

Judicial independence vs. accountability: Training judges on sexual assault

Increased scrutiny of the verdicts in sexual assault cases shows that the Canadian judiciary is not immune to sexual assault myths and stereotypes. Judges are not required to have a criminal law background to be appointed and “judge school”- which contains a sexual assault training component - did not become mandatory for new federal judges until April 2017.[\[1\]](#)

Bill C-337, the *Judicial Accountability Through Sexual Assault Training Act* is Parliament’s attempt to ensure that new federally appointed judges receive up-to-date and comprehensive sexual assault training. The Bill also aims to enhance transparency and accountability of the judiciary in sexual assault cases.

The Bill is currently being debated in the Senate. Notably, many critics, including Senator Mobina Jaffer and the Canadian Judicial Council (“CJC”) which oversees federal judges, have expressed concerns over the threat that the Bill poses to the unwritten constitutional principle of judicial independence.[\[2\]](#)

What changes does the Bill propose?

Bill C-337 has three major impacts: it ensures that applicants to superior courts receive sexual assault training, imposes reporting requirements on the CJC, and it requires judges to provide written reasons in sexual assault cases.[\[3\]](#)

The Bill would amend the federal *Judges Act* so that applicants must complete up-to-date and comprehensive sexual assault training to be eligible for a judicial appointment to a superior court.[\[4\]](#) This training would be designed in consultation with sexual assault survivors as well as the groups and organizations that support them - for example the Women’s Centre for Social Justice.[\[5\]](#)

If the Bill passes, the CJC will be required to report annually to Parliament about the content and duration of the training sessions, the number of judges who attend them, which court the judges belong to, as well as the number of sexual assault cases heard by judges who did not receive the training.[\[6\]](#)

What is judicial independence?

Judicial independence is the unwritten constitutional principle that courts must be “completely independent of any other entity,” including from other branches of government and the public.[\[7\]](#) Independence allows judges to make decisions “free of influence and based solely on fact and law.”[\[8\]](#)

The Supreme Court of Canada has described judicial independence as the “lifeblood of constitutionalism in democratic societies.”[\[9\]](#) The judiciary protects individual rights, upholds the rule of law, and ensures that the government does not overstep its power.

How does the Bill threaten judicial independence?

Currently, the judiciary controls ongoing education for judges.[\[10\]](#) The new Bill threatens judicial independence because another branch of government - the executive - is imposing mandatory education requirements on the judiciary, and special interest groups are dictating the educational content of training for judges.[\[11\]](#)

Judicial independence requires judges to be free of outside influence, whether it be from another branch of government or the public. An unelected and independent judiciary is able to protect the values of the Constitution without being afraid of making controversial decisions. For example, in the case of *PHS Community Services Society v Canada (Attorney General)*, the Supreme Court of Canada was not afraid to order the Federal Minister of Health to continue exempting Insite, a safe injection facility, from the application of criminal drug possession laws to protect the right of drug addicts to life, liberty, and security of the person.[\[12\]](#)

The CJC is concerned that the annual reports to Parliament could indirectly identify the judges who did not receive sexual assault training.[\[13\]](#) Parliament could evaluate the decisions made by these judges and look to potentially discipline them.[\[14\]](#) This type of external evaluation threatens the administrative independence of the judiciary, meaning their independence to manage themselves.[\[15\]](#)

If the government were allowed to discipline the judiciary, a judge’s decisions could be compromised out of fear of the repercussions that might flow from a decision that the government is not satisfied with. This could also potentially threaten the rule of law because the judiciary frequently judges disputes that involve the government.

Proposals for changes from the Canadian Judicial Council

The CJC’s proposed alternative to Bill C-337 is to require applicants to superior courts to comply with the Council’s new education policies.[\[16\]](#) In April 2017, the CJC changed its education policies to require that newly appointed judges attend “judge school,” which contains a sexual assault education component.[\[17\]](#) The Council encourages continuing education for judges for 10 days per year.[\[18\]](#)

In response to Bill C-337, the CJC also proposes to publish annual reports containing the following:[\[19\]](#)

- The title, description, and overview of all education seminars approved by the CJC in the previous year;
- The dates and duration of each seminar; and,
- The number of judges who attended each seminar.

Conclusion

Judicial education in the area of sexual assault is necessary for survivors of sexual violence to have confidence in the fairness and impartiality of our justice system. Judges are accountable to the public in a sense because court proceedings are generally open to the public.^[20] However, the judiciary itself is ultimately responsible for disciplining judges.

Striking the appropriate balance between judicial independence and accountability to the public is difficult. There is a risk that the CJC's proposed changes will not be adequate to address the issues surrounding judging in sexual assault trials. Mandatory education for judges imposed by the government sets a dangerous precedent. It is a possible threat to the independence of judges and it could lead to required educational training for political reasons, thus potentially threatening the rule of law.^[21]

Judicial independence is fundamental to our democratic system and thus, to the extent that Bill C-337 threatens this unwritten constitutional principle, it may come at too high of a cost.

^[1] Canadian Judicial Council, "Submissions on Bill C-337" (20 April 2017), online: <[www.cjc-ccm.gc.ca/cmslib/general/Judicial Training/2017-04-20 Council's response to Bill C-337.pdf](http://www.cjc-ccm.gc.ca/cmslib/general/Judicial%20Training/2017-04-20%20Council's%20response%20to%20Bill%20C-337.pdf)> at 4 .

^[2] "Bill C-337, Judicial Accountability through Sexual Assault Law Training Bill", 2nd reading, *Debates of the Senate*, 42nd Parl, 1st Sess, (15 June 2017) (Hon Mobina SB Jaffer) . *CJC Submissions*, *supra* note 1 at 4-6.

^[3] *Ibid*, cl 5.

^[4] *Bill C-337*, *supra* note 2, cl 3(2)(b)(i).

^[5] *Ibid*.

^[6] *Ibid*, cl 4.

^[7] *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI* [1997] 3 SCR 3 at para 83. *Mackin v New Brunswick*, 2002 SCC 13 at para 35.

^[8] Department of Justice, "The Judiciary", online: <www.justice.gc.ca/eng/csjsjc/ccs-ajc/05.html> .

^[9] *Beauregard v Canada* [1986] 2 SCR 56 at para 24.

^[10] *CJC Submissions*, *supra* note 1 at 2-3.

^[11] *Ibid* at 4. Joanna Smith, "Judicial council fears 'special interest groups' shaping sexual

assault training”, *The Star* (16 May 2017), online: <www.thestar.com/news/canada/2017/05/16/judicial-council-fears-special-interest-groups-shaping-sexual-assault-training.html>.

[12] *PHS Community Services Society v Canada (AG)*, 2011 SCC 44.

[13] *CJC Submissions*, *supra* note 1 at 5.

[14] *Ibid* at 4. Thomas Harrison, “Judicial education doesn’t breach independence, but Bill C-337 might” (22 May 2017), *Policy Options*, online: <policyoptions.irpp.org/magazines/may-2017/judicial-education-doesnt-breach-independence-but-bill-c-337-might/> [Harrison].

[15] *CJC Submissions*, *supra* note 1 at 6.

[16] *Ibid*.

[17] *Ibid* at 1.

[18] *Ibid* at 4.

[19] *CJC Submissions*, *supra* note 1 at 5.

[20] *Ibid* at 2.

[21] Harrison, *supra* note 14.