

COMMENTS AND OBSERVATIONS OF THE BARREAU du QUÉBEC

*Bill C-337 – An Act to amend the Judges Act
and the Criminal Code (sexual assault)*

Presented to the Senate Standing Committee on
Legal and Constitutional Affairs

June 11, 2018

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To ensure the protection of the public, the Barreau du Québec oversees professional legal practice, promotes the rule of law, enhances the image of the profession and supports members in their practice.

Acknowledgments

The Barreau du Québec would like to thank the members of its Human Rights Advisory Committee:

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The Barreau du Québec would like to thank the members of its Criminal Law Advisory Committee:

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Published in June 2018 by the Barreau du Québec

ISBN(PDF): 978-2-924857-40-3

Legal Deposit — Bibliothèque et Archives nationales du Québec, 2018
Legal Deposit — Library and Archives Canada, 2018

THE BARREAU DU QUÉBEC CONSIDERS THAT AMENDMENTS MADE TO THE *ACT TO AMEND THE JUDGES ACT AND CRIMINAL CODE* PROPOSED IN THE BILL MAY UNDERMINE JUDICIAL INDEPENDENCE

The Barreau du Québec shares the Bill's aim of ensuring that members of the justice system are appropriately trained, informed and educated about the specifics of sexual offences. A number of legislative reforms over the past 50 years have produced a legislative and legal framework more suited to the unique realities of sexual offences.¹ It is vital that criminal law reflect the special nature of these offences, the vast majority of victims being women, while respecting the fundamental rights of the accused. Any steps to greater familiarize members of the justice system with these specifics would, on the surface, appear beneficial.

However, we question the need to amend the *Judges Act*² to require judicial candidates to complete a complete comprehensive education in "sexual assault law," as well as to require the Canadian Judicial Council to report to Parliament on continuing education seminars in matters related to sexual assault law.

We also question the proposed amendment to *Criminal Code*³ to include a new requirement for the Court to provide written reasons for certain decisions⁴ involving sexual offences. Decisions affected by this requirement are those that have an impact on the conviction or liability of the accused.

We understand that these amendments are in response to certain high-profile cases in recent months that have shed light on a problem with how sexual assault cases are handled by the courts. However, we urge the legislator to exercise caution and reconsider the proposed solution.

First, the bill applies exclusively to federally appointed judges (in superior courts, appeal courts, the Federal Court, the Federal Court of Appeal, but also the Tax Court of Canada and the Supreme Court of Canada).

¹ The reform of 1982 replaced the offence of "rape" with that of sexual assault and amended various rules of evidence in order to improve effectiveness, punish sexual assault, improve the experience of women victims in the court system and eliminate gender discrimination in the way sexual offences are handled. See also the reform of 1992, following *R. v. Seaboyer; R. v. Gayme*, [1991] 2 SCR 577. The reform reviewed the available defences pertaining to sexual assault, particularly by barring evidence about the victim's sexual history.

² RSC 1985, c. J-1.

³ RSC 1985, c. C-46.

⁴ Decisions that a person is acquitted, discharged, found guilty of an offence, found not criminally responsible on account of mental disorder, or found unfit to stand trial in respect of the offence.

However, in practice, the vast majority of criminal offences are dealt with by provincial courts.⁵ This means that members of the judiciary covered by the bill will not necessarily be those having to rule in these kinds of cases.

Then, by requiring the Canadian Judicial Council to report on training taken by members of the judiciary, including “the number of sexual assault cases heard by judges who have never participated in such a seminar”, the concern is that the bill will threaten judicial independence.

Judicial independence is one of the cornerstones of Canada's democratic system: it is critical to the public's perception of impartiality with respect to the judicial process.⁶ This is why the *Constitution Act, 1867*,⁷ guarantees the independence and separation of the judicial, executive and legislative branches. Specifically, judicial independence is a guarantee that judges can make decisions free of influence and based solely on facts and law.

We believe that it is up to the Canadian Judicial Council to improve how the superior courts are administered and to promote the sound administration of justice before these courts. When Parliament imposes requirements on the judiciary related to its duties, it risks compromising judicial independence. Specifically, these requirements undermine institutional independence, one of the three components of judicial independence.⁸ Institutional independence means that no one can interfere with how the courts manage the litigation process or the exercise of judicial functions by the judiciary.

Lastly, we wish to point out that the administration of justice is a provincial matter under the *Constitution Act, 1867*.⁹ In general, we believe that the bill's proposed amendments to the *Judges Act* and the *Criminal Code* could potentially intrude on this jurisdiction.

⁵ In 2014-15, 99.6% of federal statute cases were handled by provincial courts.

<https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14699-eng.htm#r1>.

⁶ *R. v. Lippé*, [1991] 2 SCR 114.

⁷ *Constitution Act, 1867*, 30 & 31 Victoria, c. 3.

⁸ As established by the Supreme Court in *Valente v. The Queen*, [1985] 2 SCR 673. Judicial independence also includes security of tenure and financial security.

⁹ S. 92(14).