THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Bill C-337 – *Judicial Accountability through Sexual Assault Law Training Act*

CANADIAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION

April 2017

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél : 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc :** 613.237.0185 | info@cba.org | **www.cba.org**

PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Criminal Justice Section, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the CBA Criminal Justice Section.

TABLE OF CONTENTS

Bill C-337 – *Judicial Accountability through Sexual Assault Law Training Act*

Bill C-337 – *Judicial Accountability through Sexual Assault Law Training Act*

I. INTRODUCTION

The Canadian Bar Association's Criminal Justice Section (CBA Section) appreciates this opportunity to comment on Bill C-337, *Judicial Accountability through Sexual Assault Law Training Act*. The CBA's mandate includes seeking improvement in the law and the administration of justice. The CBA Section consists of a balance of Crown and defence counsel from every part of Canada, lawyers who appear in criminal courts on a daily basis. In this submission, the CBA Section offers practical considerations to assist Parliamentarians in their deliberations of Bill C-337.

Private Members' Bill C-337 (sponsored by acting Conservative Party leader Rona Ambrose, P.C., M.P.) would require that, before being eligible for appointment to a Canadian superior court, potential jurists would need to complete "recent and comprehensive education" about sexual assault law. It would also require judges to give written reasons for decisions in sexual assault prosecutions. Finally, it would require the Canadian Judicial Council to keep data and report to Parliament each year on sexual assault training and attendance at that training, as well as on sexual assault cases heard by judges without the training.

Bill C-337 is laudable in attempting to ensure that only qualified judges hear sexual assault cases and that those judges offer well-considered reasons for all decisions in sexual assault cases. The CBA Section is committed to both ensuring that Canada's judiciary is of the highest calibre and that justice is administered in a fair, efficient, impartial and constitutionally sound manner. All these considerations are necessary for Canadians to be confident in how the justice system functions and assured of its integrity.

II. WRITTEN REASONS

Bill C-337 would require judges to give written reasons for their decisions in sexual assault cases. The preamble to the Bill says that requiring written reasons in sexual assault proceedings would "enhance the transparency and accountability of the judiciary."

The law already requires proper reasons from judges, whether written or oral, and resources are dedicated to ensuring the practical application of this requirement. For example, the National Judicial Institute provides significant training in judicial reason writing and in the delivery of oral reasons.

The current law also requires trial judges to give reasons that allow meaningful appellate review of a conviction or acquittal, so the appeal court can determine why a ruling was made. Reasons must be responsive to the issues raised in the trial. It is not enough, for example, to say something is admissible or not when evidence is contested and serious issues are raised as to the preconditions for admissibility. It is also unacceptable to say that a person is guilty or not guilty without explanation.

The Supreme Court has outlined detailed requirements for giving reasons, whether written or oral, in all cases. In *R. v. Sheppard*,[1] Justice Binnie, writing for a unanimous Court, listed ten vital guidelines for trial courts:

> 1. The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.
> 2. An accused person should not be left in doubt about why a conviction has been entered. Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record. The question is whether, in all the circumstances, the functional need to know has been met.
> 3. The lawyers for the parties may require reasons to assist them in considering and advising with respect to a potential appeal. On the other hand, they may know all that is required to be known for that purpose on the basis of the rest of the record.
> 4. The statutory right of appeal, being directed to a conviction (or, in the case of the Crown, to a judgment or verdict of acquittal) rather than to the reasons for that result, not every failure or deficiency in the reasons provides a ground of appeal.
> 5. Reasons perform an important function in the appellate process. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of s. 686(1)(a) of the Criminal Code, depending on the circumstances of the case and the nature and importance of the trial decision being rendered.
> 6. Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve

[1] [2002] 1 S.C.R. 869, 2002 S.C.C. 26, (2002)162 C.C.C. (3d) 298 (S.C.C.).

confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record, even without being articulated.

7. Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.
8. The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.
9. While it is presumed that judges know the law with which they work day in and day out and deal competently with the issues of fact**,** the presumption is of limited relevance. Even learned judges can err in particular cases, and it is the correctness of the decision in a particular case that the parties are entitled to have reviewed by the appellate court.
10. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in such a case for a new trial. The error of law, if it is so found, would be cured under the s. 686 (1)(b)(iii) proviso.[2]

This SCC decision illustrates the importance of judicial reasons to the criminal process and underscores the duties already imposed on judges. It clearly prohibits any 'boilerplate' reasoning, and directs judges to address the issues of each particular case.[3] The *Sheppard* duty to give reasons has been reflected in many subsequent cases[4] and members of the CBA Section see these standards applied on a daily basis.

Written reasons generally take longer to craft than oral judgments. Requiring judges to give written reasons for all of a particular group of cases could add to court delays at a time when delays in the justice system, in contravention of presumptive time limits, can mean charges will be stayed.[5] It would not be in the public interest to add unnecessary barriers to the timely determination of criminal charges.

---

2 *Ibid*, at para. 55.

3 This can also be seen in the administrative context as enunciated by the Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699 (S.C.C.).

4 See, for example: *R. v. Walker* 2008 SCC 34; *R. v. Lagace,* (2003) 181 C.C.C. (3d) 12 (Ont. C.A.); *R. v. Chappell*, 2003 CanLII 28641 (ON CA).

5 *R. v. Jordan*, [2016] 1 S.C.R. 631, 2016 S.C.C. 27 (CanLII).

In addition, oral reasons are not somehow deficient or less considered than written reasons, by their very nature. A judge can reserve judgment and take the time needed to craft a decision, and this commonly occurs. Reasons may then be delivered orally from notes or handed down in written form. Either way, the presiding judge has taken the time required to come to a carefully reasoned decision. Certainly, judges are human and may occasionally misspeak, in either their oral or written forms of communication.[6]

Another practical problem is that Bill C-337 would apply only to current sexual offences. It would not address the situation of judges without training in sexual assault cases who preside over historic childhood sexual offences, for example. It seems that this may be an unintended anomaly in the Bill.

III. JUDICIAL EDUCATION

The CBA Section supports efforts to ensure a well informed and highly qualified judiciary. The proposed Bill would impose a duty on applicants for a federal judicial appointment to complete education on sexual assault issues to the satisfaction of the Commissioner for Federal Judicial Affairs, prior to appointment. It is unclear who would bear the cost for that training, or undertake that assessment. It may be the intent that each applicant would bear costs to complete the required training prior to being considered for appointment, or that the Canadian Judicial Council would be expected to provide training for all applicants (before they were actually appointed to the Bench).

The *Judges Act* applies to *all* superior court appointments, including trial courts, courts of appeal, Federal Court, Tax Court and the Supreme Court of Canada. Prospective appointees to the Tax Court, for example, would therefore also be required to take this training.

Many educational programs for judges are already in place across the country, and we note that the recent 2017 federal budget allocates additional funds for gender and cultural sensitivity training for judges. Senior administrative judges can ensure that only judges who have completed appropriate training are assigned to specific types of litigation. As a few examples of existing training:

---

6 As an example, on CBC's *As It Happens* on March 2 2017 (Episode 300281894), Professor Elizabeth Sheehy, an expert in sexual assault law, discussed the recent controversial judgment of J. Lenehan of Nova Scotia. While expressing concerns about the decision, she also stated that the judge's most repeated and controversial remark appeared a slip of the tongue, in the overall context of the decision.

- the National Judicial Institute provides comprehensive training for federally appointed judges.
- the Canadian Association of Provincial Court Judges offers extensive programs, including the New Judges' Education Program held annually, with training in dealing with sexual assault cases.
- Provincial and territorial judicial associations, such as the Education Secretariat of the Association of Ontario Judges, provide comprehensive programs.[7]
- the Canadian Judicial Council has established Judicial Education Guidelines for Canadian Superior Courts.[8]

Any amount of rigor in training procedures will not preclude the possibility of occasional inappropriate behaviour, reactions or remarks.

Bill C-337 would also not address training for provincial or territorial judges, where the bulk of sexual assault trials take place. In the recent case of Robin Camp, which led to the Canadian Judicial Council inquiry into his fitness during the time he served on the provincial bench, it was agreed:

> During his time as a Provincial Court judge, he did not receive training or judicial education on the law of sexual assault or on how to conduct sexual assault trials.[9]

IV. JUDICIAL INDEPENDENCE

Judicial independence is a pillar of our justice system and democracy. Before Parliament enacts a law requiring the judiciary to take on certain functions and report back to Parliament about them, it should give careful consideration to ensure that none of the proposals interfere with the independence or integrity of Canada's judges. While we appreciate that the Bill is not

---

7 As stated on the Association web site: Once appointed, all Ontario Court Judges are expected to take part in programs designed jointly by the Association of Ontario Judges and the court to promote and maintain their professional competence. The planning and presentation of continuing education programs is coordinated by a court committee known as the Education Secretariat. This committee has developed one of the most comprehensive and wide-ranging core programs of education available to Judges in any court in Canada. Newly appointed Judges participate in specially designed orientation and judicial skills programs. All Judges are also encouraged to take part in external education programs presented by the National Judicial Institute, the Canadian Association of Provincial Court Judges and the Canadian Bar Association, among others.

8 Judicial Education Guidelines for Canadian Superior Courts (http://ow.ly/Moxb30as0LZ).

9 Extract from para. 4 of the Agreed Statement of Facts, filed. In December of 2016, the Alberta government undertook major initiatives in judicial education (Professional Development for Provincial Court Judges of Alberta (http://ow.ly/1aaa30as1m2). Alberta has also established a Judges Education Plan and New Judges Education Plan.

intended to challenge the judiciary in this manner, any such effect may be found constitutionally unacceptable.

V. CONCLUSION

The CBA Section hopes our observations about Bill C-337 will be a helpful contribution to Parliamentarians' study of the Bill.