cases, mail sent to Wright by his wife, the plaintiff Serena Gray, was returned to Gray. When

Wright complained, he was told that the mail was not delivered because it was not consistent with his correctional plan and/or family support objectives. Wright claimed that the CSC could not have made this assessment without reading his mail.

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Of the 79 interceptions for which prior authorization had been granted, 10 per cent resulted in the interception of privileged communications with lawyers. The audit also found that CSC had failed to identify certain communicants on common call lists as privileged.

It also found that at nine of the 11 institutions audited, deputy wardens had provided verbal authorization for interceptions before the written forms were completed and that authorization forms were backdated to reflect the date of verbal approval at two institutions.

In 60 per cent of the cases audited, the initial authorization for interception was granted for longer than the mandated 30 days. In 43 per cent of cases, extensions were granted for longer than the permitted 15 days and extensions were granted after the expiry of the existing authorization in another 43 per cent of cases.

During the hearing, the parties informed the court that they had reached an agreement in principle respecting certification and submitted a memorandum of agreement and a litigation plan to the court

Justice Fothergill noted that the parties had in their memorandum of agreement acknowledged that the plaintiffs' pleadings disclose reasonable causes of action pursuant to s. 8 of the *Canadian Charter of Rights and Freedoms* and ss. 17 and 18 of the CLPA.

The judge noted that the reasonable expectation of privacy regarding solicitor-client communication is invariably high and that CD 568-10 confirms that solicitor-client communications are presumptively ineligible for interception.

The judge found that the statement of claim pleaded sufficient material facts to disclose a reasonable cause of action pursuant to s. 8 of the Charter.

The court also held that the pleadings disclosed a cause of action with respect to s.17 and s.18 of the CLPA, under which the Crown is liable for loss or damage caused as a result of intentional interceptions of private communication and the use or disclosure of such communications.

The court certified the class action.

A spokesperson for the CSC told Law360 Canada that the CSC takes its obligations with respect to interception of incarcerated people's communications very seriously and that interception is done in compliance with existing laws, policies and guidelines.

"Already CSC conducted a multi-year audit of its interception of inmate communication activities. In response to the audit findings and recommendations, CSC took swift action and has since completed all deliverables in CSC's Management Action Plan," CSC told Law360 Canada in an email.

In response to the 2021 audit, the CSC had released a management action plan including recommendations for the revision of the national guidance for the interception of communication and for the provision of continuous training for SIOs, institutional heads and deputy wardens on the relevant legal and policy framework.

Counsel for the plaintiffs were Patrick Dudding, Rajinder Sahota and Emmanuela Bocancea of Acheson Sweeney Foley Sahota LLP. They were not immediately available for comment.

Counsel for Canada were Éric Lafrenière, Laurent Brisebois, Kim Nguyen and Ami Assignon of Justice Canada.

UNIFOR CALLS FOR INTIMATE PARTNER VIOLENCE EPIDEMIC LEGISLATION IN NEWFOUNDLAND AND LABRADOR

By Anosha Khan, (Originally published on Law360 Canada, formerly, *The Lawyer's Daily*, © LexisNexis Canada Inc.)

Newfoundland and Labrador's minister of Justice and Public Safety and the minister responsible for Women and Gender Equality met with Unifor representatives who are advocating for the declaration that intimate partner violence (IPV) is an epidemic in the province. Unifor is Canada's largest private sector union.

The respective ministers, Bernard Davis and Pam Parsons, met with Unifor Atlantic Regional Director Jennifer Murray, Atlantic Regional Council (ARC) Women's Committee Member Doretta Strickland and ARC Treasurer Adele Jackman. Unifor and Murray were involved in the designation of IPV as an epidemic in Nova Scotia last month.

"I was pleased Premier Furey's office reached out to us to discuss intimate partner violence because Newfoundland and Labrador has seen some of the country's steepest increases of reports of this type of violence," said Murray in an Oct. 28 statement.

"Our meeting was productive … Now, we need to see if this meeting turns into action. Every province can and should do exactly what Nova Scotia did and pass this legislation immediately."

Jackman suggested the creation of a role within public health to act as a navigator similar to the Unifor Women's Advocate who would assist those impacted by IPV, as services and supports can often be complex.

> “Abusers often prey on people’s inability to navigate the legal questions and that contributes to people not reporting the violence they are facing”

“Abusers often prey on people’s inability to navigate the legal questions and that contributes to people not reporting the violence they are facing,” said Jackman in the statement. “Having someone act as a guide might give more people confidence when they are looking for help.”

Unifor Women’s Advocates have reported an increase in the number of their peers telling them about the violence they face. The advocates were said to be trained to connect members with appropriate medical and community supports. However, they are “increasingly seeing coworkers being forced to wait for help as shelters are over-full and other public supports are strained or non-existent.”

“We can take action today to treat IPV with a whole-of-society approach that addresses the root causes, increases funding to women’s shelters and support programs, and ultimately brings this epidemic out of the shadows and into a space of awareness and action,” said Murray.

Unifor said it was part of a decades-long push by community organizations, unions and other advocates to respond to IPV as the "societal and public health emergency it is." It noted that in 2018, Unifor members advocated for and won paid domestic violence leave, which was adopted across the Atlantic provinces and the country.

The union said it will continue to raise awareness about this issue and encourages local unions and members to do the same, especially ahead of Dec. 6, the National Day for the Elimination of Violence Against Women.

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