Submission on behalf of the Canadian Superior Courts Judges Association to the Senate Standing Committee on Legal and Constitutional Affairs in relation to Bill C-337: An Act to amend the Judges Act and the Criminal Code (sexual assault)

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Introduction

Thank you for inviting the Canadian Superior Courts Judges Association to give its views on Bill C-337. My name is Pierre Bienvenu. I am a lawyer in private practice at Norton Rose Fulbright, and I have long represented the Association in relation to matters of judicial independence and other constitutional law issues.

The Association is composed of judges appointed by the federal government to the various levels of courts across the country. It has around 1000 members, representing the vast majority of all federally appointed judges, including judges of the superior courts, appellate courts, the Tax Court and the Federal Courts. The Association’s mandate is to protect and enhance judicial independence, provide continuing education for judges, improve the administration of justice, and promote public understanding of the role judges play in the justice system.

The judiciary normally does not comment on bills. However, as with Bill C-58, which is currently before this Senate committee, Bill C-337 has a direct impact on judicial independence. The Association therefore feels compelled to provide its views on the bill at this stage.

My submissions today will focus on the provisions of Bill C-337 that seek to amend the Judges Act. The Association has already made a very general and summary submission to the House of Commons’ Standing Committee on the Status of Women regarding the provisions that seek to amend the Criminal Code, and I will not be repeating them today.
The Association’s concerns with the provisions of Bill C-337 that seek to amend the *Judges Act* were set out in a letter from the past president of the Association, dated April 18, 2017, addressed to the Standing Committee on the Status of Women. I note that other entities representing the judiciary and the legal profession, namely the Canadian Judicial Council (CJC), the Canadian Bar Association (CBA), and the Barreau du Québec, also made written submissions to that Committee. These entities’ concerns about the impact of Bill C-337 on judicial independence are the same as those of the Association, and their concerted voice in the defence of a foundational constitutional principle is one that merits the attention of lawmakers.

Bill C-337 pursues a very important objective. Judges who preside over sexual assault proceedings must be knowledgeable about that area of the law and the human dynamics and social context involved. However, pursuit of that objective should not, and need not, infringe on judicial independence.

Judicial independence is a broad concept that is of critical importance to the preservation of the rule of law. As such, judicial independence benefits not judges, but the Canadian public. Judicial independence fosters respect for the rule of law and confidence in the administration of justice. All legislation needs to be consistent with the constitutional requirement of judicial independence.

The proposed amendments to the *Judges Act* can be seen as two-pronged. First, they create a regime for mandatory sexual assault legal education for applicants to the federally appointed judiciary. Second, they create a regime for sexual-assault legal education for sitting federally appointed judges; a regime which would impose on the CJC an obligation to prepare annual reports to the Minister of Justice, who in turn tables them in Parliament, on the number of judges who have taken the requisite seminar and the number of sexual-assault cases heard by judges who have never participated in such seminar.
Overview of the Position of the Association

I would like to touch upon the following 3 basic points:

1. Bill C-337 raises concern because it fetters judicial control over the content of continuing education for judges.

2. The reporting obligation to Parliament that the Bill proposes to impose on the CJC upsets the balance between the judiciary and the legislative and executive branches of government, and risks undermining public confidence in the judiciary.

3. My third point is a broader one and serves to highlight that the amendments to the Judges Act are all the more misconceived in light of the undisputed fact that the vast majority of sexual-assault cases are tried by the provincially appointed judiciary.

I. Control over the continuing education of judges should remain with the judiciary

Judicial independence is a cornerstone of Canadian law and society. All litigants have a right to be tried by an impartial and independent judiciary. A component of judicial independence is the determination of continuing education curricula by judges, for judges, and self-determination as to the type and nature of education that a judge may wish to pursue to enhance his or her knowledge. This falls under administrative independence, one of the three core characteristics of judicial independence, the other two being security of tenure and financial security.¹

Judicial control over judicial education is recognized internationally as a principle of judicial independence. For example, in the recent Declaration of Judicial Training Principles adopted on November 8, 2017 by the International Organization for Judicial Training, which is composed of 129 judicial training institutions from 79 countries, it is stated at para. 9: “Training should be judge-led and delivered primarily by members of the judiciary who have been trained for this

¹ See Reference re Remuneration of Judges of the Provincial Court (P.E.I.), [1997] 3 SCR 3 at paras. 115-120; and Valente v. The Queen, [1985] 2 SCR 673 at 694, 704, 708 and 709.
purpose. Training delivery may involve non-judicial experts where appropriate” (emphasis added). In further elaboration of this point, at page 10 of the 11-page document, the Declaration states, “Judicial training should be judge-led, meaning that members of the judiciary have authority over the design, content, and delivery of the training. […] Adhering to this principle will enhance and protect judicial independence and ensure training is directly relevant to the professional needs of judges” (emphasis added).

A cause for concern in Bill C-337 is the way it seeks to modify s. 60 of the *Judges Act*. Proposed paragraph 60(2)(b) provides that the CJC may:

establish seminars for the continuing education of judges, including in respect of matters related to sexual assault law and social context that have been developed in consultation with sexual assault survivors, as well as with groups and organizations that support them.

(While the permissive term “may” in the original subsection 60(2) is maintained, the intent seems to be to make it mandatory, as we shall see from the reporting obligation that is imposed, which I will discuss in the next section.)

The substantive problem with the above provision is the fact of Parliament telling the judiciary how to organize continuing education for judges. There is no precedent for this, and the reason it is unprecedented is because judicial continuing education has always been considered the domain of the judiciary. Judicial independence requires this, and everyone understood it that way. If you look at the submissions of the Barreau du Québec and the CBA, you see that those organizations from the Bar express a similar concern about judicial independence that the judiciary does.

In addition to the foregoing points, it should be kept in mind that Bill C-337 is duplicative of the existing continuing education regime administered by the judiciary. The *Judges Act* itself contemplates continuing education for judges generally, to be administered by the Canadian Judicial Council.
All new judicial appointees already attend a seminar for new judges, which includes education on sexual assault issues as part of the social context component of the program. CJC policies also provide that judges should devote 10 days per year to continuing education.

The National Judicial Institute, based in Ottawa, is an example of a judge-led institution that provides continuing education to judges across the country, and not just to federally appointed judges. The Institute is “an independent, not-for-profit institution committed to building better justice through leadership in the education of judges in Canada and internationally.” It is involved in the delivery of the majority of continuing education delivered to judges in Canada.

There is another aspect of the proposed amendments that gives reason to pause, albeit not for reasons of constitutional imperative. The proposed provisions (s. 3(b)) would impose an education requirement on applicants to the Bench. This gives rise to privacy concerns and cost concerns, both of which could well reduce the pool of applicants, in turn having an impact on the diversity of that pool.

It is undisputed that the great majority of applicants to the Bench ask that the fact of their application be kept confidential. This bill would threaten that confidentiality. Furthermore, if applicants have to pay for the proposed mandated education, this adds a cost to the application process.

If the ultimate effect of a measure is to create barriers to entry for otherwise qualified judicial candidates, this is of concern to the Association since part of its mandate is to improve the administration of justice. The administration of justice is improved when the range of applicants and judicial appointees reflects the diversity of Canadian society.
II. Compelled reporting to Parliament

The amendments impose a reporting obligation on the CJC (s. 62.1(1)) and require the Minister of Justice to table a copy of the report in each house of Parliament (s. 62.1(2)). By requiring the CJC to report to the Minister on the number of judges who have attended the seminar prescribed by the bill, and to report the number of sexual-assault cases heard by judges who have never taken the seminar, Bill C-337 is imposing a type of reporting function on the CJC which is unprecedented. It is a subordination of the judiciary to the executive branch and to Parliament.

Even worse is the risk that compliance with the reporting obligation will undermine public confidence in the judiciary. I do not think it is overstated to call proposed s. 62.1 a shaming exercise. The object of the disclosure of the “number of sexual assault cases heard by judges who have never participated in such a seminar” is to highlight how many cases are heard by purportedly untrained judges. By design, this is to call into question the quality of the administration of justice and it will necessarily undermine confidence in the judiciary.

Indirectly but tangibly, this obligation also interferes with decisions regarding the assignment of judges, a matter that has been held to be protected by the principle of judicial independence.

Attendance figures for any given year is simply that, a snapshot of that year. It says nothing about the judge’s experience and expertise and what judges may already have done in the past in the way of continuing education.

While it is true that the CJC has proposed in its submission to the Standing Committee on the Status of Women to publish the number of judges who attend each judicial education seminar, the information and context are different. First, it is the CJC that is proposing to do it of its own initiative, in its annual report, without any statutory compulsion to do so. Second, the CJC is proposing to publish attendance information in general for all of its seminars, not singling out sexual-assault educational seminars, or breaking down the figures according to the courts to
which judges belong, or providing numbers for types of cases heard by judges who have not taken seminars that correspond to those types of cases.

As the CJC points out, a problem with s. 62.1(2) is that it risks being used over the long term to identify specific judges and as some kind of judicial performance tool, a tool that is based on the false assumption that attendance at a course guarantees competence.

III. The federally appointed judiciary does not adjudicate the vast majority of sexual-assault cases

My final point derives from a jurisdictional reality. The vast majority of federally appointed judges will never sit on sexual-assault cases since those cases are by and large dealt with by the provincially appointed judiciary. As set out in the submission of the Barreau du Québec before the Standing Committee on the Status of Women, at page 2, Statistics Canada reported that in 2014-15, 99.6% of offences under federal laws were adjudicated by provincial courts. The project will be mostly hollow since the ostensible education will only rarely be engaged by the federally appointed judiciary. For example, a judge of the Tax Court of Canada will never sit on a sexual-assault case. The proposed amendments end up being a blunt instrument for a matter that requires a more calibrated approach. That is why it is necessary to have it addressed by the judiciary itself, which it is already doing.

Conclusion

Honourable Senators, I acknowledge that there have been instances of reprehensible insensitivity in the context of sexual assault proceedings in recent, highly publicized cases. However, the proposed amendments to the Judges Act are a solution that is not tailored to the problem, and in the process they raise significant constitutional concerns. There is no problem of a lack of continuing education for federally appointed judges on the subject-matter of sexual assault.
The Bill has a recital that gives lip service to judicial independence. It is easy to talk the talk, but lawmakers must walk the talk, especially when foundational constitutional principles are at play.

I thank you for your attention and would be pleased further to assist the Committee by addressing any questions that you may have.