THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

October 30, 2017

Via email: JUST@parl.gc.ca

Anthony Housefather, M.P.
Chair, Committee on Justice and Human Rights
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Mr. Housefather:

Re: Bill C-51, *Criminal Code and Department of Justice Act amendments*

The Canadian Bar Association's Criminal Justice Section (CBA Section) appreciates the opportunity to comment on Bill C-51, *Criminal Code and Department of Justice Act amendments*. The CBA is a national association of over 36,000 lawyers, notaries, law students and academics, and our mandate includes seeking improvement in the law and the administration of justice. The CBA Section consists of a balance of prosecutors and defence lawyers from across Canada.

We regret that the Committee's schedule did not allow for the Canadian Bar Association to appear but trust that our written comments will be helpful to your deliberations. The CBA Section supports the intent of Bill C-51 to remove unconstitutional or obsolete sections from the *Criminal Code*. We also recognize that many complainants in sexual assault cases are dissatisfied with the response of the courts and the criminal justice system and agree that steps should be taken to rectify this situation. Bill C-51 would codify some existing jurisprudence on consent to sexual relations and make other additions to the *Criminal Code*. However, the CBA Section believes that much of what is proposed would fall short of improving justice for either complainants or accused.

1. Problems with Miscellaneous Amendments

Most of our comments address Bill C-51's changes on sexual assault. The Bill also amends other parts of the *Criminal Code*:

- Clauses 9 and 14 would eliminate the requirement for an accused to show that their unlawful conduct was justified by a lawful excuse, reversing the evidentiary burden. Clause 9 would amend sections 145(2)(a) and (b) to require the Crown to prove that an accused did not have a lawful excuse for not attending court. However, the Crown would often not have access to that information. It would be personal to the accused.
- Clause 14 would remove the evidentiary presumption in section 177, trespassing at night. Again the proposal is for the Crown to prove that the accused did not have a lawful excuse to

trespass. The provincial court decision in *R. v. Tassou*[1] held that the current provision putting the burden on the accused does not create an unconstitutional reverse onus.[2]

- Clause 37 would amend sections 351(1) and 352 to allow prior use of a break-in instrument to be a basis for convicting the accused. This would be true even if the accused did not intend anything nefarious with the instrument in the situation at hand.
- Section 719(3.1) is addressed in clause 66, and would maintain the maximum credit for pre-sentence custody at 1.5: 1. We believe instead that judges should determine when and how much additional credit is warranted in each case.

2. Sexual Assault

Honest but Mistaken Belief

Proposed amendments to sections 153.1(5) and 273.2 are unnecessary, given existing law that recognizes honest mistake as a defence only under strict conditions. Adding subsection (c) is particularly troubling, given existing subsection (b) in each of the sections. It would put an evidentiary burden on the accused to give positive evidence that "the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct". If a sexual encounter followed by a sexual assault complaint triggers a positive obligation on the accused to prove consent, it could be interpreted as reversing the burden of proof contrary to section 7 of the *Charter*. What is required is a proportional response considering what the accused knew and steps taken to confirm consent.

While we recommend omitting the proposed subsections (c) from Bill C-51, if they are added, we suggest that the wording be changed. Under (c), there would be no defence without evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or *actively* expressed by conduct.

Adding the word "actively", as proposed, could create confusion as it is contrary to the Supreme Court's statement of the law in *Ewanchuk*[3] at paragraph 49. In examining the *mens rea* or the mental intent to commit a crime – specifically for the purposes of honest but mistaken belief in consent – the Court says that to give consent means that the complainant affirmatively communicated by words or conduct their agreement to engage in sexual activity with the accused. Adding "actively" would create, rather than alleviate, uncertainty in the law. We suggest the Bill instead simply mirror the words of the Supreme Court of Canada.

Consent and Third Party Records

The proposed amendment to section 276(4) would expand the definition of sexual activity to include communications made "for a sexual purpose or whose content is of a sexual nature". There is a fundamental difference between sexual activity and speaking about sexual activity. The purpose of the sexual activity amendments was to abolish discredited views that because a person is sexually active, that person is more likely to have consented to the activity at issue, or is less worthy of being believed. These views were based on the sexual nature of the activity but do not apply to statements.

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1 (1984) 16 C.C.C. (3d) 567.

2 For this type of provision generally see *Holmes v. R.* [1988] S.C.J. No. 39, which upheld the constitutionality of requiring the accused to show why they had a lawful excuse to do what otherwise would be a crime (at para 59).

3 [1999] S.C.J. No. 10.

Proposed section 278.92 would be likely to attract extensive constitutional scrutiny given its substantial qualifiers and limits on the accused's ability to rely on records of the complainant, including those already legitimately in the accused's possession. Some repercussions we anticipate include:

1. There is already widespread concern about court efficiencies, specifically the pace of trials. The proposal would expand the basis for a sexual history application to matters beyond sexual history. Courts, Crown and defence counsel would have to spend more time on applications, delaying trials and adding to parties' costs. Cash-strapped provincial and territorial legal aid plans would also have to fund more applications.

   Records in the accused's possession or communications from the complainant would be covered by sections 10 and 11 of the *Canada Evidence Act*. Under that law, a witness can be cross-examined on such prior statements. Under Bill C-51, an accused with records that could impeach complainants or witnesses may not use those records unless they first apply for permission of the court. This also means that an accused with relevant and material evidence about the complainant's credibility must disclose the particulars to the court, putting the Crown and complainant on notice about any inconsistencies in the evidence. This would not contribute to the truth-finding function of the trial process. It is also inconsistent with the law set out by the Supreme Court in *R. v. Mills*[4] and would not prevent harmful fishing expeditions (the chief concern in that case) because the metaphorical 'fish' (the record) would already be in the possession of the accused.

   An accused who is unable to adduce this evidence and is subsequently convicted may appeal the conviction, further burdening the court system, Crown and legal aid plans. In addition, final decisions would be delayed and victims held in further limbo.

2. Sexual history provisions of the *Criminal Code* were enacted to ensure that complainants are treated fairly about prior sexual conduct. The therapeutic records provisions limit access to prior statements in situations where privacy is legitimately expected and often vital to the existence of the therapeutic relationship. However, Bill C-51 would extend this to equate other ordinary statements to those made in private, therapeutic settings.

   If an accused has somehow obtained a medical record or doctor's report about the complainant, the privacy interests at stake are significant. However, the definition of "record" is wide enough to include emails, text messages and the like from the complainant to the accused. If the accused has kept copies or legitimately possesses the materials (such as court records in family proceedings), the accused may well seek to cross-examine the complainant on issues raised if relevant to the allegations or likely to impeach the complainant's credibility. Statements by a complainant to a third party where the complainant references an alleged sexual assault would also be inadmissible without first bringing an application under sections 278.93 and 278.94.

   Crown counsel routinely ask complainants about possible evidence in emails or text messages and what that evidence says, but that does not guarantee that the Crown has heard everything. The advantages for Crown counsel and complainants to be alerted to such evidence in advance, by requiring an application by defence counsel, are clear. In contrast, this proposal would impact defence counsel's ability to conduct an effective cross-examination. The CBA Section questions the constitutionality of creating this disclosure obligation on an accused person, and its potential impact on the *Charter*-protected right of an accused to make full answer and defence.

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4 [1999] 3 SCR 668.

Crown/Complainant Relationships

Bill C-51 could impact the ability of Crown counsel to prosecute sexual assault cases and also exacerbate the problem of court delays. Giving standing to complainants to make decisions about how the prosecution should proceed runs contrary to the constitutionally entrenched independence of the Attorney General.[5] It is one thing to make victim impact statements on sentencing, but allowing complainants to decide how parts of a prosecution will proceed is quite different.

Crown counsel obligations under the *Victims Bill of Rights* include discussing an application with a complainant and giving complainants an opportunity to be heard and informed, but stop short of standing at a hearing. Bill C-51 sections 278.93 and 278.94 would essentially allow witnesses or complainants to determine whether evidence could be produced or relied on under sections 276 or 278.92. If the Crown concedes that the test is met and should be admitted into evidence, but the complainant disagrees, that relationship could be strained as the process continues.

Most of this part of Bill C-51includes designated offences under the *Victims Bill of Rights,* but that law applies even to matters not specifically designated. Complainants may not always agree with Crown decisions now, but the right to make contrary submissions in a hearing before the court would add significant formality to any potential disagreement. Even when the Crown and the complainant agree, statements may end up on the record that could be damaging later in the process.

For third party records applications under section 278.4, a complainant or witness already has the right to appear and make submissions. The proposed change would only add that a complainant can also do this for applications under sections 276 or 278.92. Third party records applications are infrequent, and complainants rarely make submissions or have counsel make submissions on their behalf. The type of evidence that would be addressed in applications under sections 276 or 278.92 is such that it could lead to more submissions from complainants or their counsel. That could lead to increased tensions, particularly between the Crown and complainant, for reasons noted above.

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Thank you for considering the views of the CBA Section. In summary, we are concerned that the proposed changes to the sexual assault consent and third party records regime in Bill C-51 would make the law too technical and complicated to be understood by the public and consistently applied by judges. The fundamental understanding of a trial in a fair, free and democratic society includes the notion that the vast power of the state is counterbalanced by allowing the accused, with few exceptions, to keep their defence secret from the Crown until they choose to bring it to bear in the trial. Bill C-51 would upset this important balance.

Yours truly,

(original letter signed by Gaylene Schellenberg for Loreley Berra)

Loreley Berra
Chair, CBA Criminal Justice Section

5 *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339.