Litigation Year in Review 2017

Canada

ISSN 2371-8250
Cat. No. J1-19E-PDF

Foreword from the Attorney General of Canada

As Minister of Justice and Attorney General of Canada, I serve a dual role. In my role as Minister of Justice, I have responsibility for legislation and policy that falls within the Justice portfolio. In my role as Attorney General, one of my main responsibilities is the oversight and management of litigation involving the Government of Canada.

In my mandate letter, I was tasked by the Prime Minister to review the Government of Canada's litigation strategy. I was mandated to make decisions to end appeals or positions inconsistent with the Government's commitments, the *Charter of Rights and Freedoms*, or Canadian values. This has been a major focus of my work as Attorney General.

I continue to receive the support of the Cabinet Committee on Litigation Management, which situates our litigation strategies within a wider policy and financial framework. This allows our Government to gain a richer appreciation of the implications of our litigation positions for our public institutions. While the Committee does not have decision-making authority, nor does it direct the Attorney General, I am grateful to my colleagues for the insights and diverse perspectives that they provide.

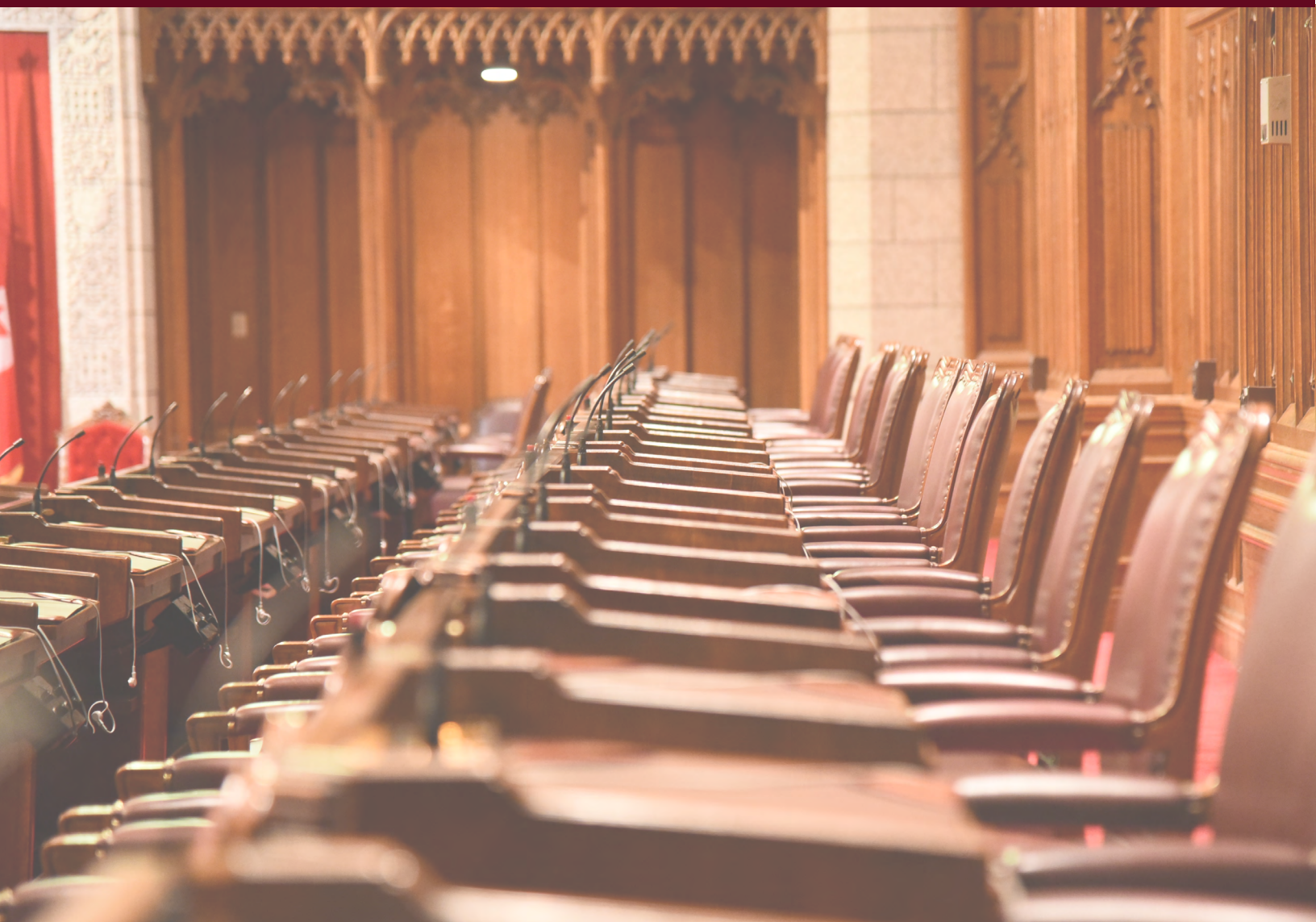
Last year, I published the Litigation Year in Review 2016. It was the first time that an Attorney General of Canada published a report on the litigation decisions and strategies deployed on behalf of the Government of Canada. This year's report highlights some of the litigation positions we took in the course of 2017, and focuses on four main themes: compensating for past wrongs, maintaining our commitment to human rights and the Charter, defending our national security, and intervening before the courts in the public interest.

These four themes are situated in the wider story of 2017: the 150th anniversary of Confederation, the 35th anniversary of the *Canadian Charter of Rights of Freedoms*, and the 35th anniversary of section 35 of the *Constitution Act, 1982* and its recognition of the rights of Indigenous peoples.

2018 marks the 150th anniversary of the Department of Justice. This Litigation Year in Review offers an opportunity to look at what we have accomplished and look forward to the next 150 years of the work of counsel for the Attorney General of Canada.

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

Contents



Introduction

The Attorney General of Canada is responsible for advancing the public interest through her oversight and conduct of litigation involving the federal government, as well as through the constitutional and legal advice she provides to the Government and its Ministers.

In her mandate letter, the Attorney General was tasked by the Prime Minister to review the Government's litigation strategy, including by making early decisions to end appeals or positions that are not consistent with the Government's commitments, the *Canadian Charter of Rights and Freedoms* ("the Charter"), or Canadian values.

In 2017, in fulfillment of this mandate commitment, the Attorney General carried out her litigation responsibilities with a view to (1) compensating for past wrongs, (2) maintaining our commitment to human rights and the Charter, (3) defending our national security, and (4) intervening before the courts in the public interest. The important litigation positions highlighted below were taken in collaboration with the relevant Ministers responsible for the issues.

Compensating for past wrongs

The Attorney General has placed an important focus on changing the Government's approach to litigation involving Indigenous peoples. This change in approach is reflective of the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, which guide the work required to fulfill the Government's commitment to renewed nation-to-nation, government-to-government, and Inuit-Crown relationships. These Principles are shaping how the Government is managing litigation involving Indigenous peoples, including the way legal arguments are framed and articulated, the nature of defences that are advanced, and an increasing emphasis on resolving rather than litigating claims.

The **"Sixties Scoop"** was a dark and painful chapter in our history. Indigenous children were removed from their homes by child welfare services, separated from their families and cultures, and placed in foster care with, or adopted by, non-Indigenous families. In many cases, this happened without the consent of the families or community leadership.

- In 2017, counsel for the Attorney General – working in partnership with officials from the former Indigenous and Northern Affairs Canada – negotiated an agreement in principle for many of those affected by the Sixties Scoop to resolve multiple class actions including ***Brown v Attorney General of Canada, Meeches et al v Attorney General of Canada*** and others. The settlement is an acknowledgment of the trauma and harm caused by past government actions, and is the first step in resolving the Sixties Scoop litigation. The Government of Canada is committed to working with other Indigenous parties, individuals, families and communities impacted by the Sixties Scoop, and with the provinces and territories that have already shown leadership in this area, to resolve the remaining litigation.

"Today, we offer a long overdue apology to all those whom we, the Government of Canada, wronged. We are sorry."

The Right Honourable Justin Trudeau, Prime Minister of Canada
Apology to LGBTQ2+ Canadians delivered in the House of Commons
November 28, 2017

This year, the Government of Canada also recognized the historic unjust treatment of LGBTQ2+ persons in the public service and armed forces, and affirmed the Government's commitment to promote a culture of healing, respect and remembrance.

- In a number of cases, including ***Ross v Canada*** and ***Roy v Canada***, former public servants had initiated class actions against the Government of Canada alleging discrimination, harassment and firings in the public service of Canada and the Canadian Armed Forces based on sexual orientation. The Government of Canada agreed that wrongs had been committed. The Prime Minister's apology on behalf of the Government of Canada to members of the LGBTQ2+ community for that systemic harassment and discrimination was an acknowledgement of that wrong. As part of the Government's wide-ranging activities related to the apology, the Attorney General supported the Government's mandate by helping to negotiate an agreement in principle to settle a class action claim involving many affected public servants and military personnel.

Maintaining our commitment to human rights and the Charter

The past year provided several opportunities for the Attorney General to put into practice the Government's commitment to conducting litigation in a manner consistent with the Charter.

- In the ***First Nations Child and Family Caring Society and Assembly of First Nations v Attorney General of Canada*** decision, released in January 2016, the Canadian Human Rights Tribunal found that Canada was responsible for discrimination in providing child welfare services in First Nations communities. The Government immediately committed to fully implementing Jordan's Principle and to addressing funding and service inequities.

  In one of its subsequent orders aimed at remedying discrimination, the Tribunal made an order that would have required officials to review all health requests on very strict timeframes, without consulting with service providers. Affected organizations believed that this part of the order could be contrary to the best interests of the child in certain circumstances, and the Attorney General therefore sought a judicial review of the problematic terms. Government officials were pleased to work in partnership with the other parties to resolve the issues and to present to the Tribunal a jointly agreed upon change in the order, allowing Canada to withdraw the judicial review.

  There is important work ahead as we fully implement Jordan's Principle, and the Attorney General will support the enormous efforts of the Minister of Indigenous Services, First Nations agencies, provinces, territories and other parties before the Tribunal in the reforms to which we are all committed.

"[449] Finally, on the same day, the AGC sent a letter confirming the items included in paragraph 447 above and, indicated that Canada is fully committed to implement all the orders in this ruling and understands that its funding approach needs to change, which includes providing agencies the funding they need to meet the best interests and needs of First Nations children and families.

[450] The Panel is delighted to read Canada's commitment and openness. This is very encouraging and fosters hope to a higher degree."

Fourth review of the Canadian Human Rights Tribunal in *First Nations Child and Family Caring Society et al v AGC*, 2018

- In ***Chu v Canada***, the British Columbia Supreme Court found that retroactively applying new rules regarding criminal record suspensions to current inmates of correctional institutions was unconstitutional. In order to promote the coherent and consistent application of the Charter, the Attorney General consented to a declaration of unconstitutionality in the ***Charron v Canada*** and ***Rajab v Canada*** cases from Ontario, which raised similar constitutional questions.

- In ***Providence Health Care Society et al v Canada***, a constitutional challenge brought by the Providence Health Care Society, the claimants alleged that prohibiting the use of prescription heroin to help treat drug addiction violated sections 7 and 15 of the Charter. Counsel for the Attorney General supported Health Canada by settling the constitutional challenge. Health Canada introduced amendments to Canada's Special Access Program to permit the consideration of requests for access to drugs, including heroin, for patients with serious or life-threatening conditions, when conventional treatments have failed. This is one example of how the Attorney General seeks policy and legislative solutions to resolve Charter challenges.

- In ***Alberta Union of Provincial Employees (AUPE) et al v Attorney General of Canada***, the Alberta Union of Provincial Employees launched a constitutional challenge against new tax disclosure duties. That challenge was discontinued after Bill C-4, *An Act to amend the Canada Labour Code, the Parliamentary Employment and Staff Relations Act, the Public Service Labour Relations Act and the Income Tax Act*, received Royal Assent in June 2017. The new legislative measures restored a fair and balanced approach to labour relations.

- Similarly, in ***BCCLA, CARL and Ansari v Attorney General of Canada*** and ***BCCLA and CARL v Attorney General of Canada (re: Hassouna)*** and a number of similar cases, the claimants challenged the constitutionality of various aspects of the *Citizenship Act*. These court challenges were all discontinued after the passage of Bill C-6, *An Act to amend the Citizenship Act and to make consequential amendments to another Act*, which addressed the issues at play in these cases, including issues related to dual citizenship, and citizenship revocation.

There will be difficult cases in which counsel for the Attorney General is called upon to defend a Charter challenge, even when the Government of Canada is committed to changing and improving the law. Consistent with the principles for conducting Charter litigation, the Attorney General must generally defend Parliament's laws until they are changed. The courts expect the Attorney General to present full and fair argument to assist them within the adversarial process to arrive at decisions that fairly consider all arguments.

Defending our national security

The Attorney General plays a crucial role in supporting government partners in matters of national security, public safety and criminal justice. Canadians must recognize the vital work that our security agencies engage in every day, professionally and in good faith, to keep us safe from the security threats we face. However, we must also never lose sight of our obligations to respect human rights, and the inevitable costs when such obligations are breached.

"I hope Canadians take away two things today: Our rights are not subject to the whims of the government of the day, and there are serious costs when the government violates the rights of its citizens."

Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada
July 7, 2017

- Hard lessons were learned this year about the costs of violating human rights and the Charter in the national security context. The Attorney General supported efforts to resolve the civil claims in ***Khadr v Canada*** and ***Almalki, El Maati and Nureddin v Canada***, arising from their detention and mistreatment abroad. These settlements were not taken lightly, and followed an assessment that the Government would have spent millions more fighting these cases, and would ultimately have been unsuccessful. In settling these matters, the Government demonstrated a commitment to learn from the past, and to make decisions that are in line with its legal and human rights obligations.

"Canada actively participated in a process contrary to its international human rights obligations and contributed to Khadr's ongoing detention so as to deprive him of his right to liberty and security of the person, guaranteed by s. 7 of the *Charter,* not in accordance with the principles of fundamental justice."

Excerpt from headnote, Supreme Court of Canada decision in *Canada (Prime Minister) v Khadr*, 2010

- The Attorney General also participated in proceedings to protect Canada's national security interests. In ***Mahjoub v Canada***, the Attorney General argued against Mohammad Zeki Mahjoub's legal efforts to have his security certificate rescinded. A security certificate had been issued against Mr. Mahjoub, rendering him inadmissible in Canada on security grounds. The Federal Court of Appeal affirmed the reasonableness of the security certificate.

- A number of extradition cases captured media and public attention in 2016 and 2017, including those of **Karim Baratov** and **Aydin Coban**. The Minister of Justice is the national authority for extradition and fulfils important international treaty obligations on behalf of Canada. This work includes supporting the principle that crimes should be tried in the countries where they were allegedly committed, before independent and impartial tribunals committed to justice, as well as seeking assurances from our treaty partners about the proper treatment of extradition returnees. The Supreme Court of Canada has upheld the Minister of Justice and Attorney General's dual roles in meeting those obligations.

Intervening in the public interest

The Attorney General sometimes intervenes in cases to which she is not otherwise a party to provide a specific perspective to the court that may not otherwise be presented. These interventions are almost exclusively at the appellate level, unless federal legislation is implicated. The Government may raise issues that are relevant to the matter at hand and that reflect a broader perspective on an issue. To that end, the Attorney General intervened in more than 30 cases in 2017 before the Supreme Court of Canada, appellate courts, and other courts across the country.

- The Attorney General often intervenes in the public interest to promote the evolution and proper interpretation of the law. In 2017, the Supreme Court of Canada heard the ***First Nation of Nacho Nyak Dun et al v Government of Yukon*** appeal respecting the management of the Peel watershed. The Government of Canada did not take a position on the merits of the outcome, but intervened primarily to provide the Court with assistance on the principles of modern treaty interpretation. Because of the Government of Canada's commitment to renewed nation-to-nation relationships, the Attorney General offered the Government's perspective on treaty obligations, including under the Yukon Final Agreements. The Court's decision provides a clear signal that courts should generally let the parties themselves resolve disputes arising from modern treaty implementation, and that judicial interventions should be carefully limited to the legal error identified. Modern treaties should be interpreted in a way that facilitates deliberation and dialogue, consistent with the objective of reconciliation.

"The remedy for any treaty breach found by the Court should further the objective of reconciliation. A remedy that does not respect the iterative, collaborative, consultive, relationship-building, and consensus-oriented aspects of the land use planning process would not advance reconciliation."

Factum of the Attorney General in the intervention in *First Nation of Nacho Nyak Dun et al v Government of Yukon*

- The Attorney General also intervened before the Supreme Court of Canada in ***Boutilier v Her Majesty the Queen*** to defend the constitutionality of sections 753(1) and 753(4.1) of the *Criminal Code*, by which dangerous offenders are designated and sentenced. The Supreme Court of Canada affirmed the constitutionality of the dangerous offender regime, a decision that is in line with the position the Government advanced in this matter.

- In ***Office of the Children's Lawyer v JPB & C-RB***, the Attorney General intervened to provide argument on the proper interpretation of the *Hague Convention on Civil Aspects of International Child Abduction* and the legal concept of "habitual residence." As the federal Central Authority and the federal policy lead for the Convention, the Minister of Justice and Attorney General actively supports Canada's commitment to promoting the effective operation of the Convention as a global response to international parental child abduction.

- In ***Ktunaxa Nation Council et al v Minister of Forests, Lands and Natural Resource Operations (British Columbia), et al***, the Supreme Court of Canada dismissed the Ktunaxa Nation's appeal. The appeal challenged a British Columbia Minister's decision to approve a development on Crown land that the Ktunaxa Nation considers sacred, finding that the provincial Minister's duty of consultation and accommodation was met in this case. Canada was an intervener in this appeal and encouraged the Court to recognize that sections 2(a) and 35 of the Constitution are distinct, yet equally important, constitutional protections, which must be considered independently as informed by Indigenous perspectives. In its decision, the Court provided unanimous guidance on the duty to consult and accommodate as-yet unproved Aboriginal rights under section 35 of the Constitution to assist parties and administrative decision makers.