CANADIAN CRIMINAL JUSTICE ASSOCIATION

BRIEF

Bill S-212, *An Act to amend the Criminal Code (disclosure of information by jurors)*

43rd Parliament, 2nd Session

April 2021

Background of the Canadian Criminal Justice Association (CCJA)

The CCJA is one of the longest serving non-governmental organizations of professionals and lay-persons interested in criminal justice issues in Canada, having begun its work in 1919 and having testified before various Parliamentary committees on numerous occasions. Our Association consists of approximately 500 members from across the country and publishes the *Canadian Journal of Criminology and Criminal Justice*, and the *Justice Report*. We also organize and host the Canadian Congress on Criminal Justice every second year. Two years ago, we celebrated our 100th anniversary.

Purpose of Brief

We appreciate the opportunity to provide our comments and recommendations on Bill S-212: *An Act to amend the Criminal Code (disclosure of information by jurors).* In summary, the CCJA agrees with Bill S-212 and submits that, given the risk of post-verdict impacts on the mental health of jurors, the proposed exception to the juror secrecy rule is necessary and appropriate.

Description of Bill S-212

Bill S-212 was introduced in the Senate on October 27th, 2020. It is a reintroduction of former Bills S-207 (43rd Parliament, 1st Session) and C-417 (42nd Parliament, 1st Session).

Bill S-212 proposes to "amend the Criminal Code to provide that the prohibition against the disclosure of information relating to jury proceedings does not, in certain circumstances, apply in respect of disclosure by jurors to health care professionals"[1]. Currently, section 649 *Crim. C.* makes it an offence for a juror to disclose "any information relating to the proceedings of the jury when it was absent from the courtroom that was not subsequently disclosed in open court", except for purposes relating to the investigation of obstruction of justice offences.

[1] Bill S-212, Summary.

Through Bill S-212, the Honourable Senator Boisvenu proposes an exception that would allow jurors to disclose information in certain specific contexts relating to their health:

> "(2) Subsection (1) does not apply in respect of the disclosure of information for the purposes of […] (c) any medical or psychiatric treatment or any therapy or counselling that a person referred to in subsection (1) receives from a health care professional after the completion of the trial in relation to health issues arising out of or related to the person's service at the trial as a juror or as a person who provided support services to a juror."

Reasons for the Bill

In June 2017, the House of Commons Standing Committee on Justice and Human Rights agreed to conduct a study into counselling and mental health support for jurors. It published in May 2018 a report that made key recommendations to the House of Commons regarding jurors, generally. In response, Michael Cooper's Private Members Bill C-417 was introduced in the House of Commons, which included provisions similar to the current Bill S-212. It had passed through the House with all-party unanimous support, but died with the dissolution of Parliament for the 2019 General Election.

Bill C-417 had received unanimous support because the rationale behind its introduction was compelling. No doubt, legal proceedings dealing with horrible crimes and involving explicit and disturbing evidence can induce stress in certain jurors[2]. Common symptoms can include intrusive thoughts, nightmares, trouble sleeping, the development of phobias, anger, loss of appetite, a sense of isolation from loved ones, hyper-vigilance, depression, anxiety and substance abuse problems[3].

Allowing jurors to disclose some of the content of the deliberation process to a mental health professional is beneficial because being able to talk about it is one of the most effective ways to reduce stress levels[4]. By adhering to a strict interpretation of the juror secrecy rule, the law is perpetuating the negative psychological effects that citizens may be subject to when required by a court to fulfill their jury duty.

This is why, in its May 2018 report, the Standing Committee on Justice and Human Rights recommended "[t]hat the Government of Canada amend section 649 of the Criminal Code so that jurors are permitted to discuss jury deliberations with designated mental health professionals once the trial is over"[5].

The Rationales for Jury Secrecy

A look back at the underlying principles and justifications for jury secrecy is necessary if we are to assess the reasonableness of creating exceptions to this historically unwavering rule.

In 2001, the Supreme Court of Canada thoroughly explored jury secrecy rules in *R. v. Pan; R. v. Sawyer*[6]. What was mainly at issue was the constitutionality of the common law jury secrecy rule, a principle deeply rooted in Canadian criminal law[7]. In parallel it tackled the constitutionality of section 649 *Crim. C.* that criminalizes disclosure of information relating to the jury deliberation process.

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[2] House of Commons, *Improving support for jurors in Canada: Report of the Standing Committee on Justice and Human Rights*, May 2018, 42nd Parliament, 1st session, p. 9 [https://www.ourcommons.ca/Content/Committee/421/JUST/Reports/RP9871696/justrp20/justrp20-e.pdf]
[3] *Id.*, p. 24.
[4] *Id*., p. 30.
[5] *Id.*, p. 30-32.
[6] *R. v. Pan, R. v. Sawyer*, 2001 SCC 42.
[7] *Id.,* par. 47.

The Court identified three rationales that have historically justified jury secrecy in Canadian criminal law. The first and foremost benefit to jury secrecy is that it promotes frank and candid debate among jurors during the deliberation process:

> "The first reason supporting the need for secrecy is that confidentiality promotes candour and the kind of full and frank debate that is essential to this type of collegial decision making. While searching for unanimity, jurors should be free to explore out loud all avenues of reasoning without fear of exposure to public ridicule, contempt or hatred. This rationale is of vital importance to the potential acquittal of an unpopular accused, or one charged with a particularly repulsive crime. In my view, this rationale is sound, and does not require empirical confirmation."[8]

Additionally, jury secrecy enables "finality of the verdict" and its "solemnity", a notion that the Supreme Court somewhat, but not fully, agreed with:

> "The Court of Appeal also placed considerable weight on the second rationale for the secrecy rule: the need to ensure finality of the verdict. Describing the verdict as the product of a dynamic process, the court emphasized the need to protect the solemnity of the verdict, as the product of the unanimous consensus which, when formally announced, carries the finality and authority of a legal pronouncement. That rationale is more abstract, and inevitably invites the question of why the finality of the verdict should prevail over its integrity in cases where that integrity is seriously put in issue. In a legal environment such as ours, which provides for generous review of judicial decisions on appeal, and which does not perceive the voicing of dissenting opinions on appeal as a threat to the authority of the law, I do not consider that finality, standing alone, is a convincing rationale for requiring secrecy"[9].

Finally, the secrecy rule promotes the safety of jurors and protects them from reprisals:

> "The respondent, as well as the interveners supporting its position and, in particular, the Attorney General of Quebec, place great emphasis on the third main rationale for the jury secrecy rule – the need to protect jurors from harassment, censure and reprisals. Our system of jury selection is sensitive to the privacy interests of prospective jurors (see *R. v. Williams*, 1998 CanLII 782 (SCC), [1998] 1 S.C.R. 1128), and the proper functioning of the jury system, a constitutionally protected right in serious criminal charges, depends upon the willingness of jurors to discharge their functions honestly and honourably. This in turn is dependent, at the very minimum, on a system that ensures the safety of jurors, their sense of security, as well as their privacy."[10]

Essentially, the Court explained that "[t]he secrecy of the deliberation process, both during and after the conclusion of the trial, is a vital and necessary component of the jury system"[11] and that it "serves to maintain public confidence in the criminal justice system"[12].

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[8] *Id.,* par. 50.
[9] *Id.*, par. 51.
[10] *Id.*, par. 52.
[11] *Id.*, par. 82.
[12] *Id.,* par. 89. See also *R.* v. *Lewis*, 2017 ONCA 216, par. 43.

Strengths and Weaknesses of Bill S-212

The CCJA believes that this Bill should be fully supported. Given its purpose and the limited settings in which jurors would be allowed to disclose information relating to the jury deliberation process, the risk of it affecting any of the three rationales justifying the jury secrecy rule (as outlined above) seems fairly low[13].

However, we recommend that proposed subsection 649(3) be modified to include a carefully crafted definition of the term "health care professional". Such a definition should balance the need to make health services for jurors as accessible as possible with the need to preserve the secrecy of the jury deliberation process. We believe the definition should include any mental health service provider who is under a *legal, professional, or cultural obligation to maintain confidentiality* with respect to information disclosed during the provision of services. This would evidently include physicians (including psychiatrists) and psychologists who are licensed and/or accredited to provide health services under applicable provincial legislation[14]. In addition, for the purpose of offering necessary support to jurors in a more inclusive and accessible way, we suggest that it should also include professionals and counsellors such as therapists, social workers, religious counsellors and Indigenous Elders (following consultations with First Nations, Métis and Inuit).

We are aware that a wider definition of "health care professional" increases the risk that the content of jury deliberations will be leaked. Indeed, while licensed health care professionals such as physicians and psychologists adhere to codes of conduct that include specific codified obligations to maintain professional secrecy regarding what they are told by their patients, other professional don't necessarily have such enforceable *legal* obligations. Yet, these other professionals can offer necessary and much more accessible support and services to jurors who need it. On balance, we believe that including professionals who are under a *legal, professional, or cultural obligation to maintain confidentiality* with respect to information disclosed during mental health care sessions would pose little or no risk to the jury secrecy rule.

Equity considerations

There is evidence that BIPOC (Black, Indigenous, People of Colour) individuals who serve on juries experience more severe symptoms of PTSD following the completion of criminal trials (Hispanic as compared to White jurors, in this study).[15] Researchers propose that it is possible that because BIPOC individuals experience higher rates of victimization, and because their PTSD symptoms are often associated with victimization, these previous experiences may amplify the risk of suffering PTSD symptoms

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[13] House of Commons, prec., note 2, p. 31.

[14] For instance, in the province of Québec:

> *Code of Ethics of Physicians*, CQLR c M-9, r 17:
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> > "20. A physician, in order to maintain professional secrecy,
> > (1) must keep confidential the information obtained in the practice of his profession;
> > […]"
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> *Code of ethics of psychologists*, CQLR c C-26, r 212:
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> > "15. Psychologists, for the purpose of preserving professional secrecy,
> > (1) must not disclose any information on their client, except the information authorized in writing by the client, or verbally in an emergency, or unless so ordered by law.
> > […]"
>
> Physicians and psychologists may however communicate information protected by professional secrecy in order to prevents acts of violence, including suicides (*Code of Ethics of Physicians*, par. 21; *Code of ethics of psychologists*, par. 18).

See also the *Code of Ethics of the Canadian Medical Association:*

> "22. Respect the patient's right to confidentiality except when this right conflicts with your responsibility to the law, or when the maintenance of confidentiality would result in a significant risk of substantial harm to others or to the patient if the patient is incompetent; in such cases, take all reasonable steps to inform the patient that confidentiality will be breached.

[15] Pole, N., Best, S.R., Metzler, T., & Marmar, C.R. (2005). Why are Hispanics at Greater Risk for PTSD? Cultural Diversity and Ethnic Minority Psychology, 11, 144-161.

as a result of exposure to explicit and disturbing evidence.[16] Authors[17] speculate that as individuals from marginalized communities often have less access to sources of social support, this might further explain the relative severity of PTSD symptoms for BIPOC jurors after criminal trials. Thus, the need for legislation that facilitates juror access to mental health services from trusted mental health professionals is particularly evident and urgent for members of these communities.

Conclusion

In conclusion, the CCJA supports Bill S-212 and is of the view that, given the risk of post-verdict mental health consequences for jurors, the proposed *exception* to the juror secrecy rule is necessary and appropriate. However, as explained, it is also our view that this exception should be wide enough to ensure the *accessibility* of these services to jurors who need them.

Furthermore, it seems unfair for a juror to have to suffer the financial costs of treatment where health issues develop as a result of being *required* by the state to fulfill a civic duty that can be not only time consuming, but potentially traumatic as well. While the provinces and territories are responsible for the costs associated with juries, we strongly suggest that the federal government participate financially and assist the provinces and territories to devote funds for this purpose. The CCJA urges the federal government to consider utilizing a mechanism such as a federal-provincial-territorial cost-sharing agreement to provide resources to indemnify jurors for any costs associated with health care services required as a result of their jury service.

Finally, we submit that, if Bill S-212 is passed, all official participants in a jury trial (judges, court officials, counsel) should make certain that jurors are aware of this exception to the jury secrecy rule and of their right to fully avail themselves of such services, where needed. One way of doing so would be for presiding judges to be certain to explain the terms of s. 649 and its limits (as amended) in their charge to the jury.

Recommendations:

1. Add to Bill S-212 a carefully crafted definition of the term “health care professional” which would include any mental health service provider who is under a *legal, professional, or cultural obligation* to maintain confidentiality with respect to information disclosed during the provision of health services.

2. The legislated definition of “health care professional” should be developed in consultation with the provinces and territories given their regulatory responsibilities for these professions, and should include physicians, psychiatrists, psychologists, qualified therapists, social workers, religious counsellors and Indigenous Elders (following appropriate consultations with First Nations, Métis and Inuit).

3. The federal government should ensure adequate funding for juror support services.

[16] MacDonald, C., Chamberlain, K., & Long, N.R. (1997). Race, combat, and PTSD in a community sample of New Zealand Vietnam War veterans. Journal of Traumatic Stress, 10, 117-124. Briere, J.N., & Elliott, D.M. (1998). Clinical utility of the Impact of Event Scale: psychometrics in the general population. Assessment, 5, 171-180.

[17] Feldman, T.B., & Bell, R.A. (1991). Crisis debriefing of a jury after a murder trial. Hospital and Community Psychiatry, 42, 79-81. Thompson, M., Norris, F., & Ruback, B. (1998). Comparative distress levels of inner-city family members of homicide victims. Journal of Traumatic Stress, 11, 223-242.