

JUDGING SEXUAL ASSAULT: THE SHIFTING LANDSCAPE OF JUDICIAL EDUCATION IN CANADA

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The authors, a law professor and a former judge, examine recent events that raise critical questions about judicial education on sexual assault. These include the Inquiry into the conduct of Justice Robin Camp, the consequent unanimous passing by Parliament of Bill C-337, the Judicial Accountability through Sexual Assault Law Training Act, and the institutional response of the Canadian Judicial Council (CJC) to the public outcry and the political response. The article considers the tension between the legitimate call for judicial accountability and the equally legitimate desire to protect judicial independence at a time of increasing public and political awareness of entrenched female inequality and its relationship to male sexual violence. They argue that the judicial education provisions of Bill C-337 reflect this tension and, as a result, are likely to be ineffective if proclaimed in force. While they identify many positive aspects to the CJC response to the Bill, the authors conclude that the CJC's continued insistence that judicial education be controlled, supervised, and implemented by judges is inadequate. They suggest that a respectful, continuous, and dynamic collaboration among judges, legal and other academics, and community members with relevant experience and expertise will contribute to public understanding of the judicial role at the same time as it increases the likelihood that judicial education will enhance women's equal treatment in the nation's courtrooms.

Les auteures, une professeure de droit et une ancienne juge, examinent les événements récents qui soulèvent des questions cruciales sur la formation des juges en matière d'agression sexuelle. Ces questions comprennent un examen de la conduite du juge Robin Camp, l'adoption à l'unanimité du projet de loi C-337 par le Parlement, qui s'en est suivie, soit la Loi sur la responsabilité judiciaire par la formation en matière de droit relatif

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aux agressions sexuelles, ainsi que la réaction du Conseil canadien de la magistrature (CCM) au tollé général et à la réponse politique. L'article examine la tension qui existe entre les revendications légitimes en matière de responsabilité de la magistrature et le souhait également légitime de protéger l'indépendance judiciaire à une époque où on assiste à une prise de conscience publique et politique grandissante sur la question de l'inégalité persistante des femmes et son rapport avec la violence sexuelle des hommes. Les auteures soutiennent que les dispositions sur la formation des juges dans le projet de loi C-337 reflètent cette tension et, par conséquent, risquent d'être inefficaces si elles entrent en vigueur. Bien que les auteures dégagent de nombreux aspects positifs de la réponse du CCM au projet de loi, elles concluent que l'insistance continue du CCM pour que la formation des juges soit contrôlée, supervisée et mise en œuvre par ces derniers est une mesure inadéquate. Elles suggèrent que la mise en place d'une collaboration respectueuse, continue et dynamique entre les juges, les universitaires se spécialisant en droit et dans d'autres disciplines et les membres de la communauté possédant une expérience et une expertise pertinentes aidera le public à comprendre le rôle des tribunaux, tout en augmentant la probabilité que la formation des juges ait pour effet d'améliorer le traitement réservé aux femmes dans les tribunaux à l'échelle du pays.

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Ultimately, we want Canadians to have faith in their justice system. The judiciary, I believe, has not stepped up to ensure that all of its judges are trained and do not unintentionally or intentionally re-victimize sexual assault complainants or, frankly, any party involved in these types of proceedings. This bill [*Judicial Accountability through Sexual Assault Training Law*] would take steps to build a more accountable and transparent judiciary.

Rona Ambrose, MP

Testimony before the Standing Committee on the Status of Women, April 4, 2017

1. Introduction

On July 5, 2018 the Canadian Judicial Council (CJC) launched a new public website offering an unprecedented glimpse into the current state of judicial education in Canada. In his Introduction, Chief Justice Wagner, Chairperson of Council, states:

Canadians want to be reassured that their judges know the law and can do their job with empathy and fairness. ... The Canadian Judicial Council wants to ensure Canadians have up-to-date knowledge about all aspects of judicial education. Public confidence in the judiciary demands no less.¹

The website offers readers a concise justification for judicial professional development, answers frequently asked questions, and briefly describes the education programs offered during the last fiscal year. While the website recognizes the importance of education about developments in the law, it emphasizes the critical importance of education on social context. Social context education “provides judges with the necessary skills to ensure that myths and stereotypes do not influence judicial decision-making” and ensures that judges are “aware of the challenges faced by vulnerable groups in society.”² The website launch is the latest, but not the only, recent CJC initiative on judicial education. In April of 2017, the CJC adopted a motion making the new judges’ program mandatory, reversing

¹ The Right Honourable Richard Wagner, [“Message from the Chair, Judicial Education”](#) online: *Canadian Judicial Council* <cjc-ccm.ca/en/what-we-do/professional-development> [“Message from the Chair”]. The CJC relaunched its website on August 26, 2019. The content of the website remains the same in all relevant details. There is no longer a separate website for judicial education. Rather information about professional development (including education programs) is incorporated into the new site.

² *Ibid.*

a long-standing policy that mandatory education was incompatible with judicial independence.³

While the launch of the website was unprecedented, it was not surprising. Seventeen months earlier, on February 23, 2017, MP Rona Ambrose introduced Bill C-337, *The Judicial Accountability through Sexual Assault Law Training Act*.⁴ According to Ms. Ambrose, the Bill addresses “the need to build more confidence in our judicial system when it comes to the handling of cases involving sexual assault and sexual violence.”⁵ More particularly, the Bill was, in part, a political response to the ongoing CJC inquiry into Justice Robin Camp’s conduct while presiding over a sexual assault trial in the summer of 2014.⁶ By 2017, Justice Camp was known in the media as the “knees-together judge” as a result of his conduct of the trial.⁷ The *Judicial Accountability Act* contains a number of proposed changes related to the judicial treatment of sexual assault.⁸ Our focus will be on the provisions which deal with the substance

³ [“Judicial Education Policies and Guidelines for Canadian Superior Courts”](#) (2017), online (pdf): Canadian Judicial Council <<https://bit.ly/2kEGy0l>> [“JE Policies and Guidelines for Canadian Superior Courts”]. An updated version was released in April 2018: CJC Policies and Guidelines, 2018 Update, *infra* note 81.

⁴ Bill C-337, An Act to amend the Judges Act and the Criminal Code (sexual assault), 1st Sess, 42nd Parl, 2017 [*Judicial Accountability Act*]. Comprehensive and up-to-date information about the Bill is available at <openparliament.ca/bills/42-1/C-337/>.

⁵ “Bill C-337, An Act to amend the Judges Act and the Criminal Code (sexual assault), 1st reading, *House of Commons Debates*, 42-1, No 146 (23 February 2017) at 1010 (Hon Rona Ambrose).

⁶ [“In the Matter of an Inquiry Pursuant to s. 63\(1\) of the Judges Act Regarding the Honourable Justice Robin Camp: Report and Recommendations of the Inquiry Committee to the Canadian Judicial Council”](#) (29 November 2016), online (pdf): *Canadian Judicial Council* <<https://bit.ly/2gGhO3F>> [“In the Matter of an Inquiry”].

⁷ A suggestion that the complainant could have avoided the sexual assault by “keeping her knees together” was one of many egregiously discriminatory remarks made by Justice Camp at the trial. The redacted version of the trial transcript, along with all other relevant documents is available at: *Ibid*. For one example of the media usage of the descriptor, see Sean Fine, [“Judge in ‘Knees Together’ Trial Resigns after Council Recommends he be Fired”](#) *The Globe and Mail* (9 March 2017), online: <www.theglobeandmail.com/news/national/judicial-council-recommends-justice-robin-camp-be-fired/article34249312/>. The moniker has followed Mr Camp off the bench. See [“Knees Together Judge Makes Case to Return to Law, says: ‘I made a mistake’”](#) (14 November 2017), online: *CTV News* <www.ctvnews.ca/canada/knees-together-judge-makes-case-to-return-to-law-says-i-made-a-mistake-1.3676709>.

⁸ The Bill amends the *Judges Act*, RSC 1985, c J-1 [*Judges Act*] to restrict eligibility for judicial appointment to individuals who have completed comprehensive education in respect of matters related to sexual assault law and social context. It requires the Canadian Judicial Council to report on continuing education seminars related to sexual assault law. It also amends the *Criminal Code*, RSC 1985, c C-46 to require that judges in a sexual assault decision provide written reasons.

of judicial education.⁹ In this regard, the Bill does three things. First, it restricts eligibility for judicial appointment to individuals who complete comprehensive education on sexual assault law and its social context. Second, it requires that the education be developed in consultation with sexual assault survivors and with groups and organizations that support them. Third, it specifies what topics, at a minimum, must be covered.

The Standing Committee on the Status of Women held hearings on the Bill in April and May of 2017.¹⁰ Representatives of the CJC, the National Judicial Institute (NJI), and the Commissioner for Federal Judicial Affairs appeared before the Committee.¹¹ Twenty-two other witnesses representing the legal profession, the academy, and front-line women's organizations also testified. On May 15, 2017, the Bill received the unanimous support of the House at Third Reading and was referred to the Senate. On social media, Ms. Ambrose expressed her gratitude for this bipartisan support and noted: "From police officers, to scholars, to women working on the front lines of sexual assault crisis centres, and most importantly from sexual assault survivors—this important legislation has

⁹ The provisions are discussed *infra* at 14.

¹⁰ The Bill was referred to the Standing Committee on Justice and Human Rights at Second Reading. That initial referral was withdrawn the next day and the Bill was redirected to the Standing Committee on the Status of Women. Referring the Bill to the Standing Committee on the Status of Women sent a message about the politics and the legal issues raised by the Bill. Clearly, Parliamentarians did not see this as a "nuts and bolts" criminal justice Bill, but rather one that responded to women's significant and vocal concerns about the treatment of sexual assault cases in the criminal justice system. Seeing the Bill this way was politically appealing, a fact confirmed by the unanimous, non-partisan support which the Bill received at every stage. The move to the Standing Committee on the Status of Women also acknowledged the significant gender equality issues at stake, issues which could be best addressed by a committee charged with women's equal status in Canadian society.

¹¹ This was the first time that representatives of the judiciary attended a hearing of this sort. For access to all briefs and submissions made to the Standing Committee, see: House of Commons, Standing Committee on the Status of Women, Work, 42-1, No 9 (15 May 2017). The CJC made a written submission: "[Submissions on Bill C-337, Judicial Accountability through Sexual Assault Law Training Act](#)" (April 17, 2017), online (pdf): *Canadian Judicial Council* <www.ourcommons.ca/Content/Committee/421/FEWO/Brief/BR8899193/br-external/CanadianJudicialCouncil-e.pdf>. The Honourable Justice Adèle Kent, Executive Director of the NJI and Norman Sabourin, Executive Director and Senior Counsel, CJC, made oral submissions and answered questions before the Committee on both April 11, 2017 and May 2, 2017 (respectively the NJI Oral Committee Submissions and the CJC Oral Committee Submissions) ["NJI Oral Committee Submissions"]. The Canadian Association of Superior Court Judges made a written submission "[Submission to: Clerk of the Standing Committee on the Status of Women](#)" (18 April 2017), online (pdf): <www.ourcommons.ca/Content/Committee/421/FEWO/Brief/BR8899196/br-external/CanadianSuperiorCourtsJudgesAssociation-e.pdf> ["Written Submissions"].

been supported by Canadians from across the country and across Party lines.”¹²

On June 21, 2019, the House of Commons rose for what is virtually certain to be the last time before the October election. The Bill was then before the Senate Standing Committee on Legal and Constitutional Affairs, which held its first and only hearing on the Bill more than a year after it passed Second Reading in the Senate. As of this writing, the Bill is effectively dead, although all parties have promised to re-introduce it should they be given the opportunity of power.¹³ Despite the Bill’s demise on the order paper, public and political support for the Bill suggest that traditional notions of judicial independence and judicial accountability are in flux. The Bill represents an indirect but potentially unprecedented incursion by legislators into the substance of judicial education programming. In addition, the Bill takes a position on an important and unresolved question—what role should public stakeholders have in the scope and content of judicial education? What does accountability mean in the education context and how is accountability related to judicial independence? With these questions in mind, the CJC website launch can be seen as an institutional judicial response to the significant public concern about the judicial treatment of sexual assault and the political and constitutional conversation provoked by the Bill.¹⁴ The connections between the Camp Inquiry, Bill C-337, and the CJC responses are obvious. However, understanding these connections requires putting them into their larger context. The purpose of this paper is to do just that.

¹² [The Just Act](http://www.thejustact.ca/en/2017/05/15/the-just-act-passes-in-the-house-of-commons/) is a website devoted to following the progress of the *Judicial Accountability through Sexual Assault Law Training Act* on behalf of Rona Ambrose, online: <www.thejustact.ca/en/2017/05/15/the-just-act-passes-in-the-house-of-commons/>.

¹³ See [“As Parliament Rises, which bills made it through—and which ones didn’t”](http://www.ckpgtoday.ca/2019/06/21/as-parliament-rises-which-bills-made-it-through-and-which-ones-didnt/) *The Globe and Mail*, (21 June 2019), online: <www.ckpgtoday.ca/2019/06/21/as-parliament-rises-which-bills-made-it-through-and-which-ones-didnt/> and John Paul Tasker, [“Rona Ambrose’s sex assault bill is dead—and so is the UNDRIP bill”](http://www.cbc.ca/news/politics/rona-ambrose-sex-assault-undrip-1.5182877), *CBC Politics*, (21 June 2019), online: <www.cbc.ca/news/politics/rona-ambrose-sex-assault-undrip-1.5182877>.

¹⁴ This paper is not intended to be a constitutional analysis of the provisions of the Bill. Rather, the paper focuses on the constitutional values which are implicated by the Bill—substantive gender equality, judicial independence, and judicial accountability. These are the normative ideals expressed in the Bill’s preamble. They are also the values regularly relied on (in different ways) by the parliamentarians who unanimously supported the Bill, by the witnesses who appeared before the Parliamentary committee, by the institutional judicial bodies controlling the judicial response, and by the media coverage of the Bill. See e.g. Rona Ambrose’s explanation for the Bill’s focus on candidates for judicial office in which she stated, “there’s a very delicate balance between judicial independence and judicial accountability”: see *infra* note 69; the testimony of women’s organizations from meeting 57 such as the DisAbled Women’s Network Canada, the Ending Violence Association of British Columbia, and the Native Women’s Association of Canada, before

This analysis is informed by our many years of experience with judicial education. Former British Columbia Justice Donna Martinson has been an active participant, planner, and speaker in judicial education at the provincial and national level for almost thirty years.¹⁵ She and Professor Rosemary Cairns-Way met in 1997 as, respectively, the judicial co-chair and academic coordinator of the brand-new and highly controversial Social Context Education Project (SCEP) at the NJI. They have continued to work together on a range of judicial education initiatives ever since.¹⁶ The SCEP was catalyzed in part by public concerns about the judicial treatment of sexual assault. In 1988–89, the CJC Annual Report characterized sexual assault as a “sensitive area” and described the “feeling among some Canadians—mostly women—that some judges do not take sexual assault and sexual abuse seriously enough.”¹⁷ In 1993, the Canadian Bar Association Task Force on Gender Equality “Touchstones for Change”, chaired by retired Supreme Court of Canada judge Bertha Wilson, recommended that all judges participate in “mandatory sensitivity

the Standing Committee on the Status of Women on April 13, 2017. All of these witnesses emphasized the systemic and intersectional nature of violence against women and the importance of ensuring that the criminal justice system be equally available to all: see the evidence online: House of Commons, Standing Committee on the Status of Women, *Evidence*, 42-1, No 57 (13 April 2017); “Why is Judicial Independence Important to You?” (May 2016), online (pdf): *Canadian Judicial Council* <www.cjc-ccm.gc.ca/cmslib/general/Why%20is%20Judicial%20Independence%20Important%20to%20You.pdf> [“Why is Judicial Independence Important to You?”]; Sean Fine, “[House of Commons Passes Ambrose’s Bill on Sex-Assault Training for Aspiring Judges](#)”, *The Globe and Mail* (15 May 2017), online: <www.theglobeandmail.com/news/national/sex-assault-training-judges/article34989088/> [Sean Fine, “House of Commons”].

¹⁵ Her judicial education work has included a variety of legal areas. She has written extensively about equality for women and children. She was the NJI’s Senior Advisor in its development of comprehensive programming, including the creation of a Bench Book, on cross-border parental child abduction.

¹⁶ Most recently Professor Cairns-Way acted as a Senior Advisor for the program “Judges and Jails”, an intensive seminar on sentencing and the realities of incarceration, which is offered annually by the NJI. Since completing her three-year secondment to the NJI as the founding national coordinator of the SCEP, she has continued to participate and advise on social context initiatives at the NJI and acted as Senior Advisor for programs including: the Intensive Criminal Law Program for provincially appointed judges in Ontario; the Challenges of the Multicultural Courtroom: Essential Tools for Judges; Why Gender Equality Still Matters: Assisting the Working Judge; and Managing the Sexual Assault Trial, Annual Criminal Law Program, NJI.

¹⁷ Canadian Judicial Council, “Canadian Judicial Council, Annual Report” (1988–89) at 12. The annual reports from 1995–96 to present are available online: “[Canadian Judicial Council, Annual Report](#)” (1995–96), online (pdf): *Canadian Judicial Council* <www.cjc-ccm.gc.ca/cmslib/general/news_pub_annualreport_1995-1996_en.pdf>. Copies of the reports from 1987–88 to 1994–95 are on file with the authors.

training” on gender and racial bias.¹⁸ In 1997, when the project began, social context education was viewed with suspicion by many judges, including then Chairperson of the CJC, the Honourable Antonio Lamer who wrote:

I am aware that when a report such as *Touchstones for Change: Equality, Diversity and Accountability* ... criticizes the judiciary and the Council itself for insensitivity to the concerns of women, we have a responsibility to either disprove that criticism or demonstrate how we are responding. In any case, we are bound to consider the matters seriously.¹⁹

Twenty years later, judicial participation in social context education has been entirely mainstreamed.²⁰ Both the CJC and the NJI take the public position that social context education is essential to judicial professional development in a society characterized by diversity and constitutionally

¹⁸ *Touchstones for Change: Equality, Diversity and Accountability*, Report of the Canadian Bar Association Task Force on Gender Equality in the Legal Profession (Ottawa: Canadian Bar Association, 1993) at 142. The Task Force recommended mandatory sensitivity courses for all judges on gender and racial bias and concluded that there was no conflict between judicial independence and judicial education. See Rosemary Cairns-Way & Brettel Dawson, “Taking a Stand on Equality: Bertha Wilson and the Evolution of Judicial Education in Canada” in Kim Brooks, ed, *Justice Bertha Wilson: One Woman’s Voice* (Vancouver: UBC Press, 2009) 278 [Cairns-Way & Dawson]. Language is significant in this context. The word “sensitivity” was commonly used in the 1980s and 90s. In addition to implying the existence of “insensitivity”, it also suggests that empathy as opposed to knowledge is an appropriate corrective for the existence of inequality and might be seen to imply that the questions at issue are not legal. One of the many successes of SCEP was the way it characterized the challenge as legal and related to constitutionally-guaranteed equality rights. A thorough discussion of the history of SCEP can be found in Rosemary Cairns-Way, “Contradictory or Complementary: Reconciling Judicial Independence with Judicial Social Context Education” in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 220 [Cairns-Way, “Contradictory or Complementary”]. See also T Brettel Dawson, “Judicial Education on Social Context and Gender in Canada: Principles, Process and Lessons Learned” (2014) 21:3 Intl J Leg Profession 259 and Donna Hackett & Richard Devlin, “Constitutionalized Law Reform: Equality Rights and Social Context Education for Judges” (2005) 4 JL & Equality 157. Professor Dawson took over as Coordinator of the Social Context Education Project in July 1999. She remained at the NJI as academic director with primary responsibility for the ongoing integration of social context into all forms of judicial education until 2016. Her work at the NJI was transformative. Justice Donna Hackett was a judicial co-director of the SCEP between 1999–04 and has continued to work internationally on social context training.

¹⁹ “Canadian Judicial Council, Annual Report 1993–1994”, Preface at i.

²⁰ See generally the CJC education website “Message from the Chair”, *supra* note 1. The website of the National Judicial Institute describes the education it develops in “[The NJI’s Judicial Education Portfolio](#)” (2014), online: *National Judicial Institute* <www.nji-inm.ca/index.cfm/judicial-education/the-nji-s-judicial-education-portfolio/>.

committed to substantive equality. There is much to be proud of in this history. But, in our view, more work is needed to ensure that judicial education fulfills its real potential to enhance judicial impartiality in a manner which is both consistent with judicial independence and truly responsive to the public interest.

This paper is organized in four parts. We begin, in Part 1, with a brief discussion of the initial SCEP at the NJI, describing in particular how education about sexual assault was developed.²¹ We examine how this controversial, independently funded, special project had a profound effect on how judicial education is conceptualized and delivered in Canada—to the point that it has been described as the “jewel in the crown” of Canadian judicial training.²² In Part 2, we turn our attention to the event which, in our view, focused public and political attention on the particular limits of judicial education, the Inquiry into the Conduct of Justice Robin Camp. The public reaction to the Camp inquiry, as well as to other highly publicized and controversial sexual assault decisions, undoubtedly provoked the political response in Bill C-337. We will examine the judicial education provisions in Bill C-337, explain why they are drafted the way they are, and consider whether the Bill, if eventually passed, is likely to achieve any of its sweeping objectives. In Part 3, we describe the judiciary’s institutional response to growing public and political demands for judicial accountability in the sexual assault context. This part is intended to provide a detailed context for the fourth and final part in which we critique the conception of judicial independence which animates the institutional response, and suggest ways of enriching that conception to better ensure that judicial education is a mechanism for both individual professional development and institutional public accountability. In our

²¹ An analysis/critique of the SCEP is beyond the scope of this paper. A description of it is included to provide background/context for the paper’s central themes. Much of this material is archived at the National Judicial Institute, which is publicly accessible via the scholarship referenced in note 18 or available from the authors. We also note that while we draw on our overall and long-time experience as judicial educators generally and our specific experience with the SCEP, we, together with others involved in planning and presenting at judicial education programs, are required to keep confidential information about the agenda and the content of any planning meeting event. It also precludes us from providing information that would identify speakers, attendee, or other participants. This analysis draws primarily on publicly available information.

²² Former Chief Justice McLachlin has referred with pride to Canada’s place on the world stage of judicial education, referring to the SCEP as the jewel in the crown of Canadian achievements in this area. We believe the phrase was first used in this context by Justice Iacobucci who was the judicial vice-chair of the Board of Governors at the NJI during the program’s inception, and who was a tireless promoter (speaking notes on file with the authors).

view, more effort is required to identify and take seriously the legitimate public interest in effective judicial education.

2. Social Context Education: The Evolution of the Canadian Model

Continuing education for judges is relatively new to the common law tradition,²³ with the first Canadian programs offered in the early 1970s.²⁴ The 1980s saw the gradual coordination of education services for judges nation-wide under the authority of the CJC, and in 1988, the NJI was formally established as an independent, judge-led, not-for-profit corporation intended to provide overall leadership in judicial education. Scholars have suggested that the increasing professionalization of the judiciary was an institutional response to public critique of the legal system, and, in particular, critique of the judiciary's perceived failure to reflect and respond to social diversity.²⁵ Public concern was fueled by the emergence of a newly entrenched *Charter of Rights and Freedoms*,²⁶ which placed judges squarely in the public eye as they grappled with the contours of constitutionally entrenched rights, and, in particular, substantive equality rights. This was certainly true of the SCEP. However, it is also true that the formal institutionalization of continuing judicial education raises particular and *distinct* challenges for the judiciary. As one scholar wrote almost thirty years ago: "What is unique about this [professionalization] process for the judiciary is that it must find a means of enhancing competence while balancing the competing precepts of independence and accountability. For the judiciary, the introduction of continuing judicial education is demonstrably more appropriate than the specter of intervention by the executive."²⁷ Twenty years after the SCEP, that specter of legislative intervention appears to have materialized.

Before trying to understand the current context, it is important to describe the key characteristics of the SCEP, the judiciary's first formal institutional response to the legitimate concerns of vulnerable

²³ For a comprehensive discussion of judicial education in the common law world, see Livingston Armytage, *Educating Judges* (Geneva: Kluwer International Publishing, 1996). This book remains one of the few academic publications devoted exclusively to the topic. See also Livingston Armytage, *Educating Judges: Towards Improving Justice: A Survey of Global Practice* (Leiden: Brill Publishing, 2015) [Armytage]. [Additional information about judicial education globally can be found in the Journal of the International Organization for Judicial Training](#), online: <www.iojt.org/Journal.aspx>.

²⁴ Cairns-Way, "Contradictory or Complementary", *supra* note 18 at 223–24.

²⁵ Armytage, *supra* note 23 at 5.

²⁶ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

²⁷ Armytage, *supra* note 23 at 5, 7.

communities, especially women victimized by gender inequality generally, and gendered violence, including sexual violence, in particular. In 1994, a unanimous CJC, acting on the advice of its newly established Equality Committee, passed a resolution calling for comprehensive, in-depth, credible social context education which focused on gender, race, and aboriginal justice.²⁸ The implementation of this resolution had a profound impact on the goals, conceptualization, and delivery of judicial education in Canada. Over the course of the next decade, judicial education evolved from a primarily black letter, positivist, judge-centric phenomenon to become more contextual and pedagogically sophisticated.²⁹ This enriched approach to judicial education was understood as having three dimensions—namely: (1) programming addressed law; (2) judicial skills; and (3) the larger social context in which the law operated and in which those judicial skills were exercised.

Judicial education about discrimination and inequality was controversial in the 1990s. Calling it social context education in 1994 was a compromise aimed at making the education more palatable to judges. Some judges, including those in leadership positions, viewed judicial independence as a major barrier. They raised concerns about inappropriate interference by “special interest groups” aiming to “indoctrinate” the judiciary.³⁰ The CJC took these concerns about judicial independence seriously, knowing that the support of judicial leaders across the country

²⁸ Decisions of the CJC, other than those published on its website, are not public documents. The language of “comprehensive, credible and in-depth”, which was in the initial resolution, is repeated in many subsequent CJC publications. See e.g. “JE Policies and Guidelines for Canadian Superior Courts”, *supra* note 3 which note that “comprehensive, credible and in-depth” is used in the Governing Resolution, Canadian Judicial Council (Sept. 2005) (quoting a 1994 CJC resolution on social context education).

²⁹ The funding provided by the Department of Justice enabled the NJI to hire a full-time academic coordinator who had the time to study the literature on adult learning and professional development. As a result, the NJI developed and incorporated a thoroughgoing and sophisticated process of program development which focused attention on learning needs, learning objectives, and variable methods of information delivery. During its first years of operation, the NJI was minimally staffed and relied on the goodwill of judicial volunteers to develop programming, with the inevitable result that planning was often rushed and insular.

³⁰ See e.g. the comments of Chief Justice Lamer in the 1997 NJI Bulletin: “I recognize that many Canadian judges are less than wholly supportive of social context education, primarily because they fear that it amounts to an attempt at indoctrination to a particular way of thinking about social context”: Chief Justice Lamer, “Social Context Education” (1997) 10 National Judicial Institute Bulletin 1 at 6 [Chief Justice Lamer, “Social Context Education”]. For a recent, succinct, and extremely helpful discussion of the Canadian values of judicial independence, its link to impartiality, and judicial accountability (both public and political) see Adam Dodek & Richard Devlin, eds, *Regulating Judges: Beyond Independence and Accountability* (London: Edward Elgar Publishing, 2016) [Dodek &

was critical. To address them and to develop an overall plan, the CJC, through the NJI, sought the assistance of a constitutional law expert, then Professor Katherine Swinton, now Justice Swinton of the Ontario Superior Court of Justice.

Her comprehensive 1996 *Report to the National Judicial Institute on Social Context Education for Judges*³¹ was unanimously endorsed by the NJI Board of Governors, the CJC Equality Committee and a “strong majority” of the full Council.³² Described by then Chief Justice Lamer as a social context operational blueprint³³ (the “Social Context Blueprint”), it concluded that social context education, including judicial education about the social context of sexual assault, effectively designed and presented, is consistent with the principles of judicial independence, supporting judicial excellence and addressing public expectations and accountability.³⁴

Several pedagogic principles emerged, all of which had judicial independence as a backdrop and were integral to the SCEP approach.³⁵ Programming must be led by and controlled by judges. The education must be non-prescriptive—not eroding judicial independence by requiring “right answers” but facilitating discussion and allowing judges to independently assess the information offered. It should take into account the judicial role, including its nature, complexity and constitutional limitations. Judicial education must be directly relevant to daily courtroom judicial decision making, which regularly includes dealing with cases involving gendered violence. Further, both the methods used and the content presented must reflect the fact that judges are sophisticated adult learners with considerable professional and life experience. Social context education was viewed not as a “one off” but as a long term process that

Devlin, *Regulating Judges*], and, in particular, Chapter 4: “Fighting Words: Regulating Judges in Canada”.

³¹ Katherine Swinton, *Report to the National Judicial Institute on Social Context Education for Judges* (Ottawa: National Judicial Institute, 1996) [unpublished, archived at the NJI, Swinton, “Social Context Blueprint”].

³² Chief Justice Lamer, “Social Context Education”, *supra* note 30 at 2.

³³ *Ibid* at 1.

³⁴ Swinton, “Social Context Blueprint”, *supra* note 31 at 1–6. The project was also significantly advanced by another report prepared for the CJC: Dean C Lynn Smith, “Social Context Education Statement of Needs and Objectives” (Ottawa: Canadian Judicial Council, February 1996) [unpublished, archived at the NJI]. Dean Smith, an acknowledged constitutional expert, became a member of the Project’s Advisory Committee, and was later appointed to the British Columbia Supreme Court.

³⁵ For more information about the SCEP see C Lynn Smith, “Judicial Education on Context” (2005) 38:2 UBC L Rev 569 [Smith, “Judicial Education”] and Cairns-Way, “Contradictory or Complementary”, *supra* note 18.

must be designed to fit within the pattern of a judicial career.³⁶ As Justice C Lynn Smith has effectively described it, the process does not work like an inoculation, but is more like a life-style change requiring diet and exercise.³⁷

The Social Context Blueprint specifically recommended that program design and delivery should incorporate consultation and input from appropriate groups and individuals in the broader community. The importance of relevant public engagement reflected an understanding that developing comprehensive, credible, and in-depth judicial education required the participation of three groups: (1) the judiciary; (2) legal practitioners and legal and other academics; and (3) members of the community.³⁸ This structure, known as the Three Pillars Approach, was formally captured in 2006 in “Twenty Principles of Judicial Education”, which provided that while education must be “judge-led”, it would be enhanced by involving and collaborating with representatives of the other two pillars.³⁹

Involvement of the broader community in the planning and delivery of judicial education was directly connected to the nuanced and complicated understanding of judicial independence that was developed as part of the SCEP. It recognized impartiality as the pre-eminent judicial obligation. Impartiality needed to be understood in the context of the Canadian commitment to substantive equality. Women’s groups were specifically included in planning and delivering education about gendered violence, including sexual assault, recognizing that their contributions have the legitimate function of advancing women’s substantive equality rights.

In the 1990s, the strongly held and non-negotiable view was that judicial education could not be made mandatory without threatening judicial independence. The authors have always been of the view that judicial independence, understood as a means to the end of judicial impartiality, actually requires that judges engage in continuing professional development that is intended to assist them in delivering independent and impartial justice. Then, the CJC disagreed, or at least was unprepared to risk tinkering with the status quo by imposing education requirements.

³⁶ Swinton, “Social Context Blueprint”, *supra* note 31 at 24.

³⁷ Smith, “Judicial Education”, *supra* note 35 at 8.

³⁸ For more information see Rosemary Cairns-Way, “Community Involvement in Judicial Education: Why? And How?” [unpublished paper on file with the NJI] and The Honourable Donna J Martinson, “The Invaluable Role of Non-Legal Community Involvement in the Planning and Delivery of Judicial Social Context Education” [unpublished conference presentation on file with the NJI].

³⁹ National Judicial Institute, “NJI Board of Governors” (October 2006) at Principle 9 [unpublished, archived with the NJI and on file with the authors].

In 1996, Chief Justice Lamer suggested publicly that mandatory social context education would fundamentally threaten judicial independence, positing the difficulty of a recalcitrant judge as a reason to make the education voluntary.⁴⁰ While participation in judicial education programs was highly recommended, with the CJC suggesting that individual judges aspire to at least ten days a year, it was not mandatory.

We and our colleagues understood that our role was to make sure judges would want to attend continuing education because the programs were valuable, relevant, and excellent.⁴¹ The evolution of trust between judicial participants and judicial educators was part of an incremental cultural shift in an increasingly professionalized judiciary. In the result, well into the 2000s, voluntary, judge-led, non-prescriptive social context education, developed and delivered with community participation, was well entrenched in Canadian judicial education.⁴²

3. Judging Sexual Assault: Déjà Vu All Over Again

Despite the fact that much of the Canadian legislative framework dealing with sexual assault is progressive as written, deeply problematic examples of the judicial mistreatment of sexual assault cases continue to attract public attention,⁴³ denying substantive equality to women victimized by

⁴⁰ The Right Honourable Antonio Lamer, “The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change” (1996) 45 UNBLJ 3 at 18.

⁴¹ This approach was developed based on the advice of an Advisory Committee of judges, academics, and community members, and supported by the NJI Board of Governors. It also was pedagogically sound. Given the fact that many judges were concerned, it made good sense to take those concerns seriously and respectfully, to respond to them carefully by offering quality programming rooted in legal norms and constitutional values, to give participants the opportunity to discuss and work through their questions, and to rely on the many judges who supported the programming to convince more skeptical colleagues and act as ambassadors. This approach is discussed at length in Cairns-Way, “Contradictory or Complementary”, *supra* note 18 at 243–54.

⁴² Much of the credit for this evolution belongs with Professor T Brett Dawson, who was the second national coordinator of SCEP and continued to work at the NJI as an academic director until 2016. Under her leadership, the NJI created comprehensive social context education guides and engaged in faculty development programs focused on social context education.

⁴³ See, for example: *R v Barton*, 2019 SCC 33, 86 Alta LR (6th) 1; *R v Al-Rawi*, 2018 NSCA 10, 4 CR (7th) 148; Elaine Craig, “Judging Sexual Assault Trials: Systemic Failure in the Case of Regina v Bassam Al-Rawi” (2017) 95:1 Can Bar Rev 180; Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal: McGill-Queen’s University Press, 2018) [Craig, *Trials on Trial*]; *R v Ghomeshi*, 2016 ONCJ 155, 27 CR (7th) 17.

sexual violence.⁴⁴ Most feminists would agree that the mainstreaming of social context education, although it has undoubtedly had an impact on some women's experiences in the courtroom, has not been a panacea. The Camp Inquiry⁴⁵ is perhaps the most significant recent example of judicial acknowledgment that continuing education is essential, particularly in the context of sexual violence. The current institutional judicial education attendance issue, at least with respect to new judges,⁴⁶ is not whether judges should participate. Rather, it is the reality that judicial attendance at any education program must be approved by the relevant Chief Justice and that court resources, timing, and availability may make attendance very difficult, thwarting even the most well-intentioned judicial learner. The following excerpt from "Who Judges the Judges?" demonstrates well the adverse consequences of the lack of availability of sexual assault education:

[R]eams of case law and newspaper columns have been filled with the examples of jurists who bungled the ideas of sexual consent or post-assault behaviour and go on to preside and rule again. Despite those past failures and ever-increasing awareness of prejudices, judicial education in Canada is in such a state that Camp's lawyers sought ignorance as a defence, maintaining he never learned how to run a sex assault trial.⁴⁷

The trial proceedings that led to the Camp Inquiry occurred between June and September of 2014. Judge Camp's decision to acquit the accused was appealed to the Court of Appeal of Alberta. That court ordered a new trial in October 2015, deciding: "[W]e are satisfied that the trial judge's comments throughout the proceedings and in his reasons gave rise to

⁴⁴ There is a vast literature on sexual assault. A vital entry point to that literature can be found in the collected materials in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) as well as in the painstaking and thoroughly documented analysis in Craig, *Trials on Trial*, *supra* note 43. See also Lise Gottell, "Canadian Sexual Assault Law: Neoliberalism and the Erosion of Feminist inspired Law Reform," in Clare McGynn & Vanessa Munro, eds, *Rethinking Rape Law* (London: Routledge, 2010) 209 and Emma Cunliffe, "Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality?" (2012) 57 *SCLR* 301.

⁴⁵ All of the relevant official documents may be accessed online: "In the Matter of an Inquiry", *supra* note 6. The Canadian Judicial Council Report to the Minister recommended Justice Camp's removal from the bench. It was delivered to the Minister on March 8, 2017.

⁴⁶ As we explain below, judges sitting for more than five years are not required to attend education programming focused specifically on sexual assault.

⁴⁷ Jason Markusoff, Charlie Gillis & Michael Friscolanti, "[The Robin Camp Case: Who Judges the Judges?](http://www.macleans.ca/news/robin-camp-case-who-judges-the-judges/)" *MacLean's* (14 September 2016), online: <www.macleans.ca/news/robin-camp-case-who-judges-the-judges/>.

doubts about the trial judge's understanding of the law governing sexual assaults ... We are also persuaded that sexual stereotypes and stereotypical myths, which have long since been discredited, may have found their way into the trial judge's judgment."⁴⁸ The conduct complained of included asking the complainant, a vulnerable 19-year-old woman, "why didn't [she] just sink [her] bottom down into the basin so he couldn't penetrate [her]" and "why couldn't [she] just keep [her] knees together," that "sex and pain sometimes go together [...]—that's not necessarily a bad thing" and suggesting to Crown Counsel "if she [the complainant] skews her pelvis slightly she can avoid him."⁴⁹

Alice Woolley, commenting on the Camp case, notes that despite the deeply problematic conduct of Judge Camp at trial, the complaint to the CJC arose "almost by accident."⁵⁰ It was the result of the diligent work of four law professors, then Professor Woolley (now Justice Woolley of the Court of Queen's Bench of Alberta), Professor Elaine Craig, Professor Jennifer Koshan, and Professor Jocelyn Downie, who, after learning of the judgment on appeal, obtained and analyzed the trial transcripts. In less than a month, on November 9, 2015, they jointly submitted a complaint to the CJC. On the same day, Professors Woolley and Craig penned a powerful op-ed in the *Globe and Mail*.⁵¹ The CJC initiated a review panel hearing immediately and when Alberta's Minister of Justice, Kathleen Ganley, filed a formal complaint on December 22, 2015, the process moved directly to the Inquiry stage. The Inquiry committee, composed of three members of the CJC and two lawyers, held public hearing over five days in September of 2016. In addition to an Agreed Statement of Facts and other documentary evidence, the Committee heard testimony from Justice

⁴⁸ *R v Wagar*, 2015 ABCA 327, 2015 CarswellAlta 1968 (WL Can).

⁴⁹ ["In the Matter of S. 65 of the Judges Act, R.S., c. J-1, and of the Inquiry Committee convened by the Canadian Judicial Council to review the conduct of the Honourable Robin Camp of the Federal Court: Report to the Minister of Justice"](#) (8 March 2017), online (pdf): *Canadian Judicial Council* <<https://bit.ly/2mnQLKZ>> at para 17 (from agreed statement of facts).

⁵⁰ Alice Woolley, "The Resignation of Robin Camp: Background and Reflections" (2017) *Legal Ethics* [forthcoming].

⁵¹ Elaine Craig and Alice Woolley, ["Myths and Stereotypes: Some Judges Still Don't Get It"](#) *The Globe and Mail* (9 November 2017), online: <www.theglobeandmail.com/opinion/myths-and-stereotypes-some-judges-still-dont-get-it/article27164326/>. Both Professors Woolley and Koshan authored posts on *ablawg.ca*: Alice Woolley, ["When Judicial Decisions go from Wrong to Wrongful—How Should the Legal System Respond"](#) (3 November 2017), online (blog): <ablawg.ca/2015/11/03/when-judicial-decisions-go-from-wrong-to-wrongful-how-should-the-legal-system-respond/> and Jennifer Koshan, ["Judging Sexual Assault Cases free of Myths and Stereotypes"](#) (2 November 2017), online (blog): <ablawg.ca/2015/11/02/judging-sexual-assault-cases-free-of-myths-and-stereotypes/>. In her reflections, Woolley notes their surprise when the case "went viral".

Camp, as well as from three witnesses who had mentored, counselled, and taught Justice Camp in his post-complaint efforts at personal remediation: Justice Deborah McCawley, Dr. Lori Haskell, and Professor Brenda Cossman. In November 2016, the Committee unanimously recommended that Justice Camp be removed from the bench, concluding that: “Justice Camp’s conduct in the Wagar trial was so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role that public confidence is sufficiently undermined to render the Judge incapable of executing the judicial office.”⁵² On March 8, 2017, the CJC recommended Justice Camp’s removal to the Minister of Justice. He resigned the next day.

Mere weeks later, the federal government tabled a budget which allocated 2.7 million dollars over five years (and .5 million per year thereafter) for the CJC to support programming on judicial education, ethics, and conduct. The Budget document specifically targets gender and diversity training and is intended to ensure that judges “are sensitive to the evolving nature of Canadian society.”⁵³ And in April 2017, the Minister of Justice announced almost \$100,000 in new funding to the NJI to develop training for both federally and provincially appointed judges that will focus on gender-based violence, including sexual assault and domestic violence.⁵⁴ There is no doubt that both of these funding decisions are aligned with government policy. The current federal government (as of June 2019) is publicly committed to gender equality and diversity writ large. They have promised to make “transparent, merit-based appointments” intended to achieve gender parity and better reflect “Indigenous Canadians and minority groups in positions of leadership,” and operationalized these principles in a revamped approach to federal judicial appointments announced in October of 2016.⁵⁵ The government has publicly supported judicial education, which furthers diversity ideals. However, it is equally obvious that the announcements were a political response to the increasingly intense public debate over the treatment of sexual assault in the justice system, a debate that had been sparked by the

⁵² “In the Matter of an Inquiry”, *supra* note 6 at para 344.

⁵³ House of Commons, [“Building a Strong Middle Class: Budget 2017”](http://www.budget.gc.ca/2017/docs/plan/budget-2017-en.pdf) (22 March 2017), online (pdf): <www.budget.gc.ca/2017/docs/plan/budget-2017-en.pdf> at 189.

⁵⁴ [“Government of Canada Announces Measures to Combat Gender-based Violence”](http://www.canada.ca/en/department-justice/news/2017/04/government_of_canadaannouncesmeasurestocombatgender-basedviolenc.html) (26 April 2017), online: *Department of Justice* <www.canada.ca/en/department-justice/news/2017/04/government_of_canadaannouncesmeasurestocombatgender-basedviolenc.html>.

⁵⁵ The Federal Commissioner for Judicial Affairs provides a detailed description of the appointments process on their website: [“Overview of Federal Judicial Appointments”](http://www.fja.gc.ca/appointments-nominations/index-eng.html) (2018), online: *Office of the Commissioner for Federal Judicial Affairs Canada* <www.fja.gc.ca/appointments-nominations/index-eng.html>. See also Rosemary Cairns-Way, “Reforming Judicial Appointments: Change and Challenge” (2017) 68 UNBLJ 18.

CJC Inquiry, fueled by the February tabling of Bill C-337, and fanned by the intense and critical media coverage of the Al-Rawi case.

The Camp case exposed the realities of judicial education to the public. Robin Camp was appointed to the Provincial Court of Alberta in March of 2012. Like many judicial appointees, he came from a business law background. He had no experience or expertise in criminal law but was appointed to a court whose primary jurisdiction is the criminal law. It is likely that he began to hear cases within weeks of his appointment. While he did attend a new judges' seminar, and semi-annual provincial education meetings, the agreed statement of facts before the CJC asserted that he received zero training on how to conduct a sexual assault trial. In closing submissions, his lawyer characterized Justice Camp's misconduct as a failure to educate himself about the social context of sexual assault. He argued that this admitted failure had been remediated by his client's efforts post-complaint to learn about the history and current reality of sexual assault law, the myths and stereotypes which continue to permeate the law, the impact of trauma on complainants and other vulnerable witnesses, and best practices for the judicial management of sexual assault trials.⁵⁶

Counsel also made the point that Justice Camp's failure, although reprehensible, was by no means unique. This attempt to redirect attention from his client's misconduct to larger questions about the availability and effectiveness of judicial education was unsuccessful before the CJC but was seized upon by the media.⁵⁷ We suspect that most members of the public found Justice Camp's lack of training both surprising and worrisome. Judges exercise considerable public power. The appointment process focuses on overall merit rather than on particular suites of skills.⁵⁸ While it may be reasonable to assume that lawyers appointed to the bench will have the experience, intelligence, and humility to recognize their own educational needs and the professional integrity to seek out the remediation they require, the Camp case demonstrates the danger of such assumptions. In recommending that Justice Camp be removed from the bench, the CJC responded to his individual misconduct. However, the inquiry process did not—and could not—address the institutional

⁵⁶ Justice Camp's self-remediation efforts are documented on the CJC Camp Inquiry site: "In the Matter of an Inquiry", *supra* note 6.

⁵⁷ See Allison Crawford, "[Mandatory Education on Sexual Assault Law a Hot Topic at School for New Judges](#)" (6 April 2017), online: CBC <www.cbc.ca/news/politics/judges-school-sexual-assault-laws-justice-1.4056483>.

⁵⁸ We acknowledge the political pliability of the concept of merit. Our point is that appointments are not made directly in response to the needs of a particular court or in response to the need for expertise in criminal law. See discussion of this issue in Craig, *Trials on Trial*, *supra* note 43 at 207–10.

questions which emerged. Should judges undergo mandatory training either prior to ascending the bench, or once sitting? Does sexual assault law raise such particular and challenging concerns that a special model of education is required? Is the current model of self-directed, voluntary education for judges still viable and legitimate in a dynamic and evolving social context? One response to the accountability questions illuminated by the Inquiry process is provided by Bill C-337, which preceded the final CJC report by mere weeks. It is to that fascinating piece of legislation that we now turn.

4. The Judicial Accountability through Sexual Assault Law Training Act: Politicizing Judicial Education

Bill C-337, the *Judicial Accountability Act*, is unique in many ways.⁵⁹ It is unique in that it specifically addresses judicial education, previously understood as an important part of judicial professional self-regulation entirely within the authority of a constitutionally independent judiciary. More pragmatically, the Bill has enjoyed an unusual degree of non-partisan support from the beginning—unusual given its status as an opposition private member’s bill. The *Judicial Accountability Act* has made remarkably speedy progress through the House. It was fast-tracked through Second Reading, unanimously, on a motion by MP Tom Mulcair, then leader of the opposition federal NDP. A mere three months after it was tabled, the Bill was approved on Third Reading, again unanimously. The Bill made headlines when it was introduced and has continued to attract media attention.⁶⁰ Guaranteed to be newsworthy in light of the Camp inquiry,

⁵⁹ Elaine Craig has written extensively and thoughtfully on judicial education in the context of sexual assault. “Judicial Error in Sexual Assault Cases”, chapter 7 of Craig, *Trials on Trial*, *supra* note 43 (and in particular 206–218) is a comprehensive analysis of when and how judges go wrong in the adjudication of sexual assault and how judicial education might respond to those errors. Craig’s book is explicitly intended to identify the ways in which the legal profession unnecessarily (and often unlawfully) contributes to the harms experienced by complainants in the criminal trial process. She argues, convincingly, that there are “changes within the control of the legal profession that could reduce the re-victimization that is experienced by some of those who turn to, or are forced into, the criminal justice process following violations of their sexual integrity”: Craig, *Trials on Trial*, *supra* note 43 at 11. She suggests, among a range of solutions, that before being assigned to preside over a sexual assault trial, judges must have been given basic training on the fundamentals of sexual assault law and assessed on their knowledge of the relevant basic rules: Craig, *Trials on Trial*, *supra* note 43 at 210.

⁶⁰ See e.g. Sonja Puzic, “[Ambrose Tables Bill on Mandatory Sex Assault Law Training for Judges](http://www.ctvnews.ca/politics/ambrose-tables-bill-on-mandatory-sex-assault-law-training-for-judges-1.3298432)” CTV (23 February 2017), online: <www.ctvnews.ca/politics/ambrose-tables-bill-on-mandatory-sex-assault-law-training-for-judges-1.3298432>; Sean Fine, “House of Commons”, *supra* note 14; Richard Aiello, “[Private Members’ Bills to Watch in 2018](http://www.ctvnews.ca/politics/private-members-bills-to-watch-in-2018)” CTV (2 January 2018), online: <www.ctvnews.ca/politics/private-members-bills-to-watch-in-2018-1.3736473>.

numerous other examples of contested judicial decision-making in sexual assault cases,⁶¹ and the burgeoning of the #MeToo movement, the Bill continues to attract public attention. Parliamentarians of all stripes are eager to publicly support the Bill, and the House took the unusual step of calling on the Senate to speed up passage of the Bill in October of 2017.⁶² Despite this parliamentary exhortation, the Bill languished for a year on the Senate floor. It was debated and put-off thirteen times before being referred to committee in June 2018. The Senate Standing Committee on Legal and Constitutional Affairs held a hearing on the evening of June 3, 2019, but the Bill did not return to the Senate Floor before both the Senate and the House of Commons adjourned.⁶³

The Bill contains a lengthy, often redundant, and sometimes inconsistent preamble. The most significant provisos, in our view, are the first three. They state that: 1) “[S]urvivors 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.”⁶⁴ They highlight, in other words, transparency and accountability while acknowledging the priority of judicial independence. The sixth proviso connects these values to continuing judicial education, the value and importance of which is explicitly affirmed.

The Bill’s judicial education objectives are achieved through an amendment to the *Judges Act*.⁶⁵ Section 2(2)(b) deals with eligibility for federal judicial appointment. It adds a new criterion (in addition to the required ten years of practice) which is related to pre-appointment education. The section provides that applicants to the federal judiciary must, to the satisfaction of the Federal Commissioner of Judicial Affairs:

2(2)(b) ... have completed recent and comprehensive

⁶¹ See notes 44 and 45.

⁶² Richard Aiello, [“In Light of ‘MeToo’ Campaign, Commons Urges Senate to Pass Sex Assault Training Bill”](https://www.ctvnews.ca/politics/in-light-of-metoo-campaign-commons-urges-senate-to-pass-sex-assault-training-bill-1.3650531) (26 October 2017), online: CTV <www.ctvnews.ca/politics/in-light-of-metoo-campaign-commons-urges-senate-to-pass-sex-assault-training-bill-1.3650531>.

⁶³ Current as of June 30, 2019. We are in no position to speculate on the reasons for the Senate delays, although Rona Ambrose has publicly described them as the work of “a group of old-boys protecting another group of old-boys”: Amanda Connelly, [“Liberals will re-introduce Ambrose’s judicial sex assault training bill if they win election”](https://www.globalnews.ca/news/5413859/judicial-sex-assault-training-bill/) (20 June 2019), online: *Global News* <www.globalnews.ca/news/5413859/judicial-sex-assault-training-bill/>.

⁶⁴ *Judicial Accountability Act*, *supra* note 4, Preamble.

⁶⁵ *Judges Act*, *supra* note 8.

- (i) education in sexual assault law that has been developed in consultation with sexual assault survivors, as well as with groups and organizations that support them, and that includes 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, and
- (ii) social context education.⁶⁶

Another section appends this detailed language about sexual assault and social context to the provision in the *Judges Act* which authorizes (but does not require) the CJC to establish seminars for the continuing education of judges.⁶⁷ It is important to note that the aim is to do more than impose an additional appointment criteria related to experience. The provision specifically identifies the topic(s) of the required education and specifically requires that the education incorporate relevant experiential public input.

Perhaps the most important aspect of the Bill is its focus on “pre-judges.” The Bill targets aspiring judges because drafters had concerns about whether the legislative imposition of mandatory education for sitting judges was consistent with judicial independence. Rona Ambrose, in a post-introduction scrum, told media representatives that the reasons the Act did not require sitting judges to take the training were “constitutionality issues” and continued “[t]here’s a very delicate balance between judicial independence and accountability ... We’ve gone as far as we possibly can.”⁶⁸ In her appearance before the Committee, Ms. Ambrose exhibited frustration with what she saw as judicial foot-dragging on an important issue. She said: “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.”⁶⁹ It is clear that for her the focus on aspiring judges represents a significant compromise but one that she (and other legislators) are prepared to accept in order to be seen as responsive to public concern about and distrust of the justice systems’ treatment of sexual assault. Unfortunately, the legitimate concern about potentially unconstitutional legislative interference with judicial self-regulation has led to provisions which are quite likely to be, in our view, both ineffectual and counterproductive.

⁶⁶ *Judicial Accountability Act*, *supra* note 4.

⁶⁷ *Ibid*, s 3(b).

⁶⁸ Beatrice Britneff, “[Ambrose Tables Private Members’ Bill on Sexual Assault Law Training](#)” (23 February 2017), online: *iPolitics* <ipolitics.ca/2017/02/23/ambrose-tables-private-members-bill-on-sexual-assault-law-training>.

⁶⁹ House of Commons, Standing Committee on the Status of Women, Evidence, 42-1, No 54 (4 April 2017) at 5 (Hon Rona Ambrose) [Rona Ambrose, MP].

Three compelling reasons for this were identified by the institutional judicial witnesses appearing before the parliamentary committee. The first is the short-term challenge presented by the Bill. The Commissioner for Federal Judicial Affairs testified that there was a real risk that the new criteria would delay judicial appointments at a time when there is public concern about judicial vacancies and the provision of timely justice.⁷⁰ This is because of the time required to develop and deliver a sophisticated and pedagogically sound program, in consultations with relevant public stakeholders, which can be accessed by pre-judges, and whose participation in the program is amenable to evaluation of some kind. While this is a serious concern, this challenge could be managed by delaying the implementation of the Bill until the necessary programs were in place.

The second concern is quality assurance. We wonder: How does one evaluate pre-judicial participation in a program of this kind? Will mere completion suffice? Or is a proficiency test necessary? If so, what does proficiency require? Is black-letter legal competence sufficient? How does one evaluate whether the kinds of attitudinal and personal changes contemplated by the legislation have been achieved? Is it possible to evaluate open-mindedness? Recognition of hitherto-unconscious bias?⁷¹ These important and difficult questions are delegated to the Commissioner. While the legislation assumes the transformative potential of education, it fails to elaborate on any of the how, why, when, and where questions which will determine its effectiveness.

The third challenge is pedagogic. Justice Adèle Kent, Executive Director of the NJI, testified that a sitting judge was far more likely to

⁷⁰ In *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631, the Supreme Court of Canada revisited its jurisprudence on unreasonable delay under section 11(b) of the *Charter* and imposed a new presumptive ceiling for when delay becomes constitutionally unreasonable. The decision had an immediate impact on the criminal courts. See Sean Fine, “[Courts Shaken by Search for Solutions to Delays](#)” *The Globe and Mail* (10 March 2017), online: <www.theglobeandmail.com/news/national/courts-shaken-by-search-for-solutions-to-delays/article34275019/>. For a discussion of the problem of judicial vacancies see Janice Dickson, “[Wilson-Raybould Fills More Judicial Vacancies, Backlog Continues](#)” *The National Post* (6 September 2018), online: <nationalpost.com/pmnl/news-pmnl/canada-news-pmnl/liberals-plan-to-increase-frequency-of-judicial-appointments-in-face-of-backlogs>.

⁷¹ Whether and how judicial knowledge and/or performance can be evaluated in a way which does not compromise judicial independence is a complex question beyond the scope of our analysis. The point here is that delegating an unconstrained discretion regarding evaluation to the Commissioner has the potential to seriously undermine the objectives of the Bill. For a helpful discussion of judicial assessment mechanisms see Dodek & Devlin, *Regulating Judges*, *supra* note 30 at 84, 96–97.

take this education seriously: “The real effectiveness of judicial training is that they are judges. They know they’re in the seat ... they know that next week they’re going to have to do it.”⁷² She observed that new judges were demonstrably engaged during the new judge’s training course offered for many years and which includes a sexual assault component.⁷³ Adult learning theorists know that education is effective when the learner, often a busy professional, has something at stake. For the judge adult learner, that stake will almost certainly be a sincere desire to deliver justice in a sexual assault trial in a manner that takes account of all of the constitutional and criminal justice interests at play. More cynically (or pragmatically) participants may also wish to avoid public embarrassment, appellate intervention, or being subjected to a disciplinary complaint. For even the most thoughtful and sincere judicial applicant, participation in this legislatively mandated education may be about ticking a box. For the pre-appointment applicant, the personal, practical relevance of the education is, at the time of its completion, entirely hypothetical.

The choice to focus on aspiring judges appears to insulate the other features of the legislation from a critique based on judicial independence. Nevertheless, both the content specificity and the naming and deliberate inclusion of public stakeholders in the development of the education raise important questions about the relationship(s) between judicial education and judicial independence. Both of these aspects of the Bill were the result of amendments made at the committee stage. The first amendment specified that the education needed to be developed in consultation with public stakeholders. Witnesses before the committee noted that comprehensive and effective education on sexual assault needed to incorporate the lived reality of sexual assault for complainants and for those working in the field of violence against women. The committee was apparently convinced that the legislation’s accountability objectives necessitated relevant public inclusion. Ms. Ambrose highlighted this issue by suggesting to the committee that they talk to witnesses “about their interactions with the Judicial Council and others who put together the training for both lawyers and sitting judges.” She continued: “My understanding right now is that there really is no interaction and no transparency. We can’t even see the kind of training that’s offered at this point, so experts have asked, ‘Can we at least look at it and give you some advice on whether or not this is the most up-to-date, best kind of training?’”⁷⁴

The second amendment added “social context education” to the content requirement. This amendment responds to the under-inclusivity

⁷² “NJI Oral Committee Submissions”, *supra* note 11.

⁷³ *Ibid.*

⁷⁴ Rona Ambrose, MP, *supra* note 69.

of the initial focus on sexual assault. Witnesses successfully convinced the committee that effective education on sexual assault has to pay attention to the complexity of women's experience of sexual violence, a complexity which includes other indicia of inequality such as, for example, indigeneity, race, culture, disability, poverty, and sexual identity. This insight into how inequalities intersect was an important part of SCEP, which emerged from a resolution explicitly naming gender and race (including aboriginal peoples, blacks, and other visible minorities) as the key foci of social context education, and ended up developing a broad, inclusive and open-ended approach to the existence of inequality more consonant with the substantive equality guaranteed in section 15 of the *Charter*.⁷⁵

In our view, Bill C-337 offers a quick political fix to complex challenges, elevating political expedience above a careful analysis of what our normative commitments to substantive equality, judicial independence and public accountability require. In doing so, it focuses on one very important social context issue, gendered sexual violence, and one piece of our public response, the judiciary, over other issues and other communities. Most dangerously, it sets a precedent which allows the government of the day to determine which issues should be prioritized by judicial education, without any necessary link to actual challenges faced by the justice system or whether the issues enhance and are consistent with constitutional values such as substantive equality.

Nevertheless, it is important to acknowledge the public good that resulted from the introduction of the Bill. The Bill's content, and the discussions which took place during the Committee hearings, capture the breadth and depth of public concern about judicial education on sexual assault in a dramatic way. Those who participated in the hearings not only raised concerns and identified significant gaps, but, through academics and other equality seeking community members, offered suggestions as to how judges and community members might work collaboratively to achieve the goal of judicial competency. The unanimous passing of the Bill generated a significant judicial response at the Committee stage. Judicial representatives responded publicly to questions such as whether

⁷⁵ During the SCEP the limited initial concept of social context evolved to more closely reflect the early recommendations of then Dean Lynn Smith who wrote: "Social context' refers to background factors which may inform judicial decision-making. Examples include the history, culture, economic, and social circumstances of aboriginal peoples, the current situation of immigrant and visible minority populations in Canada and the issue of systemic racism, the changing role of women, their economic and social circumstances and the implications flowing from a commitment to equality between the sexes, and the circumstances and needs of persons with disabilities and the consequences of the requirement that they be accommodated." Smith, "Judicial Education", *supra* note 35 at 1.

judicial education should be mandatory, what transparency requires, and how to ensure that sexual assault education is in fact included in judicial education. This is no small feat. Obtaining this kind of engagement by judges has long eluded many equality seeking academics and other community members interested in judicial education. On the issue of the nature of judicial independence, the passing of the Bill itself, and the public responses of the judiciary during the hearings about what judges think it means and requires, have led to broader public discourse on its legitimate parameters. We now turn to consider the institutional judicial response, first by describing it in some detail, and second, by offering our own reflections and critique.

5. The Judiciary Responds: Protecting Judicial Independence

The objective of Bill C-337 is, overall, to ensure that federally appointed judges are exposed to a particular and important perspective on sexual assault, grounded in community expertise, and one that has informed much of the legal reform in this area. At the committee hearings, judicial representatives opposed the legislation on the basis of its inappropriate interference with judicial independence. However, it is to their credit that both the CJC and the NJI engaged meaningfully in the Parliamentary hearing process. In its Written Committee Submissions the CJC stated that it “takes this matter extremely seriously and wants to work collaboratively with all stakeholders, including Parliamentarians, moving forward.”⁷⁶ Below, we consider specifics of the judicial response which include: the importance of judicial education on sexual assault; the need for judicial control of the content of sexual assault programming; the role of public participation in sexual assault program conception, development, and delivery; and mandatory judicial education on sexual assault.

The position of the CJC and the NJI is that Parliament does not have the constitutional right to require the judiciary to engage in education on sexual assault or any topic. However, they agree that sexual assault education for judges is important; as the CJC puts it, sexual assault cases are some of the most complex and difficult matters heard by the courts.⁷⁷ The CJC suggested both to the Committee and the Minister of Justice that applicants for appointment, as part of the application process, specifically undertake to participate in ongoing social context education, including education on sexual assault issues.⁷⁸ Both say that they have been educating judges about the topic for many years, their education programs are effective and contribute to their reputation as world leaders on judicial

⁷⁶ “Written Submissions”, *supra* note 11 at para 6.

⁷⁷ *Ibid* at para 20.

⁷⁸ *Ibid* at paras 14, 16.

education.⁷⁹ Gender based violence, equality, and discrimination are said to be key parts of the NJI's broader social context programming.⁸⁰

In April 2018, shortly before the Senate referred the *Judicial Accountability Act* to committee, the CJC released its latest *Professional Development Policies and Guidelines*.⁸¹ In them, the CJC specifically reaffirmed its commitment to a three dimensional approach to education, encompassing substantive content, skills development, and social context awareness, underscoring that “credible, in-depth and comprehensive’ social context education is indispensable to maintaining a fair and well-informed judiciary.”⁸² Both the CJC and the NJI support a broad, contextual approach to professional development emphasizing that: it assists judges in fully understanding the realities, circumstances and experiences of those who interact with the legal system; and that social context education helps judges to ensure that personal or societal biases, myths, and stereotypes do not influence their decision making.⁸³

As to the question of control of judicial education content, the *Professional Development Policies and Guidelines* state that the principle of judicial independence requires that professional development be planned, implemented and supervised by judges. The reasons provided focus on the importance of judicial impartiality and of protecting the public by protecting judges from outside influence or interference:

B. The Nature of Professional Development

2. ... At all times, professional development must be judge led and delivered in a manner that ensures the fair and equal delivery of justice to preserve the impartiality of the court.

C. Judicial Independence

1. An independent judiciary is indispensable to impartial justice. In keeping with the principles of judicial independence, professional development must remain

⁷⁹ “NJI Oral Committee Submissions”, *supra* note 11 at para 11; “Written Submissions”, *supra* note 11 at para 7.

⁸⁰ “NJI Oral Committee Submissions”, *supra* note 11.

⁸¹ [“Canadian Judicial Council Professional Development Policies and Guidelines”](https://bit.ly/2kOoaSs) (2018): online *Canadian Judicial Council* <<https://bit.ly/2kOoaSs>> [CJC Policies and Guidelines, 2018 Update].

⁸² *Ibid* at para A.6.

⁸³ *Ibid* at para B.2 and “Written Submissions”, *supra* note 11 at paras 8–9. See also “NJI Oral Committee Submissions”, *supra* note 11.

under the control and supervision of the judiciary, free from outside influence or interference.

...

3. The principle of judicial independence was not created for the benefit of judges, but for the protection of the public. By protecting judges against outside influence, it ensures that any dispute entrusted to judges will be decided fairly and impartially.⁸⁴

Who should participate in sexual assault program conception, development and delivery? The Three Pillars Approach, and in particular the third pillar—involving members of the community—is not mentioned in the judicial responses to the Bill. However, the CJC and the NJI have recently provided information about their approaches to the inclusion of non-legal, non-academic participation in judicial education generally, and in sexual assault education in particular. The CJC published “Why is Judicial Independence Important to You?”⁸⁵ in May 2016, several months after the Camp complaints were made. It describes a made-in-Canada education model said to be generally heralded as the gold standard around the world. In the model it is primarily judges who do both the planning and the actual education delivery, supported by academics:

- [Judges] determine their own needs as well as the content of the various education and training programs. The initiative belongs to judges;
- The specific determination of each training program is done by a team of judges who are experts in the field and are recognized by their peers;
- The judges committee is supported by a number of people, such as administrators and experienced professors, who are bound by confidentiality;
- However, the control of the content of training programs remains with the judges;
- The training is led by judges and the majority of instruction is also done by them⁸⁶

The NJI, in a January 2017 article in *Law Now*, called “The Work of the National Judicial Institute,”⁸⁷ published shortly after the release of the Camp Inquiry Committee Report, also states that education should be

⁸⁴ *Ibid.*

⁸⁵ “Why is Judicial Independence Important to You?”, *supra* note 14.

⁸⁶ *Ibid* at 17.

planned and presented by judges: “Judges learn best from other judges. This means that, for the most part, education for judges is planned and delivered by judges.”⁸⁸

The new CJC website on judicial education⁸⁹ provides clues to the judicial view on public participation. It describes the courses, including sexual assault courses, offered during the fiscal year preceding the release of the website on July 5, 2018. While no information is provided about the conception and design processes used for sexual assault programming, there is a general description of the faculty members for each, general information about the topics covered, as well as the number of judges who attended. We found no program said to be dealing with sexual assault in which people other than judges, lawyers, and academics presented the education.⁹⁰ The NJI has provided information and answered questions about the inclusion of members of the public who are not judges, lawyers, or academics, in its sexual assault education programming. With respect to sexual assault, it says it has worked over the years with, by way of example, police, victim support workers in domestic and sexual assault violence, psychologists, and psychiatrists, members of the indigenous community, and other diverse groups. Having said that, it agreed that it can do more.⁹¹

⁸⁷ Adèle Kent, [“The Work of the National Judicial Institute”](#) (4 January 2017) online: *Law Now Magazine: A Website of The Centre for Public Legal Education Alberta* <www.lawnow.org/the-work-of-the-national-judicial-institute/>.

⁸⁸ *Ibid* at 1.

⁸⁹ “Message from the Chair”, *supra* note 1.

⁹⁰ The [CJC website](#) now includes a searchable list of judicial education programs offered between April 2017 and March 2018. Programming related to sexual assault can be accessed here <<https://bit.ly/2kS6yoM>>. Sample descriptions from this list include an NJI Criminal Law Seminar that describes sessions on “Adjudicating Sexual Assault Trials involving Intoxication or Historical Sexual offences, including Relevant Social Context” said to be “led by experienced judges, legal academics with expertise in criminal law, and members of the Bar from both the Crown and Defence.” A one-day program called Criminal Law Fundamentals included issues the law of sexual assault. It is described as a seminar to help judges learn how to manage sexual assault trials through improved awareness of social context and the law. Faculty members included an academic expert and experienced trial judges. A two-day seminar for the Court of Queen’s Bench in Manitoba focused on the law and social context of sexual assault trials. It was again led by senior judges and a legal academic. A two-day education program for the Court of Queen’s Bench of Saskatchewan dealt with two topics, the Canadian child welfare system and the law and social context of sexual assault. It was led by senior judges and academics and a front-line worker in child protection. A program for the British Columbia Court of Appeal dealt with current issues in sexual assault trials which was presented by a UBC professor.

⁹¹ “NJI Oral Committee Submissions”, *supra* note 11.

The NJI also addressed questions about the inclusion of women's groups specifically in its sexual assault programming.⁹² The issue arose at least in part because a number of women's groups participating in the Bill C-337 hearings said they would like to collaborate on the content of judicial education but had not been asked to be part of the training or decision making. The NJI responded that it has worked with some women's groups but does so carefully because judges need a balanced approach to education:

Some of those groups are advocates and we can't have advocates teach our judges—we need the balance. ... We cannot have people who appear before judges in our training sessions because the very next day a judge may walk in and have one of them in front of them.⁹³

To explain the concern about balance, the NJI provided the example of education on criminal law, saying that when they have a prosecutor come to talk about something involving criminal law, they will always have someone from the defence bar to ensure the necessary balance.⁹⁴

A significant judicial response to the Camp case and Bill C-337 has been a change in the judiciary's seemingly intractable position that making judicial education mandatory is contrary to the principles of judicial independence. Now the CJC is saying that making aspects of education mandatory is necessary to ensure judicial competence. The *Professional Development Policies and Guidelines* make judges accountable for their ongoing professional development, requiring each judge to prepare a professional development plan which "should" include social context awareness. Those who have been judges for five years or less must attend the new Judges Program, and other designated programs. All judges should invest the equivalent of 10 days per year of professional development and are required to attend local court-based programs.⁹⁵ The NJI website now lists the numerous courses, covering a broad range of topics, from which judges can choose.⁹⁶ The Policies and Guidelines themselves do not specifically require any judge to engage in education on sexual assault, or on any other topic. However, the education for recently appointed judges and for local court programs can and likely does include education on sexual assault.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ "JE Policies and Guidelines for Canadian Superior Courts", *supra* note 3.

⁹⁶ "[NJI Course Calendar: Judicial Education Overview and Education Resources](http://www.nji-inm.ca/index.cfm/publications/)", online: National Judicial Institute <www.nji-inm.ca/index.cfm/publications/>.

6. Enriching the Conception, Planning and Delivery of Sexual Assault Judicial Education

The *Judicial Accountability Act* may never be proclaimed in force. We would not be disappointed if that happened.⁹⁷ The Bill has, however, catalyzed an important and necessary conversation between the judiciary, the legislature, the public in general, and public stakeholders in particular. This conversation has the capacity to enhance Canada's international reputation as a judicial education leader. There are numerous positive aspects to the judicial response. It acknowledges the need for public confidence in the competence of the judiciary and the critical role judicial education plays in ensuring that confidence. It reaffirms the need for comprehensive, in-depth, credible social context education as an essential element of a three-dimensional education program. It identifies the particular importance of sexual assault education for judges. It serves an accountability function by providing general information about judicial education to the public. It takes action by making 10 days a year of judicial education generally mandatory, and it requires new judges to attend a new judges' training program that includes sexual assault.⁹⁸

The judiciary has also effectively educated the public about the risks of political interference in judicial education in both the "Professional

⁹⁷ The *Judicial Accountability Act*, *supra* note 4 is a political response to a systemic challenge. Clearly, meaningfully improving the experiences of sexual assault survivors within the criminal justice system requires change far beyond the federal judiciary. Most sexual assault cases are heard in provincial court by provincially appointed judges. Provincial appointment processes vary but changes in criteria like those included in the *Judicial Accountability Act* would require legislation at every provincial level. While it is possible that federal legislation might assist in establishing norms related to pre-appointment experience and mandatory training, there is no guarantee that this will occur. Most criminal cases, if charges go forward at all, end with a plea bargain. Full-blown trials are very much the exception and are the final stage of an exhausting, uncertain, and re-traumatizing process for complainants which starts with the decision to report. Feminist activists, front-line workers, journalists, scholars, and lawyers have repeatedly catalogued the ways in which the criminal justice system fails victims of sexual assault (see note 44). See also the powerful Globe and Mail investigative report on police founding practices for sexual assault charges which revealed shocking and unexplained disparities between jurisdictions: Robyn Doolittle, "[Unfounded: Why Police Dismiss 1 in 5 Sexual Assault Claims as Baseless](http://www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309/)" *The Globe and Mail* (3 February 2017), online: <www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309/>. While the political instincts which animated the non-partisan support of the *Judicial Accountability Act* were undoubtedly sincere, we worry that politicizing judicial education is a simplistic response to a complex challenge which may divert energy away from the search for more constructive and holistic solutions.

⁹⁸ No public information is available with respect to the specific content of, or the time devoted to, the sexual assault programming.

Development Policies and Guidelines” and “Why is Judicial Independence Important to You?”. These publicly available documents clearly explain that judges must be insulated against and independent from “any and all sources of improper influence”, including all forms of coercion, threat or harassment, direct or indirect, whether from government, politicians, persons in authority, relatives, neighbours, interested parties, fellow judges, chief justices, and judicial bodies or organizations.⁹⁹ Judicial independence is a constitutional imperative which is essential to the rule of law, and it is necessary to continue to deliver this important message to the public.

However, the judicial response to another significant and related aspect of the legislation, the requirement that the education be developed in consultation with sexual assault survivors, as well as with groups and organizations that support them, is, we respectfully suggest, inadequate. The essence of the response is that the principle of judicial independence requires that judicial education must be led and controlled by judges, that judges must be free from outside influence, that the judiciary will decide if, when and how public stakeholders will be involved, and that—while women’s organizations have been included in some stages of program development—caution is necessary. The underlying concern is the risk of advocacy outside the courtroom—the answer is a resort to “balance” which emphasizes that judges need to be in control of what education is necessary and how it should be delivered. In our view, the institutional judicial response would be enriched by paying attention to the direct connection between understanding inequality, and hearing about it, in all its complexity, from those who experience it. We suggest that the conception, planning, and delivery of judicial education would be improved by opening it up, in a systematic, structured, and respectful way, to relevant public input. Seeking that input, and taking it into account, is indispensable to true judicial impartiality and fundamental to the legitimacy of judicial education programming.

The third pillar of the Three Pillars Approach—including the broader community in education conception, design and delivery—incorporates the powerful idea, expressed well by a judge in the 1990s that it is important for judges to know what they don’t know.¹⁰⁰ This is particularly true when considering inequality and how to remedy it, and in understanding the complexities of the concept of impartiality. Judges committed to offering impartial justice have an obligation to explore their own perspectives and experience, and to learn about the perspectives and experience of others in order to avoid, as much as possible, acting on the basis of a partial

⁹⁹ “Why is Judicial Independence Important to You?”, *supra* note 14 at 2.

¹⁰⁰ Swinton, “Social Context Blueprint”, *supra* note 31 at 35.

perspective. The stakes in the adjudication of sexual assault could not be higher. Women's equality, personal safety, security, and their confidence in the fairness of the system are at risk. Yet these are often the cases where judges, like Robin Camp, may not know what they don't know. Judges, like everyone else, have unexamined and unacknowledged prejudices that reflect their identity and life experiences and that may be inconsistent with the principles of equality for women. The participation of women serving groups and organizations, as well as sexual assault survivors is therefore particularly valuable in sexual assault education programming.¹⁰¹

Judges, academics and other professionals are essential resources for the development of sexual assault programming. They are well placed to provide useful information about the first two of the three judicial education dimensions: the law of sexual assault; the constitutional principles of substantive equality; some of the judicial skills needed to fairly conduct a sexual assault trial; and academic research and statistics about the social context of sexual assault. However, in most cases, they will not be well placed to understand themselves, let alone educate others, about the actual lived reality of sexual violence, including the intersecting and complex experiences of inequality and discrimination that many women who have been sexually assaulted suffer. Members of the broader community who have been assaulted, and those who directly work with them to provide support and to ensure that their equality rights are protected, have the expertise, knowledge, and experience to provide that context.

There is an inevitable tilt to the judicial partial perspective, which reflects the fact that judges as a group enjoy social, legal, and political privilege. As a result, the education needed to fill gaps inevitably focuses on the experiences and perspectives of those disadvantaged by the status quo, with the least access to power, and whose silences have been ignored.¹⁰² Lawyers and academics have, for the most part, a similar partial perspective. Education developed and presented without the inclusion of community members will be incomplete and potentially ineffective, running the risk of presenting judges with a filtered view of the actual social reality at issue. In the early days of the SCEP, some judges were concerned about hearing from what they considered to be special interest groups¹⁰³ intent on indoctrination and not education. In 2019,

¹⁰¹ These cases can be contrasted with many commercial ones in which the business participants cannot be considered vulnerable and subject to discrimination in the same way.

¹⁰² Cairns-Way, "Contradictory or Complementary", *supra* note 18 at 245–46.

¹⁰³ See Cairns-Way, "Contradictory or Complementary", *supra* note 18, n 66: The question of who is a "special interest group" is fraught with political and ideological baggage. Often the terminology is used as a justification for both exclusion and trivialization. Those who were opposed to receiving information from "special interest groups" as part of

we understand that women's groups and sexual assault survivors are not special interest groups, but groups who wish to ensure that women's constitutional equality rights are respected. The suggestion that including women-serving organizations gives problematic access to special interest groups assumes that ensuring equality and preventing discrimination are ideological positions rather than legal obligations.¹⁰⁴ As long as the contributions of relevant community participants and groups assist with achieving the educational objectives of the program, there is no reasonable basis upon which to exclude them, and every reason to include them. In our view, the real risk to a "balanced" program is the failure to include perspectives which have, perhaps unintentionally and unknowingly, been excluded. The premise that judges alone should determine their needs, and that judges learn best hearing from other judges, is incompatible with an inclusive vision of social context education.

We recognize that professional education, which is experienced as alienating or perceived as an irrelevant time-waster is unlikely to achieve any of its pedagogic objectives. Successful judicial education is education that judge participants want to attend because the programs are valuable, relevant, and objective. This was an important premise of the SCEP. The original Social Context Blueprint specifically acknowledged that programs focused on gender could be enriched by consulting with and incorporating the suggestions of organizations such as, at that time, the National Advisory Committee on the Status of Women, LEAF, the DisAbled Women's Network, and others. The Blueprint supported having non-legal community speakers, including those with strongly held views: "social context education, in introducing judges to other perspectives, cannot be sanitized to hide views that challenge pre-existing beliefs."¹⁰⁵ There is a bright line between what is challenging and difficult and what is inappropriate. Judges should not be shielded from what is uncomfortable; to the contrary, the judicial role involves dealing with the uncomfortable. And, as the education is non-prescriptive, judges can accept some, all, or none of what is presented so long as they take what is said seriously, listen respectfully and with an open mind, using a substantive equality lens.

continuing judicial education tended more often to characterize equality-seeking communities as representing special interests. Lawyers, legal academics, and other judges tended not to be labelled in that way. See: Gregory Hein, "Interest Group Litigation and Canadian Democracy" (2000) 6:2 *Choices: Courts and Legislatures* 1 for an analysis and discussion of interest groups at the Supreme Court of Canada. Hein demonstrates that the interest group(s) who appear most frequently before the Court represent business and corporate interests. See also, FL Morton & Avril Allen, "Feminists and the Courts: Measuring Success in Interest group Litigation in Canada" (2001) 34:1 *Can J Political Science* 55.

¹⁰⁴ Cairns-Way, "Contradictory or Complementary", *supra* note 18, n 66.

¹⁰⁵ Swinton, "Social Context Blueprint", *supra* note 31 at 43-44.

Though the CJC position on the planning and delivery of judicial education starts from the premise that judicial independence requires that judges be protected from inappropriate outside influence, it does not explain the difference between inappropriate influence and necessary public involvement. Examples relating to political interference such as coercion, threats, or harassment, are not readily transferable to the judicial education setting. Yet the distinction is critical because the judiciary agrees in principle that the involvement of non-judges, including members of the non-legal community, is not only appropriate, but essential to effective judicial education on social context.

Determining what is or is not inappropriate depends on what educational goals are being pursued. Judicial education, and social context education in particular, is intended to assist judges in exercising their role as the guardians of Canada's constitutional values by providing hitherto unexamined information or perspective. We agree that the principle of judicial independence requires judicial control of judicial education in the sense of ultimate control, an approach taken by the SCEP. But, using the language of the Social Context Blueprint, ultimate control "does not mean, and should not mean, that the design and delivery of the program must be left only to judges".¹⁰⁶ What is required, as part of an institutional judicial education structure, is a continuous and dynamic collaboration among judges, legal and other academics, and community members with relevant experience and expertise, throughout the program development and delivery process. Doing this entails respectful, careful, open-minded consideration by judges of the views of all participants, including views expressed about how the judicial system could be improved. If, after following such a process, there are disagreements about what is or is not appropriate judicial education that cannot be resolved, the judges should make the decision, keeping in mind the educational goals of the program.

7. Conclusion

If there is to be a serious respect for and public confidence in judicial independence, it will be with more and not less judicial accountability.¹⁰⁷ What does public confidence in the judiciary demand? How can we ensure that the judiciary remains independent at the same time as it is accountable to the public it serves? In this paper, we explored the relationship(s) between judicial independence, judicial accountability, and judicial education at a time of significant public and political concern about the judicial treatment of sexual assault, and, more generally, at a time of

¹⁰⁶ *Ibid* at 8.

¹⁰⁷ Allan Hutchinson, "Towards Judicial Accountability—Are the Excuses getting Lamer" (1996) 45 UNBLJ 44 [Hutchinson].

increasing public awareness of the entrenched reality of female inequality in the face of male power, often expressed through the imposition of sexualized violence. We have described the relatively remarkable events which were catalyzed by the Camp Inquiry, the least of which, perhaps surprisingly, was Justice Camp's eventual resignation. We have explained that the Camp Inquiry motivated the political response of Bill C-337, a Bill which links judicial accountability directly to mandatory training on a specific topic, and which enjoyed unanimous, non-partisan support in the House of Commons. We have suggested that the politicization of judicial education in Bill C-337 triggered a cautiously defensive judicial institutional response. That response conceded the question of mandatory education as long as it was judicially imposed (for recently appointed judges at least), held firm on the necessity of judicial control of that education, and moved subtly towards transparency, by making basic information about judicial education publicly available. A decade ago, one of us argued that:

[T]he current state of judicial education in Canada (written in 2009) reflects the transcendence of an account of judicial independence shaped by the entrenched value of equality, which acknowledges the significance of context and diversity, and which takes seriously the obligations imposed by public accountability. [It is] a conception which ... is about more than shielding the judiciary from inappropriate influence, but which, in fact, obligates the judiciary to reach out to the public in whose interest it serves.¹⁰⁸

While willing to concede the optimistic tenor of that claim, we note that, for the most part, the significance of an entrenched constitutionalized commitment to substantive equality continues to inform the public stance of judicial institutions on both the necessity and the nature of judicial education. We applaud the fact that contemporary Canadian judicial education programming is regularly attentive to diversity, inequality and vulnerability. However, the witness testimony given at the Committee hearings on Bill C-337 offers compelling evidence that relevant public stakeholders, in this case, women's organizations with years of front-line experience, do not feel heard, accounted for, or taken seriously by judicial educators. In other words, there is a serious disconnect between the judicial perception of the power of judicial education to fulfil the judiciary's accountability obligation, and the experience of relevant public stakeholders.

This disconnect is unacceptable. It explains the political attraction of Bill C-337 (even if it is never, as seems increasingly likely, proclaimed in force). The Bill gave politicians the opportunity to take a public stance on sexual violence and the judiciary, and, significantly, in our view, highlighted

¹⁰⁸ Cairns-Way, "Contradictory or Complementary", *supra* note 18 at 223.

the importance of involving public stakeholders in the development of judicial education. It also inserted political expediency into a project that requires care, respect, and collaboration—none of which are hallmarks of the political process. We are disappointed that the official judicial response to Bill C-337 has failed to acknowledge the necessity of that kind of public involvement. In our opinion, public involvement in judicial education is the natural and inevitable result of the inextricable links among impartiality, equality, and independence. We see no necessary contradiction between public participation and judicial independence, and in fact, imagine that the benefits of a “continuous and dynamic collaboration among judges, legal and other academics, and community members with relevant experience and expertise” characterized by respect and open-mindedness will be mutually beneficial. Taking public accountability seriously means recognizing that “with the privilege of power, comes the duty of responsibility.”¹⁰⁹ The events we describe here confirm that now is the time for judicial institutions to reach out to the public they serve, whose confidence they require, and involve them in the task of self-regulation.

¹⁰⁹ Hutchinson, *supra* note 107 at 100.