HENSEL BARRISTERS PROFESSIONAL CORPORATION

The Honourable Serge Joyal, Chair
Standing Senate Committee On Legal and Constitutional Affairs
The Senate
Ottawa, Ontario K1A 0A4

September 19, 2018

Dear Chair Joyal:

As a Secwepemc member of the Indigenous Bar Association, I have the honour to transmit to you for tabling in the Senate, the enclosed Brief with respect to the impacts of Bill C-51 (*An Act to Amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act).*

Sincerely,

Katherine Hensel
Josephine de Whytell
Encl.

cc. Mark Palmer, Committee Clerk

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Before the Senate Standing Committee on

Legal and Constitutional Affairs

On behalf of the Indigenous Bar Association

Brief with respect to the impacts of Bill C-51

(An Act to Amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act)

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PREFACE

The Indigenous Bar Association ("IBA") is a national organization representing Indigenous lawyers, paralegals, elders, law students, judges and practitioners of Aboriginal law in Canada.

The IBA is pleased to provide submissions about the impact of Bill C-51 and brings a unique perspective in terms of addressing the concerns most commonly brought to the attention of IBA members by Indigenous clients.

I. Introduction

Bill C-51 aims to clarify the law on consent to engage in sexual activity, admissibility of evidence, and legal representation for the complainant. The Bill also addresses the admissibility of defence documents where those documents are ones over which the complainant has a reasonable expectation of privacy.

The proposed amendments attempt to forge a new balance: between a complainant's reasonable expectation of privacy over documents that could cause them harm if released, and, the rights of an accused. The accused, in particular, is protected by the *Charter* and common law a number of ways, including by the requirement that the Crown prove guilt beyond a reasonable doubt, and the rights to silence (*i.e.*, to not say anything in response to the charges), to consult with counsel upon arrest or detention, to full answer and defence, and to a fair trial.

Bill C-51 purports to bring the *Criminal Code* into line with Supreme Court rulings such as *R. v. Ewanchuk, R. v. Darrach, R. v. Mills, R. v. J. A.*, and to respect the equality of complainants' dignity in the trial process. While the IBA supports the government's goals, its position is that the proposed *Criminal Code* amendments are not fairly balanced with other *Charter* principles and will cause significantly more direct and indirect harm to Indigenous people in Canada.

The IBA foresees the proposed amendments increasing the overrepresentation of Indigenous accused persons serving pre-trial custody by causing significant delay during the criminal process. The IBA also has concerns that the increased participatory rights of complainants will do little, if anything, to support the types of issues faced by Indigenous complainants of sexual assault, and may ultimately do more harm.

The IBA supports the ongoing and further codification of Supreme Court rulings regarding unconstitutional elements of the *Criminal Code*, particularly with respect to the standard of proof, reverse onus provisions, evidentiary presumptions, and mandatory minimum sentences, all of which have a greater impact on Indigenous offenders.

The IBA observes that more can and should be done to address the mandatory minimum sentences that continue to prejudice Indigenous offenders more than non-Indigenous offenders. However, in response to Bill C-51, the IBA submissions are focused on the changes to the laws on sexual assault.

II Amendments to the *Criminal Code* re: Sexual Assault

Bill C-51 proposes to make the following arguably unconstitutional amendments to sexual assault law:

1. It clarifies when a person is not able to consent to sexual assault, by identifying that a person cannot consent when unconscious (*actus reus* - s.153.1(3)(a.1) and *mens rea* s.273.1(2)(a.1)) or if they are incapable of consenting for any reason other than unconsciousness. (*actus reus* - s.153.1(3)(b) and *mens rea* - s.273.1(2)(b)).
2. It creates an unprecedented and unparalleled disclosure obligation on a defendant to interpret the relevance of information 60 days prior to hearing the Crown's case, and to share what could be a material element of their anticipated case with both the Crown *and* the Complainant, based only on review of the Crown's disclosure. (s.278.3(5)).
3. It expands the "rape shield" protections that limit the admissibility of irrelevant sexual history evidence which would otherwise be prejudicial, by:
    a. Creating notice and participatory rights for the complainant, including to be represented; and
    b. Expanding "other sexual activity" in the meaning of what is presumably irrelevant, to "any communication made for a sexual purpose or whose content is sexual in nature."
4. It prohibits a defendant from using evidence in their possession in which the complainant has a reasonable expectation of privacy, without first providing the complainant notice and a right to challenge its admissibility through independent counsel (s.278.92 and s.278.93).

It is widely accepted that Indigenous offenders are over-represented in the justice system. They face substantial barriers to attaining just or fair treatment in the courts, and this Bill impacts their common law and *Charter* rights to a fair trial.

Indigenous women, girls, 2SLGBTQAI individuals, and boys are at higher risk of being victims of sexual assault,[1] and where they might be complainants under the proposed statutory regime, this Bill impacts their humane and dignified treatment during the criminal process, their equality, and their expectations of a speedy trial and resolution.

The IBA supports Parliament's intention behind introducing greater protections for complainants of sexual assault, however, the risk Bill C-51 poses to Indigenous accused and victims is significant.

The IBA proposes amendments including a positive approach to identifying consent in the context of the *Criminal Code*, as well as striking out the amendments regarding personal records in the possession of the accused.

(a) Background:

There are well-known access to justice issues among Indigenous accused, including, among other things:

- the prevalence of poverty and lower incomes among Indigenous peoples;
- the under-resourced and over-stretched legal aid system; and,
- the overrepresentation of Indigenous people arrested, charged, and sentenced. [2]

Indigenous peoples are unfairly targeted by law enforcement, by legislation, and by sentencing structures and mandatory minimum penalties.[3] Their right to a fair trial is constitutionally

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[1] Self-reported sexual assault in Canada, July 2017, by Shana Conroy and Adam Cotter for Statistics Canada: https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14842-eng.htm

[2] CBA – Study on Access to the Justice System – Legal Aid, 2016, generally, available at: https://www.cba.org/CMSPages/GetFile.aspx?guid=8b0c4d64-cb3f-460f-9733-1aaff164ef6a

[3] Report of the Royal Commission on Aboriginal Peoples: https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx; Report of the Commission of Inquiry Relating to the Death of Neil Stonechild: http://www.publications.gov.sk.ca/freelaw/Publications_Centre/Justice/Stonechild/Stonechild.pdf; Executive Summary, the Report of the Ipperwash Inquiry: https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/vol_4/pdf/E_Vol_4_Full.pdf; Royal Commission on the Donald Marshall Jr. Prosecution: https://novascotia.ca/just/marshall_inquiry/; Report of the BC Missing Women

guaranteed, however, the implementation of this principle is where human frailties and the long history of Colonialism in Canada interferes with the aspirations/operation of the Rule of Law.

Balancing rights is essential, particularly when introducing legislation aimed at ameliorating the prejudice experienced by one group, in a way that is likely to cause prejudice to another group. This is even more important to achieve when both groups are marginalized.

The import of illegal and myth-based concepts into the sexual assault trial is something that is addressed in s. 276 of the *Criminal Code*. However, its lack of consistent and effective implementation continues to cause discrimination against Indigenous victims of sexual assault.[4]

The IBA's position is that the *Criminal Code* is already systemically slanted against Indigenous accused, and these amendments would make the barriers they face much greater. Moreover, the IBA does not have confidence that the proposed amendments would benefit Indigenous complainants of sexual assault, or that such benefit would justify the colossal infringement of the accused's rights to a fair trial, as guaranteed by s.7, s.11(d), and s.15 of the *Charter*.

Society can address sexual assault in a number of ways. Increasing resources for youth and adult programs in Indigenous communities, as well as resources for adequate housing is one way of improving prevention. Encouraging complainants to come forward and making them feel safe in the courtroom, is arguably putting the cart before the horse.

(b) Consent

Bill C-51 seeks to clarify the law of sexual assault by identifying that a person cannot consent when they are unconscious, or if they are incapable of consenting for any reason other than unconsciousness. This applies both to the *actus reus* of the offence (s.153.1(3)(a.1) and s.153.1(3)(b)), for the purposes of determining if the accused ought to have known the complainant was unable to consent, and to the *mens rea* of the offence (s.273.1(2)(a.1) and s.273.1(2)(b)), for the purposes of whether the accused had a reasonable honest mistaken belief that consent was obtained. This is already trite law and does not translate to a codification of the legal issue at point in *R. v. J.A.*

Inquiry: http://www.missingwomeninquiry.ca/reports-and-publications/; Report of the Aboriginal Justice Inquiry of Manitoba: http://www.ajic.mb.ca/volume.html.

[4] *R. v. Barton*, 2017 ABCA 216.

The Supreme Court majority in *R. v. J.A.* held that a person cannot consent to a sexual act occurring after the person becomes unconscious, even if they anticipated the unconsciousness, and consented to that forming part of the sexual activity. They lack this consent by virtue of the fact that they must always have an ability to withdraw their consent. Justice Fish dissented on this point, finding this an undue restriction on a woman's autonomy to consent to an activity pre-emptively.

The addition of the "unconscious" wording in the *Criminal Code*, as suggested to be in response to *R. v. J. A.*, will do little to address – and arguably more to prejudice – the victims of sexual assault who are intoxicated, but not to the point of unconsciousness.

In the scenario where complainants are objectively not too intoxicated to be incapable of giving consent, but objectively too intoxicated to have a reliable memory of whether they did or not, these types of complainants are particularly vulnerable. To focus on unconsciousness, or anything other than unconsciousness, does not address the large grey area in between, where vulnerable members of society can be preyed on, particularly while intoxicated, so as to intentionally reduce the reliability of their evidence and ability to seek justice.

Addiction issues are a systemic response to trauma, and many Indigenous peoples find themselves enmeshed with such addiction problems, reacting to personal and collective traumas associated with Colonialism. The higher rates of addiction issues foretell the increased chances of vulnerable members of the Indigenous community being intoxicated, and to levels that are lodged firmly in the grey area between unconsciousness and "other than" unconsciousness, as defined by the proposed amendments. This means Indigenous people will suffer more from vagueness in the law, where the lines about consent and intoxication are not clearly spelled out, than other groups in society.

The IBA recommends consideration of a positive, rights-based approach to the law on consent, setting out when a person is able to consent, and assessing criminal conduct against that standard as a means to better clarify the law in this area.

(c) Disclosure

The IBA suggests that Indigenous accused rarely have the resources to go on fishing expeditions for 3rd party records of complainants. In this sense, the law appears to be amended to address an issue that arises more commonly in circumstances between non-Indigenous complainants and defendants.

A side-effect of this amendment, which cannot be countenanced, is the greater prejudice it would do to Indigenous accused.

Obligating defence disclosure is unconstitutional for a number of reasons: it undermines the right to pre-trial silence, the right to full answer and defence, the right to a fair trial, all of which are constitutionally guaranteed. Furthermore, it will have a greater unfair impact on Indigenous accused, given the prejudice they already experience in the justice system, and thereby undermine their equality before and under the law.

The language of the proposed amendments is far too broad, and could entail a large array of defence disclosure – which may not legitimately come to mind until the day of trial, requiring mid-trial applications, adjournments, delays, and foreseeably, stays of proceedings – where delays exceed the maximum time for proceedings set out in *R. v. Jordan.*

If, for example, the accused's own mental health records relate to the accused's relationship with the complainant, there could be pertinent and relevant evidence supporting the credibility of the accused, that could arguably trigger the privacy interests of the complainant. It would be unfair to the accused to have to disclose such evidence; it would breach the accused's privacy interests. It should not be presumptively inadmissible. The Court must be entitled to decide this on a case-by-case basis in the context of each case to ensure fairness is tailored to the circumstances, and not to a one-size-fits-all standard.

Requiring an Indigenous accused to provide 60 days' notice of intending to use evidence which may trigger privacy rights of a complainant is further likely to reduce the already small number of Indigenous accused who are able to use their right to full answer and defence to the maximum of their legal interest. It places an unrealistic and unnecessary burden on their counsel to assess the case well in advance of hearing the Crown's evidence, and decide whether to jeopardize their client's right to silence in favour of their right to a fair trial, or *vice versa*. It reduces the Court's ability to respond justly, with flexibility and expediency, all of which is reasonable and necessary in a free and democratic society.

In light of access to justice issues experienced by Indigenous accused, they often only have the benefit of one meeting with their lawyer prior to trial, and sometimes that occurs on the day of trial. Requiring such a large notice period prior to introducing evidence in which the complainant may

have a privacy interest places an unreasonable and over-representative burden on Indigenous accused, which would foreseeably impede their ability to defend the case against them. In addition, they lose the ability to conduct their case as they see fit, and to effectively cross-examine the complainant, who is often the only Crown witness against them in a one-on-one credibility contest.

When Indigenous defendants are already at a disadvantage in the justice system, these provisions (which may indeed provide a positive protection for some complainants), are likely to have a severely negative effect on an Indigenous accused's right to full answer and defence. This likely harm is inconsistent with the goal of amelioration for the rights of those complainants the amendments might protect.

The IBA's position is that an accused's rights to a fair trial outweigh a complainant's privacy rights to the extent that the accused's position is relevant to their innocence at stake. The judiciary and the legal profession bear responsibility as Officers of the Court to ensure relevant arguments are brought forward responsibly, appropriately, and in a manner that does not discriminate against the complainant in a manner that can be characterized as bringing the administration of justice into disrepute. All of this is captured by the current legislative scheme in s.276 of the *Criminal Code.*

In the recent case of *R. v. Barton*, it was the prosecutor who introduced twin myth narrative by referring to the complainant as a prostitute. The trial judge failed to notice or correct this error. The defence counsel capitalized on it, continuing to demean the identity of the complainant and indirectly suggest that because she was a "native girl", her value is less, and the accused had the right to understand she consented to violent sex causing her death, because, as a native prostitute, she's more likely to have consented.[5]

These problems cannot be fixed by simply amending the *Criminal Code*. Indigenous ethics and values are inherently known by Indigenous peoples through their understanding of their family's and community's stories. Valuing equality cannot be imposed by law, it must be introduced through education, communication and participation. There is more that can be done to protect victims of sexual assault, but providing them with rights to defence disclosure in a criminal trial changes the

[5] *R. v. Barton*.

bilateral nature of the proceeding. Where an accused could be wrongfully convicted and sentenced to jail, it is not a minimal encroachment of their rights to deny them their right to pre-trial silence.

(d) Complainant's participation in admissibility hearings

Bill C-51 seeks to expand s.276, the provision which renders presumptively inadmissible any evidence about a complainant's "other sexual activity" so as to avoid troubling stereotypes which have long-permeated sexual assault trials, *i.e.*, that a complainant with previous sexual history is either more likely to have consented, or less credible about whether they did or not. Section 276 is a very important and useful provision to remind courts to protect their decision-making forum from irrelevant and prejudicial considerations which are discriminatory to a complainant.

The consistent implementation of s.276 is the responsibility of all legal actors, from police investigating crimes, to prosecutors, defence counsel, and judges. More can be done to address the lack of successful implementation, as opposed to expanding the provision to create more uncertainty in the trial process for an accused.

The IBA recognizes that many victims of sexual assault are reluctant to come forward because of the grueling legal process and their treatment within it. Indigenous witnesses are often found less credible due to the "twin myths" but also due to other systemic issues. It is foreseeable that even more Indigenous victims would be reluctant to resolve the hurtful trauma of experiencing sexual assault, through the criminal justice system, because of their anticipated treatment within it. This is compounded by the fact that courts rarely hold non-Indigenous people accountable to the same degree as Indigenous people, as demonstrated by the overrepresentation of Indigenous prisoners in jail. It is far too common for non-Indigenous people to view Indigenous people as morally blameworthy, as has recently been demonstrated by an array of all white juries turning out acquittals for non-Indigenous accused, where their victims were Indigenous.[6]

Given the importance of this issue for Indigenous victims of sexual assault, the IBA finds it necessary to advance change to better protect the rights of Indigenous complainants. Participation

[6] *R. v. Barton, R. v. Stanley* (death of Colten Boushie), *R. v. Cormier* (death of Tina Fontaine).

with notice and counsel, however, could have a variety of unwanted impacts, both on accused persons and on victims.

The criminal justice action is characterized as Regina versus 'the Accused', however, increased victim participation would create a circumstance where the Accused is automatically engaged in legal proceedings against the victim and the State. In the case of intimate partner assaults, the willingness of the accused to take responsibility, where there is responsibility to take, could foreseeably be impacted by the adversarial role of the victim and submissions made on behalf of the victim.

Although participation is characterized as a right, it may actually be a detriment to some victims. They could be re-traumatized by being forced too early in their recovery from the incident, to have to turn their mind to the experience. And not just once with police, once with the Crown, and then at one court date before the Judge, but also with another lawyer, and at another proceeding. It is foreseeable that this could create an even larger barrier to Indigenous complainants coming forward.

Receiving advice about protection of privacy interests is reasonable, however, disrupting the flow of the criminal trial and creating an admissibility hearing which could arguably be determinative of the issues at trial, is not.

(e) Expansion of "other sexual activity" to include electronic communication

The presumptive inadmissibility of "other sexual activity" evidence should not apply to contemporaneous communications for a sexual purpose, such as electronic text messages before and after the alleged non-consensual activity, as this is likely to be highly relevant to the *actus reus* and the *mens rea* of the offence, albeit certainly not determinative of whether consent was present at the time of the sexual activity forming the subject matter of the charge.

The extension of the rape shield protections to electronic communications are important, but must be appropriately limited, so as not to unnecessarily curtail the rights of the accused. The IBA suggests that the trial judge, properly attuned to these issues, is best placed to determine what constitutes "other sexual history" on a case-by-case basis, and these amendments create more uncertainty than clarification. That is not to say that alternative amendments could not guide judges to ensure the effective implementation of s.276, such as, for example, a provision stipulating the steps to take if s.276 is offended, and when it is appropriate to stop the proceedings and order a re-trial.

(f) Complainant's records in the possession of the accused

Bill C-51 addresses the admissibility of records in the accused's possession, in which a complainant of sexual assault might have a reasonable expectation of privacy. It expands the protections related to records for which the accused must make a pre-trial application, to records in the accused's possession.

This is highly important, because it makes the infringements of the right to pre-trial silence addressed earlier in this brief even worse. In the case where the accused brings an application to obtain relevant documents, there may be some grounds to assess the merits of this application in the context of accused's propensity to go on fishing expeditions to help defend their case.

With respect to the records already in the possession of the accused, it dictates how the accused can defend the case against them and compels disclosure of defence documents which, if disclosed earlier than after the close of the Crown's case, might incriminate the accused, or encroach upon the accused's privacy rights.

Furthermore, it impacts the solicitor/client relationship in such a way that if a complainant did have counsel, such counsel could be in the position of making submissions in the context where their client was excluded from being present because they are a witness. In such cases, a lawyer may have to act in their client's best interests, without proper instruction, and then not be able to share with their client what occurred. Where the complainant's lawyer is not from the same community as the complainant, or if they do not speak the complainant's language, or if the plethora of other access to justice issues that usually apply to Indigenous people requiring counsel apply in the context of this scenario, it places an insurmountable burden on the solicitor/client relationship.

III: Conclusion

The portions of Bill C-51 highlighted in this brief are unconstitutional in their present form and would not be upheld under section 1 of the *Charter*. The provisions that are unconstitutional are not minimally impairing the rights they infringe, which, as identified earlier, are significant legal rights enshrined in the *Charter* and long recognized at common law.

The amendments not only undermine the right to be presumed innocent until proven guilty, they cause the opposite presumption to exist, particularly in the case of an Indigenous accused, who is

marginalized already in the justice system. The backdrop of access to justice issues creates even further uncertainty for the Indigenous accused, who will be denied their right to full answer and defence, almost presumptively, if they are not able to have reasonable access to counsel, in their language of choice. The right to pre-trial silence and protections against self-incrimination are rendered futile by the operation of, s.278.93

IV: References

s. 276 expansion:

R. v. Darrach, 2000 SCC 46 – s.276 was enacted for the purposes of eradicating the application of the "twin myths": that the complainant's sexual history makes them more likely to have consented, and less believable about whether they did. Also, the Crown has a duty to consult with complainants.

R. v. Boucher, [1955] SCR 16 at para. 26; *R. v. Babos*, 2014 SCC 16 – prosecutors have a public duty to the administration of justice that goes beyond winning or losing.

R. v. Lyttle, 2004 SCC 5, para. 1-2 – the right of cross-examination is an indispensable ally in the search for truth.

The right to full answer and defence includes the right to independently investigate and to call the defence case as the defendant sees fit: *R. v. Seaboyer*, [1991] 2 SCR 577 at para. 39; *R. v. Lyttle* 2004 SCC 5, para. 1-2; *R. v. Barros*, 2011 SCC 51 at paras, 28, 37; *R. v. Rose*, [1998] 3 SCR 262 at para 103; *R. v. Garofoli*, [1990] 2 SCR 1421 at para. 112; *R. v. S. (N.)*, 2012 SCC at para. 24.

R. v. S. (N.), 2012 *SCC* – cross-examination is a safeguard against wrongful convictions and the element of surprise plays an important role in assessing credibility of responses.

R. v. M. (S. C.) [1997] OJ No 1624 (C. A.) at para. 3 – sexual assault prosecutions often turn on the evidence of two people, rendering effective cross-examination integral to the assessment of credibility and the determination of the case.

R. v. Francois, [1994] 2 SCR 827 at para. 14 – a high level of defence is granted by appellate courts due to the significance of the trial judge's ability to observe the witness' reaction to confrontation.

R. v. D.L.D., 2014 ABCA 218 – contemporaneous text messages can be arguably relevant as a *res gestae* exception to the hearsay rule.

Delay:

R. v. Jordan, 2016 SCC 27 at para. 157 – the right to be tried within a reasonable time is a free-standing right with intrinsic value.

R. v. Morin, [1992] 1 SCR 771 – delay for institutional reasons is an infringement of the right to be tried within a reasonable time.

Defence Disclosure:

R. v. Bartholomew, 2017 – sexual assault complainants do not retain a privacy interest in any documents filed on consent as public court exhibits.

R. v. Henry, 2005 SCC 76 at para. 2 – pre-trial silence is linked to presumption of innocence.

R. v. P. (M.B.), [1994] 1 SCR 555 at para. 37 – the right to pre-trial silence is the single most important organizing principle of criminal law, and the principle that there is no general defence disclosure obligation.

R. v. B. (S.A.), 2003 2 SCR 678 at para. 57 – a defendant has the right to choose to participate in case against them, or not.

R. v. Stinchcombe, [1991] 3 SCR 326 at paras 11-12 – a defendant is "entitled to assume a purely adversarial role towards the prosecution."

R. v. Noble, [1997] 1 SCR 874 – defence disclosure of alibi evidence is a limited exception to the right to pre-trial silence because alibi evidence can be easily fabricated and it is not directly related to the guilt of the accused. Also, principle that failure to provide an alibi witness is only one factor used to assess credibility.

R. v. Hong, 2015 ONSC 4840 at para. 56 – timing of disclosing an expert report minimizes infringement of right to pre-trial silence.