Canadian Justice Review Board

In Alta Tende, Integitatem Pete Prinipiaque

To the Senate Standing Committee on Legal and Constitutional Affairs

BRIEF TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS CONCERNING Bill C-3

An Act to amend the *Judges Act* and the Criminal Code

THE PREAMBLE to Bill C-3 states:

Survivors of sexual assault must have faith in the justice system. [emphasis added]

THE PROBLEM :

The original "must" intent of Bill C-3, as in its earlier versions Bill C-337 and Bill C-5 was an enforceable directive by virtue of the word "shall". This has been replaced by the non-binding and legally unenforceable word "should".

OVERVIEW:

More to the point, survivors of sexual assault (and all Canadians) MUST be able to have faith in the justice system. This requires an enforceable law, as Bill C-3 originally intended. In an April 2020 speech to the Harvard Law School, Canada's Supreme Court Justice Rosalie Abella correctly stated **" Justice may be blind, but the public is not."** (1)

(1) ROSALIE SILBERMAN ABELLA CONTRIBUTED TO THE GLOBE AND MAILPUBLISHED APRIL 24, 2020

.../2

HISTORY:

[1] Parliament created the Canadian Judicial Council (CJC) in the *Judges Act* as its regulator, with a duty to ensure uniformity in judicial decisions and proper judicial conduct. On recognizing that the CJC has failed to perform this function, Parliament could have equally amended the *Judges Act* to dissolve the CJC and institute an impartial system that does not involve "judges judging judges". Instead, in Bill C-3 the House has taken direct action that intends to ensure that judges commit to being educated in various aspects of the law, and in requiring that the CJC provide the said education.

[2] In her April 2020 lecture to the Harvard Law School , her Honour Mdme Justice Abella also said:

> ***"We can't keep telling the public that this increasingly incomprehensible complicated process is in their interests and for their benefit, because they're not buying it any more. When we say, "It can't be done," and the public asks, "Why not?" they want a better reason than, "Because we've always done it this way."***: (2)

(2) ROSALIE SILBERMAN ABELLA CONTRIBUTED TO THE GLOBE AND MAILPUBLISHED APRIL 24, 2020

[3] The elected representatives of the people of Canada in the House of Commons decided that judges receive proper education in, among other things, decorum; by enacting a law. The law purports that the CJC report to Parliament on the nature of the education it provides (if any). The original Bills C-337, C-5 and C-3 were intended to be an enforceable Act that would provide transparency so that Parliamentarians and the public would know that the "education" that the CJC delivers to judges is neutral in nature and not an indoctrination of the views of any political lobby group.

.../3

[4] The matter before the Senate arose from inappropriate comments to a sexual assault victim by then Justice Robin Camp.

[5] Bill C-3 was originally introduced as private member's Bill 337 by MP Ms. Rona Ambrose. It was fast-tracked unanimously without amendment, on a motion by MP Tom Mulcair, the then leader of the opposition federal NDP. Parliament prorogued while the Bill was in the Senate but the Bill made headlines when it was introduced and has continued to attract media attention.

[6] The Bill was reintroduced by the Trudeau government as Bill C-5 without any amendments and with all party support. The hearings of the Justice Committee on Bill C-5 were interrupted when Parliament was again prorogued.

[7] The Trudeau government re-introduced the Bill with all party support as Bill C-3 without any amendments as an enforceable Act.

[8] The aforementioned word "shall" was changed to "should" and therefore the imperative "must" that is the intent of the Bill (as expressed in its preamble) was altered to the proverbial "may" at the House Justice Committee stage, apparently without any appreciation of its ramifications.

[9] The CJC's current position is that judges have unfettered decision making powers to make any decision or comments they like and to draw on personal experiences as Robin Camp apparently did.

> ***"Thus, we now realize that having a variety of backgrounds and personal experiences is useful when it comes to judicial decision-making. each person's unique and individual personal histories provide insights and influences, which usually mean the decisions made are arrived at with a wider perspective in mind."***

[10] However, this position allows for many biases and as many different decisions on the same set of facts as there are judges. It provides no consistency. This inconsistency would not arise if judges applied the law instead of their own views. Although the CJC may be blind, the public is not, and realizes that judicial decisions are increasingly arbitrary and irrational.

.../4

THIS BRIEF PROVIDES THE SENATE WITH AN ANALYSIS

[11] An Act of Parliament (the *Judges Act*) created the CJC and in so doing did not infringe on judicial independence. The CJC is not a court of law. For Parliament to now enact Bill C-3 to amend the *Judges Act* to provide more specific instructions that direct the CJC to be an effective regulator is also not an infringement on judicial independence.

> The CJC states at page 3 in its publication '*Why Judicial Independence Is Important to You*' dated May 2016 that "the fundamental concept of judicial independence exists for the benefit of all citizens, not judges, to ensure that their decisions will be based upon the law as it applies to the evidence presented and properly admitted, in order to do justice between the parties." (3)
>
> *(3) https://www.bccourts.ca/documents/Why_is_Judicial_Independence_Important_to_You.pdf*

[12] Judicial independence means that judges must be free to apply the law without fear or favour. Judicial independence does not mean, as the CJC often wishes to suggest, that judges are free to make any decisions that suits them. Furthermore, the Federal Department of Justice states:

> ***"Each province and territory has superior courts, which are courts of inherent jurisdiction. This means that they can hear cases in any area except when a statute or rule limits that authority."*** [emphasis added] (4)
>
> (4) https://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/02.html

[13] Thus Parliament is supreme in determining, and often limiting judicial jurisdiction and powers. This also does not infringe on the true meaning of judicial independence.

.../5

[14] The House and the Senate should be mindful of, and follow the principles set out by the Ontario Court of Appeal.

> **"The Court is not a self-created body with original powers; it is not a benevolent autocrat with full powers to act as it should think fit; the Court is an institution organized by the people through their representatives for the purpose of giving to those who apply to it their rights according to law, the law not being made by th Court but laid down for it by authority: the Court has no right to give a decision in accord with its own views of equity and good conscience, as distinct from the rules laid down for it. The Court has no right to take power unto itself which is not conferred by the people"** [Ontario Court of Appeal DLR53, 64OLR422]

[15] It is crucial that the Senate amend sections 60 and 62 to give the Act its intended force and effect by replacing the word "should" with the word "shall". Anything less is an insult and an affront to those who have endured sexual assault or systemic racism.

[16] For Bill C-3 to have force and effect it cannot merely be optional for the CJC to comply. It cannot merely be optional for the CJC to report to Parliament. It cannot merely be optional for the CJC to account for how taxpayer money is spent on education (if at all). The word 'should' means that the CJC has no obligation to change its behaviour. An "Act" of Parliament that is not enforceable damages Parliament's reputation as a governing body and pays lips serve to the problems that sexual assault victims (and others) face.

[17] The chronology of the Robin Camp affair appears to be as outlined below and it prompted the House to take direct action by passing Bill C-3:

(a). It appears that the remarks of Robin Camp were first brought to the CJC's attention by public complaints.

(b). The CJC was essentially none responsive or unconcerned at that point.

(c). As a result Alberta's Minister of Justice, Kathleen Ganley, filed a formal complaint on December 22, 2015.

(d). Pursuant to the *Judges Act,* the CJC could not ignore a complaint from the provincial Attorney General; and only then did the process move to an inquiry.

.../6

[18] It is apparent from the foregoing chronology that the CJC can ignore complaints unless they come from a provincial attorney general . Bill C-3 does not address that particular problem but does highlight that unless there is an enforceable law the CJC can treat education as optional, and does not need to account to Parliament for the very large sums of taxpayer money entrusted to it for that purpose.

[19] In **'The Shifting Landscape of Judicial Education in Canada,'** Rosemary Cairns-Way and Donna Martinson quote Ms. Ambrose as saying that in her view the CJC's conduct has been one of judicial foot-dragging on this important issue. They quote her as saying***:***

> ***"Frankly, the Judicial Council should just step up and say that we're going to have better training, it's going to be transparent, we're going to work with experts to make sure it's good, and we're going to mandate it."*** *(5)*
>
> *(5) https://cbr.cba.org/index.php/cbr/article/view/4537*

In the same Canadian Bar Review, Vol 97, Rosemary Cairns-Way and Donna Martinson also conclude that the most significant provisions in Bill C-3 are the first three clauses which state that: 1) "Survivors of sexual violence in Canada must have faith in the criminal justice system;" 2) "Parliament recognizes the importance of a free and independent judiciary"; and 3) "Parliamentarians have a responsibility to ensure that Canada's democratic institutions reflect the values and principles of Canadians and respond to their needs and concerns."

CONCLUSION:

The Canadian Justice Review Board (CJRB) recommends the following:

[1] Sections 60 and 62 must be amended by the Senate to read "shall" and not "should" (see appendix attached).

.../7

[2] The Senate Standing Committee on Legal and Constitutional Affairs should approve the original intent of Bill C-3 with the aforementioned amendment reinstating the word "shall" instead of the word "should" , thereby providing the Bill with its intended force and effect in law. [and to also conform with the Government of Canada's 'GUIDE TO MAKING FEDERAL ACTS AND REGULATIONS']

[3] The current "policies" of the CJC (if they exist) are not law and are not binding. This has created the current problem that Bill C-3 seeks to address. Parliament and the people of Canada must be satisfied that the course material judges receive from the CJC is neutral and impartial, and does not amount to indoctrination with the views of any particular lobby group. This is accomplished by directing that the CJC "shall' report to Parliament in a public manner to provide some meaningful improvement to the sad state of the justice system described by Madame Justice Abella (supra).

[4] The CJRB agrees with the statement of Jonathan Rudin, program director at Aboriginal Legal Services in Toronto. that, ***"We're at a place that is very confusing and it's not great. Different judges have reached different conclusions and it makes for a complete mess once people come to court,"*** (6)

(6) Importance of Judge Shopping in Politically Driven Courts, Ottawa Citizen, January 10, 2015, Andrew Seymour

..../7

-7-

[5] The CJRB agrees with University of Waterloo political science professor and constitutional expert Emmett MacFarlane who describes the CJC's opposition as merely a continuation of ***" a fight over whether the demands of justice should take a back seat to the more political tussle over judicial autonomy."****(6)* . In keeping with that observation the CJRB sees the efforts to water down and negate the intent of Bill C-3 with the word "should" as part of that ongoing struggle.

(6) Importance of Judge Shopping in Politically Driven Courts, Ottawa Citizen, January 10, 2015, Andrew Seymour

.../8

[6] The CJRB agrees with The Law Times and Toronto Star (7) that judges themselves have no faith in the Canadian Judicial Council.

***(7) Canadian Judicial Council under fire by federal judge** Toronto Star Feb 12 2015 by Olivia Carville Law Times February 2008,*

[7] The Constitution Act, 1982, ensures equality. without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." But Bill C-3 does not reiterates this principle unless the Senate makes it a **"shall do"** directive.

[8] The CJRB agrees that Bill C-3 is a needed step in the right direction and a step that is consistent with Parliament's duty to the people of Canada.

[9] The CJRB agrees with Ms. Sandy Garossino who is a former Crown prosecutor and prominent media commentator and winner of 'Best Column' in Canada in the 2017 Canadian Online Publishing Association's awards. In her words: (8)

"Camp is the Calgary judge who set off an international media fracas by asking a sexual assault complainant why she didn't keep her knees together. Yet still thornier problems await, especially our culture of deference that tolerates bias, abuse or incompetence in the name of judicial independence. (Note to lawyers: the line between provincially and federally appointed judges is deliberately blurred here for easier reading). But it's the unsuspecting public I think of most, when I look back on it now.

It must be said that almost all judges in Canada maintain very high standards. But we're inexcusably bad at dealing with the exceptions. The afternoon alcoholic, the chronic abuser, the incurable procrastinator with a wake of desperate litigants waiting endlessly for verdicts. All surrounded by a system that knows it all and covers for them. Stories like Camp's dog every workplace, but no other profession has the impunity of Canada's judiciary. Canadians fired our prime minister twice in the last decade. Corporate CEOs get fired all the time, including Target, Empire, and Rogers, just in 2016 alone. Doctors, lawyers, and pilots lose their licenses regularly. Hell, even the Vatican fires priests—defrocking almost 900 between 2004 and 2014. But there's one job that you pretty much can't be fired from: Canadian judge. It's never happened. The Canadian Judicial Council (CJC) has recommended a judge's removal 5 times in 45 years, yet no government has ever followed through and actually fired anybody. Ever. For anything. That's your scandal right there, Canada.

../9

While Robin Camp's atrocious attitudes during a sexual assault trial were irredeemable, they are symptomatic of an even deeper problem. The Canadian judicial system is permeated with cultural paternalism, a fact which even escapes most practitioners. Like fish in water, lawyers are often blind to the environment that surrounds, sustains, and protects them."

(8) https://www.canadianjusticereviewboard.ca/articles-caselaw/articles/myth-and-history-shield-judges-from-modern-accountability,-loose-canons-and-loaded-guns-who-judges-judges National Observer *Dec 07, 2016*

ALL OF WHICH IS RESPECTFULLY SUBMITTED
Canadian Justice Review Board

E. F. Marshall
chairperson

(appendix attached .../10)

.../10

APPENDIX
Bill C-3 in its current amended form

"2 (1) **Paragraph 60(2)(b) of the Act is replaced by the following:**
(b) establish seminars for the continuing education of judges, including seminars on matters related to sexual assault law and social context, which includes systemic racism and systemic discrimination;
(2) **Section 60 of the Act is amended by adding the following after subsection (2):**
Seminars related to sexual assault law
(3) The Council ***should*** ensure that seminars on matters related to sexual assault law established under paragraph (2)(b)

(a) are developed after consultation with persons, groups or organizations the Council considers appropriate, such as sexual assault survivors and persons, groups and organizations that support them, including Indigenous leaders and representatives of Indigenous communities, as well as those persons, groups or organizations that support such groups as the Elizabeth Fry Society and the Canadian Centre for Men and Families; and
(b) include, where the Council finds appropriate, instruction in evidentiary prohibitions, principles of consent and the conduct of sexual assault proceedings, as well as education regarding myths and stereotypes associated with sexual assault complainants.

Report — seminars
62.1 (1) Within 60 days after the end of each calendar year, the Council ***should*** submit to the Minister a report on the seminars referred to in paragraph 60(2)(b) on matters related to sexual assault law and social context, which includes systemic racism and systemic discrimination, that were offered in the preceding calendar year.
The report ***should*** include the following information:
(a) the title and a description of the content of each seminar, its duration and the dates on which it was offered; and
(b) the number of judges who attended each seminar.
Tabling of report
(2) The Minister **shall** cause a copy of **any** report received to be tabled in each House of Parliament on any of the first 10 days on which that House is sitting after the Minister receives the report."

Note that the objectionable amendment in 60(3) and 62.1(2) contemplates and allows that there may not be any report received by Parliament and that the CJC may continue on its path of not stepping up to the plate (as originally cited by Ms. Ambrose supra).