



LEGISLATIVE SUMMARY

BILL C-5: AN ACT TO AMEND THE JUDGES ACT AND THE CRIMINAL CODE

Publication No. 43-1-C5-E
10 February 2020

Lyne Casavant
Laura Munn-Rivard
Brendan Naef
Erin Shaw
Alexandra Smith
Legal and Social Affairs Division
Parliamentary Information and Research Service

Library of Parliament ***Legislative Summaries*** summarize bills currently before Parliament and provide background about them in an objective and impartial manner. They are prepared by the Parliamentary Information and Research Service, which carries out research for and provides information and analysis to parliamentarians and Senate and House of Commons committees and parliamentary associations. Legislative Summaries are revised as needed to reflect amendments made to bills as they move through the legislative process.

Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

© Library of Parliament, Ottawa, Canada, 2020

Legislative Summary of Bill C-5
(Legislative Summary)

Publication No. 43-1-C5-E

Ce document est également publié en français.

CONTENTS

1	BACKGROUND	1
1.1	Recent Spotlight on Judicial Treatment of Sexual Assault Cases	2
1.2	Reporting of Sexual Assault in Canada.....	2
1.3	Overview of the Canadian Judiciary.....	3
2	DESCRIPTION AND ANALYSIS.....	4
2.1	Preamble.....	4
2.2	<i>Judges Act</i> (Clauses 1 to 3).....	5
2.3	<i>Criminal Code</i> and Record of Reasons (Clause 4)	5

LEGISLATIVE SUMMARY OF BILL C-5: AN ACT TO AMEND THE JUDGES ACT AND THE CRIMINAL CODE

1 BACKGROUND

Bill C-5, An Act to amend the Judges Act and the Criminal Code,¹ was introduced in the House of Commons on 4 February 2020 by the Honourable David Lametti, Minister of Justice and Attorney General of Canada. A Charter Statement for the bill was tabled on 7 February 2020.²

A similar version of this bill was introduced in the House of Commons on 23 February 2017 by the Honourable Rona Ambrose (former Bill C-337, An Act to amend the Judges Act and the Criminal Code (sexual assault)³), but it did not pass the Senate before the 2019 election. Bill C-337 was studied by the House of Commons Standing Committee on the Status of Women, which in its report on the bill recommended amendments to three clauses and the deletion of one clause.⁴ The House of Commons passed the bill with the committee's amendments on 15 May 2017. Bill C-337 received first reading in the Senate and was referred to the Standing Senate Committee on Legal and Constitutional Affairs, which recommended amendments in its report presented on 5 June 2019.⁵

According to the Department of Justice backgrounder published in February 2020, Bill C-5 is

consistent with former Bill C-337, which did not pass the Senate before the last election. The Bill takes into account the recommendations made by the Senate Standing Committee on Legal and Constitutional Affairs, which received widespread support from the originating sponsor, stakeholders, and many parliamentarians.⁶

Bill C-5 has three central purposes:

- It adds a new eligibility requirement for lawyers to qualify to become a judge of a superior court in any province – namely, that they must undertake to participate in continuing education on matters related to sexual assault law and social context.
- It requires the Canadian Judicial Council (CJC) to submit an annual report to Parliament through the Minister of Justice on the delivery of and participation in sexual assault law seminars established by the CJC.
- It requires judges to provide reasons for decisions in sexual assault cases. These reasons must be recorded or provided in writing (if not recorded).

1.1 RECENT SPOTLIGHT ON JUDICIAL TREATMENT OF SEXUAL ASSAULT CASES

In a February 2020 news release on Bill C-5, the Honourable David Lametti said that judges are expected to “have the necessary training to understand the complex nature of sexual assault and the myths that too often surround them.”⁷ In her testimony on Bill C-337 before the House of Commons Standing Committee on the Status of Women, the Honourable Rona Ambrose stated that she introduced the bill after noting “a disturbing number of sexual assault cases that have shaken the public’s confidence in our justice system.”⁸

These cases involved judges who made statements in court or in their decisions with respect to sexual assault trials that critics said relied on discredited stereotypes about victims of sexual abuse. In one case, a judge resigned from the bench after the CJC recommended his removal in light of comments “evidencing an antipathy toward laws designed to protect vulnerable witnesses, promote equality, and bring integrity to sexual assault trials.”⁹

In a case from 2016, a retrial was ordered first by the Alberta Court of Appeal and then by the Supreme Court of Canada (SCC) when the judge was found to have relied on myths about the “expected” behaviour of a victim of sexual abuse in his reasons for acquitting a man accused of sexually assaulting his stepdaughter over several years.¹⁰

In 2017, another judge was widely criticized for using insensitive language when referring to a woman who was intoxicated at the time of the alleged sexual assault.¹¹ More recently, in 2019, the SCC ordered a retrial for a man found not guilty of killing an Indigenous woman because the evidence about sexual history was mishandled by the trial judge.¹²

Senator Raynell Andreychuk, who sponsored Bill C-337 in the Senate, stated that such cases add to the factors that deter victims from reporting sexual assault. She emphasized that Bill C-337 aims to prevent further judicial decisions that rely on stereotypes about victims of sexual assault and to restore survivors’ confidence in the court process.¹³

1.2 REPORTING OF SEXUAL ASSAULT IN CANADA

Sexual assault is one of the most under-reported crimes in Canada. According to the 2014 Statistics Canada General Social Survey on victimization, only 5% of sexual assaults were brought to the attention of the police that year.¹⁴ Research indicates that reasons for under-reporting include “the shame, guilt and stigma of sexual victimization,” “the normalization of inappropriate or unwanted sexual behaviour,” and “the perception that sexual violence does not warrant reporting.”¹⁵ Many victims also report refraining from coming forward because of their “belief that they would not see a positive outcome in the justice system.”¹⁶

In 2014, sexual assault was the only violent crime type for which the victimization rate had remained relatively stable since 1999, while the rates for other violent crimes were significantly lower in 2014 than in 1999.¹⁷

Furthermore, there is a high attrition rate for sexual assault cases in the criminal justice system. Of every 100 police-reported sexual assaults¹⁸ in Canada between 2009 and 2014, only 21 cases went to court and 12 resulted in a criminal conviction.¹⁹

1.3 OVERVIEW OF THE CANADIAN JUDICIARY

The Canadian court system is composed of courts with either provincial or federal jurisdiction, the SCC being the final appeal court for all other Canadian courts. According to the Department of Justice:

The provinces and territories are responsible for providing everything the courts under their jurisdiction need, from building and maintaining the courthouses, to providing staff... to paying provincial/territorial court judges. The federal government appoints and pays judges for the superior courts in each province, as well as judges at the federal level. It is also responsible for the administration of the Supreme Court of Canada and federally created courts.²⁰

Provincial superior court judges and other federally appointed judges of superior courts as defined in the *Interpretation Act*²¹ are governed by the federal *Judges Act*,²² which sets out requirements for matters including eligibility for appointment of provincial superior court judges. The eligibility requirements for judges of the Supreme Court of Canada, the Federal Court and the Tax Court of Canada are set out in the Acts governing each of these courts.²³

The provinces are responsible for appointing provincial court judges. The majority of criminal cases in Canada – including sexual assault cases – are heard in the provincial courts. The provisions of Bill C-5 amending the *Judges Act* apply only to judges of superior courts, because it is outside Parliament's jurisdiction to legislate in relation to provincially and territorially appointed judges.

In addition to the courts, bodies that are important to the administration of justice in Canada include these:

- The Office of the Commissioner for Federal Judicial Affairs (FJA): The goal of the FJA is to safeguard the independence of the judiciary and provide federally appointed judges with administrative services independent of the Department of Justice. The FJA reports directly to the Minister of Justice. Duties and responsibilities include administering Part I of the *Judges Act*. The FJA provides services to all federally appointed judges (approximately 1,200 judges).²⁴

- The Canadian Judicial Council (CJC): A federal body created under the *Judges Act*, the CJC has as its main purpose to establish policies and provide tools that help the judicial system remain efficient, uniform and accountable. The CJC has authority over the work of federally appointed judges. It is composed of 41 members and is chaired by the Chief Justice of the SCC. Council membership consists of the chief justices, associate chief justices, and some senior judges from provincial and federal superior courts across Canada. The CJC has the power under the *Judges Act* to investigate complaints made by members of the public and referrals made by the Minister of Justice or the attorney general of a province about the conduct (not the decisions) of federally appointed judges. After an investigation, the CJC can deliver recommendations, including a recommendation to remove a judge from office.²⁵
- The National Judicial Institute (NJI): The NJI is an independent, not-for-profit institution whose goal is to improve the justice system in Canada and internationally through leadership in the education of judges. The NJI delivers education on its own or in collaboration with courts and other organizations and is “involved in the delivery of the majority of education taken by judges in Canada.”²⁶

2 DESCRIPTION AND ANALYSIS

Bill C-5 consists of a preamble and four clauses that make amendments to the *Judges Act* and the *Criminal Code*.²⁷

2.1 PREAMBLE

The preamble sets out the context giving rise to the bill. It affirms the need for survivors of sexual violence to have faith in the criminal justice system and Parliament’s responsibility to ensure that Canada’s democratic institutions reflect the “values and principles” of Canadians. However, it balances this statement with an acknowledgment of the importance of an independent judiciary. By recognizing both the need for a fair criminal justice system and an independent judiciary, the preamble recognizes the precautions Parliament must take when legislating with respect to judicial appointments.

The preamble also emphasizes the effect that sexual assault proceedings have on the lives of those affected and their potential to revictimize survivors of sexual violence, and it warns of problematic interpretations of the law during sexual assault proceedings. It declares that Parliament recognizes the importance of judges participating in continuing legal education.

Finally, the preamble emphasizes that Parliament wishes to be informed of the participation of judges in sexual assault law training and affirms the value of reasons for decisions in sexual assault proceedings.

2.2 *JUDGES ACT* (CLAUSES 1 TO 3)

Clause 1(2) modifies the eligibility requirements for judicial appointments contained in the *Judges Act*. Under new section 3(b) of the *Judges Act*, to be eligible to be appointed a judge of a superior court in any province (namely, a provincial superior court or a provincial court of appeal), a candidate must undertake to participate in continuing education on matters related to sexual assault law and social context.²⁸ Social context training requires judges to consider the context of the cases they hear and not be influenced by attitudes based on stereotypes, myths or prejudice.²⁹ According to a Department of Justice news release on Bill C-5 published in February 2020: “Social context education is designed to teach awareness and skills for judges to ensure that all people who come into the courtroom are treated respectfully, fairly and equally.”³⁰

Clause 2(1) amends section 60(2)(b) of the *Judges Act*, which empowers the CJC to establish seminars for the continuing education of judges. The amended section stipulates that the continuing education seminars must include courses on matters related to sexual assault law and social context. These courses must be developed in consultation with persons, groups or organizations that the CJC considers appropriate, such as sexual assault survivors and organizations that support them. New section 60(3) further stipulates that this education must include instruction on issues related to evidence, consent and the conduct of sexual assault proceedings, as well as myths and stereotypes associated with sexual assault complainants in accordance with the recommendation made by the Standing Senate Committee on Legal and Constitutional Affairs.³¹

Clause 3 adds new section 62.1 to the *Judges Act*, requiring that the CJC produce an annual report, which must be submitted to the Minister of Justice and tabled in Parliament. The report must contain information on the above-mentioned seminars offered in the preceding calendar year, specifically their titles, a description of their content, their duration, and the dates on which they were offered, as well as the number of judges who attended. As noted in the February 2020 Department of Justice backgrounder, “This requirement is intended to enhance accountability in the education of sitting judges on these matters and to act as an incentive to encourage their participation.”³²

2.3 *CRIMINAL CODE AND RECORD OF REASONS* (CLAUSE 4)

Clause 4 amends the *Criminal Code* by adding new section 278.98. New section 278.98(4) states that the section applies only to proceedings before a judge without a jury.

New section 278.98(1) requires the presiding judge to provide reasons for decisions regarding certain sexual offences for which the accused is acquitted, discharged after being convicted, found guilty, found not criminally responsible, or found unfit to stand trial. The offences included in new section 278.98 are:

- sexual interference (section 151);
- invitation to sexual touching (section 152);
- sexual exploitation (section 153);
- sexual exploitation of person with disability (section 153.1);
- incest (section 155);
- compelling the commission of bestiality (section 160(2));
- bestiality in the presence of a child or compelling bestiality by a child (section 160(3));
- parent or guardian procuring sexual activity (section 170);
- householder permitting prohibited sexual activity (section 171);
- corrupting children (section 172);
- indecent acts (section 173);
- sexual assault (section 271);
- sexual assault with a weapon, threats to a third party or causing bodily harm (section 272); and
- aggravated sexual assault (section 273).

New section 278.98(2) specifies that new section 278.98 will also apply to criminal offences committed in the past if the conduct alleged is an offence under one of the above sections of the *Criminal Code* when clause 4 of the bill comes into force.

New section 278.98(3) stipulates that the reasons for a decision must be entered in the record of the proceedings or, if the proceedings are not recorded, must be provided in writing.³³

NOTES

1. [Bill C-5, An Act to amend the Judges Act and the Criminal Code](#), 1st Session, 43rd Parliament.
2. Department of Justice, [Bill C-5: An Act to amend the Judges Act and the Criminal Code: Charter Statement](#), 7 February 2020.
3. [Bill C-337, An Act to amend the Judges Act and the Criminal Code \(sexual assault\)](#), 1st Session, 42nd Parliament.

4. House of Commons, Standing Committee on the Status of Women [FEWO], [Bill C-337, An Act to amend the Judges Act and the Criminal Code \(sexual assault\)](#), Ninth Report, 1st Session, 42nd Parliament, 12 May 2017.
5. Senate, Standing Committee on Legal and Constitutional Affairs [LCJC], [Report of the Committee](#), Thirty-third Report, 1st Session, 42nd Parliament, 5 June 2019.
6. Department of Justice, [Judicial training in sexual assault law and social context](#).
7. Department of Justice Canada, [“Government of Canada introduces legislation to ensure judges participate in training on sexual assault law and social context”](#), News release, 4 February 2020.
8. FEWO, [Evidence](#), 1st Session, 42nd Parliament, 4 April 2017, 0850 (Hon. Rona Ambrose, Member of Parliament for Sturgeon River—Parkland).
9. Canadian Judicial Council [CJC], [Canadian Judicial Council Inquiry into the Conduct of the Honourable Robin Camp: Report to the Minister of Justice](#), 8 March 2017, para. 10.
10. [R. v. A.R.D.](#), 2017 ABCA 237 (CanLII); and [R. v. A.R.J.D.](#), 2018 SCC 6 (CanLII).
11. [R. v. Al-Rawi](#), 2018 NSCA 10 (CanLII); and Frank P. Hoskins, R. Daren Baxter and Katherine Fierbeck, [In the Matter of Complaints Against Judge Gregory Lenehan, made pursuant to the Provincial Court Act, R.S.N.S. 1989, c. 238: Decision of the Review Committee](#), 29 March 2018.
12. [R. v. Barton](#), 2019 SCC 33.
13. Senate, [Debates](#), 1st Session, 42nd Parliament, Vol. 150, No. 128, 6 June 2017, p. 3264.
14. Samuel Perreault, [“Criminal victimization in Canada, 2014,” Juristat](#), Statistics Canada, Catalogue no. 85-002-X, 23 November 2015, p. 25.
15. Shana Conroy and Adam Cotter, [“Self-reported sexual assault in Canada, 2014,” Juristat](#), Statistics Canada, Catalogue no. 85-002-X, 11 July 2017, p. 4.
16. Cristine Rotenberg, [“From arrest to conviction: Court outcomes of police-reported sexual assaults in Canada, 2009 to 2014,” Juristat](#), Statistics Canada, Catalogue no. 85-002-X, 26 October 2017, p. 4.
17. Perreault (2015), p. 5.
18. Police-reported sexual assaults are those that are brought to the attention of the police and classified as founded.
19. Rotenberg (26 October 2017); and Cristine Rotenberg, [“Police-reported sexual assaults in Canada, 2009 to 2014: A statistical profile,” Juristat](#), Statistics Canada, Catalogue no. 85-002-X, 3 October 2017.
20. Department of Justice, [How Does Canada’s Court System Work?](#)
21. The definition of “superior court” is contained in section 35 of the [Interpretation Act](#) (R.S.C. 1985, c. I-21).
22. [Judges Act](#), R.S.C. 1985, c. J-1.
23. See [Supreme Court Act](#), R.S.C. 1985, c. S-26; [Federal Courts Act](#), R.S.C. 1985, c. F-7; and [Tax Court of Canada Act](#), R.S.C. 1985, c. T-2.
24. Office of the Commissioner for Federal Judicial Affairs Canada, [Welcome to the Website of the Office of the Commissioner for Federal Judicial Affairs Canada](#).
25. CJC, “Mandate powers,” [What is expected of us](#); CJC, [About the Canadian Judicial Council](#); and CJC, [Judges moving justice forward](#).
26. National Judicial Institute, [About the NJI](#).
27. [Criminal Code](#), R.S.C. 1985, c. C-46.
28. The social context education criterion was added to Bill C-337 in an amendment proposed by the House of Commons Standing Committee on the Status of Women after witnesses informed the committee that training in sexual assault law alone was too narrow. See FEWO (12 May 2017).
29. For a description of social context education, see FEWO, [Evidence](#), 1st Session, 42nd Parliament, 11 April 2017, 0855 (Hon. Adèle Kent, Executive Director, National Judicial Institute).
30. Department of Justice Canada (4 February 2020).
31. LCJC (2019).

32. Department of Justice, *Judicial training in sexual assault law and social context*.
33. In many cases, judges' decisions are written, although some are made orally. Oral decisions are typically transcribed, although the practice differs from court to court. See Simon Fraser University, Centre for Education, Law and Society, "[Judges and the Law](#)," Backgrounder.