THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Bill S-7 – *Zero Tolerance for Barbaric Cultural Practices Act*

CANADIAN BAR ASSOCIATION
CRIMINAL JUSTICE AND IMMIGRATION LAW SECTIONS, CHILDREN'S LAW COMMITTEE AND SEXUAL ORIENTATION AND GENDER IDENTITY CONFERENCE

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Criminal Justice and Immigration Law Sections, Children's Law Committee and Sexual Orientation and Gender Identity Conference, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the CBA.

TABLE OF CONTENTS

BILL S-7 – *ZERO TOLERANCE FOR BARBARIC CULTURAL PRACTICES ACT*

Bill S-7 – *Zero Tolerance for Barbaric Cultural Practices Act*

I. INTRODUCTION

The Canadian Bar Association (CBA) appreciates the opportunity to comment on Bill S-7, *Zero Tolerance for Barbaric Cultural Practices*.[1] This submission represents a collaboration of the National Criminal Justice Section (which represents a balance of Crown and defence lawyers), the National Immigration Law Section (representing specialists in immigration and refugee law), the Children's Law Committee (provides input to CBA Sections on children's rights issues) and the Sexual Orientation and Gender Identity Conference (raises legal issues of particular concern to lesbian, gay, bisexual, transgendered and two-spirited people).

A. Rationale for Bill S-7

The government's rationale for Bill S-7 is to address violence against women and children in Canada and to protect victims of crime. Citizenship and Immigration Minister Chris Alexander said:

> With the *Zero Tolerance for Barbaric Cultural Practices Act*, we are strengthening our laws to protect Canadians and newcomers to Canada from barbaric cultural practices. We are sending a strong message to those in Canada and those who wish to come to Canada that we will not tolerate cultural traditions in Canada that deprive individuals of their human rights.[2]

The CBA supports legislation that provides effective tools to eradicate gender discrimination, inequality and violence against women. Practices like imposing marriage on women and girls against their will are antithetical to the values and rights enshrined in the *Canadian Charter of Rights and Freedoms*, as well as international human rights instruments that Canada has

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1 Canada, Bill S-7, *An Act to amend the Immigration and Refugee Protection Act, the Civil Marriage Act and the Criminal Code and to make consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2014 (Bill S-7).

2 Government of Canada, "News Release: Protecting Canadians from Barbaric Cultural Practices" (5 November 2014), online: http://news.gc.ca/web/article-en.do?nid=900399.

ratified.[3] These practices cannot be condoned, whether they take place in Canada or elsewhere in the world.

While accepting the underlying premise of the Bill, the CBA has concerns about aspects of the Bill, notably the immigration provisions, amendments to the provocation defence under section 232 of the *Criminal Code* and the Bill's actual impact on women and children. We make several suggestions to assist the government in ensuring that the Bill will effectively accomplish the goal of protecting women and children in Canada and internationally.

B. Short title of Bill S-7

The short title for Bill S-7 – *Zero Tolerance for Barbaric Cultural Practices Act* – suggests that violence against women and children is a cultural issue limited to certain communities. This is divisive and misleading, and oversimplifies the factors that contribute to discrimination and violence against women and children.

In general, we recommend that short titles be used to succinctly and neutrally indicate the Bill's subject matter or any other Acts to be amended by the Bill (eg *Criminal Code* amendments (provocation defence).

II. IMMIGRATION AND REFUGEE PROTECTION ACT

Bill S-7 would add section 41.1 to the *Immigration and Refugee Protection Act*:[4]

> 41.1 (1) A permanent resident or a foreign national is inadmissible on grounds of practising polygamy if they are or will be practising polygamy with a person who is or will be physically present in Canada at the same time as the permanent resident or foreign national.
>
> (2) For the purposes of subsection (1), polygamy shall be interpreted in a manner consistent with paragraph 293(1)(*a*) of the *Criminal Code*.[5]

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3 *The Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13; *International Covenant on Civil and Political Rights,* 19 December 1966, 999 UNTS 171; Organization of American States, *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, 9 June 1994 (entered into force 9 June 1994); *Declaration on the Elimination of Violence against Women*, GA Res 48/104, UNGAOR, 86th Sess, Supp No 49, UN Doc A/48/49 at 217.

4 *Immigration and Refugee Protection Act*, SC 2001, c 27.

5 Bill S-7, *supra* note 1, clause 2.

The CBA supports measures to protect women and children. We question whether an amendment to render those who "practice polygamy" inadmissible to Canada is necessary or would advance that goal because:

- the Canadian immigration system already has mechanisms to prevent the immigration of polygamous persons to Canada.
- evidence indicates that the practice of polygamy is rare in Canada.[6]
- the legal boundaries of "practising polygamy" have not been clearly defined by the courts and would be difficult to apply in the immigration context.
- keeping women and children in polygamous relationships from immigrating to Canada does not contribute to their protection.

A. Polygamous Persons Prevented from Immigrating to Canada

Polygamy is illegal in Canada and Canada has means beyond criminalization to restrict the immigration of polygamous families to Canada. The *Immigration and Refugee Protection Act* already imposes restrictions on family class immigration that effectively prohibit multiple spouses from being recognized:

- A foreign national seeking to become a permanent resident may have only one spouse.
- A temporary resident who practices polygamy in their country of origin is generally allowed to enter Canada with only one spouse.
- A permanent resident may be found criminally inadmissible for practising polygamy if they are convicted under section 293 of the *Criminal Code* and receive a term of imprisonment of more than six months, or found inadmissible for misrepresentation if they lied about being involved in a polygamous relationship when they became a permanent resident.

B. Polygamy is Rare in Canada

The rationale for additional legislation to control the practice of polygamy, which does not appear a widespread problem for Canada, is unclear.

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6 See *infra*, at 4 and notes 8-10.

The most comprehensive examination and legal study of the practice of polygamy in Canada took place in the British Columbia *Polygamy Reference*.[7] Evidence in that case showed that polygamy is practiced in isolated fundamentalist Mormon communities in the US and Canada, and by a "small number" of North American Muslims.[8]

According to one expert who testified in the case, polygamy among Muslims in Canada is generally taboo, not only because it is illegal in Canada, but because it is considered shameful.[9] These factors make it difficult to determine the extent to which polygamy is actually practiced in North America, but we are unaware of any evidence that it is a widespread problem.[10]

C. "Practising Polygamy" Not Clearly Defined

Bill S-7 is unclear about when a person would be considered to be "practising polygamy" from a legal perspective in the immigration context. The immigration provision would rely on the *Criminal Code* definition, which has been interpreted in various ways.

Section 293(a) of the *Criminal Code* criminalizes anyone who "practises or enters into or in any manner agrees or consents to practise or enter into a union that represents:

(i) any form of polygamy, or

(ii) *any kind of conjugal union with more than one person at the same time* whether or not it is by law recognized as a binding form of marriage.[11] (emphasis added)

The language in (ii) is broad and ambiguous and the potential for differing interpretations was abundantly clear during the *Polygamy Reference*.

The court in that case outlined the federal government's position on overseas marriages:

> [935] The AG Canada submits that s. 293(1)(a)(i) prohibits the practice of entering into multiple simultaneous marriages that are legally valid under the law where they were celebrated. Given that it is not legally possible to marry multiple people in Canada, this offence should be interpreted as referring to non-residents of Canada who marry their spouses in a foreign country in accordance with its laws and then

7 *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588.

8 *Ibid.* at para 236.

9 *Ibid.* at para 426.

10 *Ibid.* at para 429.

11 *Criminal Code,* section 293(a).

> come to Canada. Upon their arrival in Canada, they are practising polygamy within the meaning of that subsection.[12]

Some examples illustrate the difficulties in applying the proposed amendment in the Canadian immigration context:

- If someone arrives in Canada alone, but is in a polygamous marriage elsewhere in the world, is that person "practising polygamy"?
- If a person in a polygamous relationship is in Canada and a spouse "will be" anywhere in Canada at some point in the future, the person would be "practising polygamy".
- If someone visits Canada alone, but is in a polygamous marriage with someone outside Canada, are they "practising polygamy" if they communicate with or send money to a spouse abroad? What if communication with a spouse is only through electronic means?
- If someone visits Canada without a spouse, but with children from multiple spouses, is that person "practising polygamy"?
- If a visitor to Canada is accompanied by spouses, but lives separately, and does not talk to or interact with spouses, is the visitor "practising polygamy"?

The reach of this provision should be clarified before it becomes part of Canadian law.

D. Protecting Women

Protecting women is one articulated goal of Bill S-7, but the Bill overlooks the broader impact of the targeted practices on women in affected countries. From an immigration perspective, any woman subjected to the stated cultural practices would be inadmissible to Canada if she is or will be practising polygamy with another person who is or will be physically present in Canada at the same time. A woman who legally entered a polygamous marriage abroad will be inadmissible to Canada if her husband is in the country at the same time as she or is going to be in future. The broad scope of that prohibition is illustrated by the examples above.

Rather than protecting women, this would go against Canada's obligation to protect the human rights of all women, particularly those forced or coerced to comply with certain cultural practices against their will. Those women will not have the opportunity to come to Canada and be afforded the respect and protection that Canadian women are offered.

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12 *Polygamy Reference*, *supra* note 7 at para 935.

Permanent residents who start or resume a polygamous relationship in Canada could be found inadmissible on that basis alone, without evidence of misrepresentation in the immigration application or criminal conviction. The basis for determining inadmissibility is unclear. If a tip was made anonymously, would that suffice? What procedural protections would be afforded to the permanent resident and dependents if a concern was raised?

E. Protecting Children

The inadmissibility provisions could also harm children of polygamous unions, by removing their parent(s) from Canada, removing the children themselves from Canada, and infringing their rights under international law.

The negative consequences of forced marriage highlight the need for Canada to continue to provide asylum and humanitarian and compassionate consideration to foreign national children (predominantly female) who come to Canada to escape such practices, and to provide support services to those children once they arrive. Given the potential impact on children and the range of tools already available to address the relatively small problem of polygamy in Canada, we question whether the amendments in Bill S-7 are necessary.

Canada has ratified the *Convention on the Rights of the Child*,[13] which includes children's right to be protected from separation from their parents, except in the best interests of the child (Article 9), the right to family reunification and the right to maintain regular and direct contacts with both parents should children be separated from them across borders (Article 10).[14]

Under Bill S-7, children of polygamous relationships could not be in Canada with both parents at the same time. The children would lose the benefit of a meaningful relationship with one parent while only the temporary resident parent remains in Canada.

Canadian-born children could lose a relationship with a parent removed from Canada on grounds of inadmissibility because of polygamy. If one parent is subject to removal and the other has no status in Canada, children could potentially lose both parents if they are left in Canada with extended family, friends or in foster care. This is in addition to the loss of financial support and other benefits caused by the removal of a parent. Foreign national children could

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13 *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 [*Convention on the Rights of the Child*]. See also UNICEF Canada Brief to the House of Commons Standing Committee, February 2015, on Bill S-7: *Zero Tolerance for Barbaric Cultural Practices Act.*

14 *Ibid*.

themselves face removal, losing established ties to community, friends, family and services in Canada.

Finally, children left behind in the country of origin could lose financial support, educational or other opportunities, access to necessary health care or other services, and stigmatization from "illegitimacy" caused when the parent seeking admission to Canada as a permanent resident must "convert" their polygamous marriage to a monogamous one. A foreign national in a polygamous relationship seeking temporary admission to Canada would be prevented from entering with even one spouse, raising the possibility that children will be left with the other parent in the country of origin.

III. PROVOCATION DEFENCE

The provocation defence in common law goes back as far as the 16th century. It has been in Canada's *Criminal Code* since its inception in 1892, and its defining elements have remained substantially the same since.

The defence under section 232 of the *Code* is tightly circumscribed. It only applies in cases where an accused has committed a murder (culpable homicide)[15] and does not allow a complete defence to a murder charge. If accepted by the court, the effect of the provocation defence is to reduce what would otherwise be a conviction for murder to a manslaughter conviction.

The very limited availability of the provocation defence should remain in place in its existing form.[16] Bill S-7 proposes a radical departure from the traditional defence. It would redefine the constituent elements of section 232 and the provocation defence. We support legislative change when an existing statutory framework fails to respond to the collective needs of Canadian society, and acknowledge that antiquated and outdated laws ought to be scrutinized and amended as necessary. However, this type of change should not occur on a piecemeal basis but should consider the impact on the legislation at issue overall.

While research and a principled reassessment may ultimately demonstrate that amendments to the provocation defence are required, Parliament should not modify a long-standing law

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15 *Criminal Code,* section 232.

16 The CBA Criminal Justice Section has previously argued against piecemeal reform, and suggested a comprehensive review before changes are made. See, for example, letter from H. McVey to R. Mosley, QC, *Reform to defence of provocation* (Ottawa: CBA, 2001).

without an informed and comprehensive assessment of the justifications for amending the provocation defence, the relevant jurisprudence, and the practical impact of the amendment on the criminal justice system as a whole. Consultations with key stakeholders would provide meaningful insight into the efficacy of the existing provocation provisions. These steps have not occurred in regard to the changes to the provocation defence proposed in Bill S-7.

A. The Proposal

Section 232 of the *Criminal Code* reads:

> 232. (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.
>
> (2) *A wrongful act or an insult* that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.
>
> (3) For the purposes of this section, the questions
>
> (*a*) whether a particular wrongful act or insult amounted to provocation, and
>
> (*b*) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,
>
> are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being. (emphasis added)

Clause 7 of Bill S-7 would amend the definition of provocation under section 232(2) of the *Code* by replacing the words "wrongful act or insult" with "conduct of the victim that would constitute an indictable offence under this Act that is punishable by five or more years of imprisonment."[17] CBA has previously argued against raising the threshold for the use of the provocation defence, and this would significantly raise that threshold.

B. Murder for "Honour"

One justification for this substantial change appears to be that the provocation defence has been or will be relied on in so-called "honour killing" cases. Again, the current provocation defence does not excuse accused persons from criminal liability, but merely limits their legal culpability in certain limited circumstances. The provocation defence is simply not a "get out of

17 Bill S-7, *supra* note 1, clause 7(1).

jail free" pass for defendants in "honour killing" cases. We urge government leaders to address this misconception.

On December 4, 2014, Immigration Minister Chris Alexander told the Senate Committee on Human Rights that:

> [t]he defence of honour as a basis for provocation has been used dozens of times in Canada and its very existence under our criminal law weakens the defence that women and girls deserve to have in their own homes from their own relatives. We should not be allowing there to be any concept of family honour, however construed, as a mitigating factor for the murder of a family member. (…) It could be used in the future and its very existence sends a message to men... that their honour is somehow at stake and could be used to defend them in a court of law from the charge of murder.[18]

Senator Attaulahjan, who moved the second reading of the Bill on November 18, 2014, said:

> Measures in the bill would also amend the *Criminal Code* to address so-called honour killings, where so-called honour-based violence is perpetrated against family members — usually women and girls — who are perceived to have brought shame or dishonor to the family. Honour killings are usually premeditated and committed with some degree of approval from family and/or community members. However, in some cases alleged spontaneous killings may be in response to behaviour by the victim, who is perceived to be disrespectful, insulting or harmful to a family's reputation.[19]

If Canadian courts were routinely allowing cultural and religious beliefs to justify killing innocent women and children, the need for legislative action would be clear. In fact, our experience is that the provocation defence would not apply in such cases. We are unaware of any Canadian court that has allowed the perpetrator in any "honour killing" case to successfully use the provocation defence to justify actions based on a system of beliefs that condones violence against women. On the contrary, courts have sent a strong message that there is absolutely no place for violence against women in Canadian society.

The CBA denounces any attempt to justify, excuse or reduce a person's responsibility for killing another person by asserting that the murder is less repugnant because it was done for "honour." Neither Canadian courts nor the *Criminal Code* authorize any reduction of criminal

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18 Standing Senate Committee on Human Rights, *Evidence* (4 December 2014). See also, CBC News, "'Barbaric cultural practices' bill hearing leads to snarky exchange" (4 December 2014), online: www.cbc.ca/news/politics/barbaric-cultural-practices-bill-hearing-leads-to-snarky-exchange-1.2860352.

19 *Debates of the Senate (Hansard)*, 41st Parl, 2nd Sess, No 149 (18 November 2014) (Hon Salma Ataullahjan).

culpability based on revenge, retribution or cultural beliefs inconsistent with Canadian fundamental values, such as gender equality. This rationale for the Bill is unfounded.

Judicial response to provocation defence

Before the provocation defence can be used, the Crown must first prove murder beyond a reasonable doubt. Only then does the defence have the potential to reduce a conviction from murder to manslaughter. That can happen only if each element of the defence is also proven beyond a reasonable doubt.[20]

Over its long history, legal limitations have been imposed on the provocation defence. In *R v Tran*, the Supreme Court explained its historical development:

> [13] The defence of provocation, presently codified in s. 232 of the *Criminal Code*, has its origins in the English common law. More specifically, its precursor lies in the sixteenth century concept of "chance-medley" killings.
>
> [14] During the seventeenth century, another trend in the law of homicide emerged. It provided that anyone charged with murder was presumed to have acted with "malice aforethought", for which the punishment at the time was death. In response to the severity of the law, *the courts resorted to the separate crime of manslaughter to take into account certain human frailties that would operate to rebut the presumption. One such concession to human frailty was that the accused had been provoked into committing the act* (Department of Justice, *Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property: A Consultation Paper* (1998), at p. 2).[21] (emphasis added)

The defence takes into account "mitigating" circumstances that could reduce murder to manslaughter in certain situations, again only if all elements of the defence are proven beyond a reasonable doubt. In essence, "[p]rovocation is an allowance made for human frailty which recognizes that a killing – even an intentional one – may be accompanied by a complete loss of self-control that makes the act less heinous than an intentional killing by someone with rational intent."[22]

In *R v Humaid*, the Ontario Court of Appeal held that the provocation defence cannot apply where the accused acted based on revenge, retribution or a cultural belief that homicide is an appropriate response:

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20 *R v Humaid* (2006), 81 OR (3d) 456, 208 CCC (3d) 43 (Ont CA) [*Humaid*].

21 *R v Tran*, 2010 SCC 58 at paras 13, 14 [*Tran*].

22 Michael Spratt, *The honour killing bill: Who's the barbarian now?* (November 18, 2014), online: iPolitics www.ipolitics.ca/2014/11/18/the-honour-killing-bill-whos-the-barbarian-now/.

> [85] … Provocation does not shield an accused who has not lost self-control, but has instead acted out of a sense of revenge or a culturally driven sense of the appropriate response to someone else's misconduct. An accused who acts out of a sense of retribution fuelled by a belief system that entitles a husband to punish his wife's perceived infidelity has not lost control, but has taken action that, according to his belief system, is a justified response to the situation: see *R. v. Dincer*, [1983] 1 V.R. 450 (Vic. S. Ct.), at p. 464.
>
> [86] … If an accused relies on religious and cultural beliefs like those described by Dr. Ayoub to support a provocation defence, the trial judge must carefully instruct the jury as to the distinction between a homicide committed by one who has lost control and a homicide committed by one whose cultural and religious beliefs lead him to believe that homicide is an appropriate response to the perceived misconduct of the victim. Only the former engages the defence of provocation. The latter provides a motive for murder.[23]

The Court further held that the provocation defence cannot be based on beliefs that go against fundamental Canadian values, such as gender equality:

> [93] … The difficult problem, as I see it, is that the alleged beliefs which give the insult added gravity are premised on the notion that women are inferior to men and that violence against women is in some circumstances accepted, if not encouraged. *These beliefs are antithetical to fundamental Canadian values, including gender equality.* It is arguable that as a matter of criminal law policy, the "ordinary person" cannot be fixed with beliefs that are irreconcilable with fundamental Canadian values*. Criminal law may simply not accept that a belief system which is contrary to those fundamental values should somehow provide the basis for a partial defence to murder.*[24] (emphasis added)

In *Tran,* the accused claimed that seeing his wife's sexual involvement with another man amounted to an "insult" that provoked him to attack her. The Supreme Court of Canada held that this "insult" was insufficient to excuse a loss of control, within the meaning of section 232, "for the ordinary person of whatever personal circumstances or background."[25] The Court further stated:

> It follows that the ordinary person standard must be informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the *Canadian Charter of Rights and Freedoms*. For example, it would be appropriate to ascribe to the ordinary person relevant racial characteristics if the accused were the recipient of a racial slur, but it would not be appropriate to ascribe to the ordinary person the characteristic of being homophobic if the accused were the recipient of a homosexual advance. Similarly, there can be no

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23 *Humaid, supra* note 20 at paras 85-86.

24 *Ibid* at para 93.

25 *Tran, supra* note 21 at para 7.

> place in this objective standard for antiquated beliefs such as "adultery is the highest invasion of property" (*Mawgridge*, at p. 1115), nor indeed for any form of killing based on such inappropriate conceptualizations of "honour".[26]

The "ordinary person" test that applies to the provocation defence clearly deals with a Canadian person, and the courts have articulated that beliefs "antithetical to fundamental Canadian values" cannot shield an accused from murder based on the notion that violence against women is justified in certain situations.

The passage above similarly addressed concerns about a "gay panic" defence in murder prosecutions (also known as "homosexual panic" or "trans-panic"). An accused person claims they were the object of a same-sex or transgender victim's romantic or sexual advances, and these advances provoked the homophobic/transphobic accused into a psychotic state that brought them to commit a physically-violent crime.[27]

The CBA supports improvements in the law to recognize the human rights of lesbian, gay, bisexual and transgender people and members of other equality-seeking groups.[28] The CBA has also previously supported maintaining the provocation defence for exceptional cases.[29]

Limiting the availability of the defence to instances where the victim's conduct itself constitutes an indictable offence, as proposed by Bill S-7, would further narrow its availability. That might be necessary if the defence were being inappropriately accepted by Canada's appellate courts. However, without evidence of a problem, the CBA is opposed to the significant legislative change proposed to the provocation defence in Bill S-7. Credible evidence, careful research and broad consultation should found any such change.

C. Practical and Procedural Considerations

Due to the trial judge's gatekeeper function, the provocation defence rarely goes to the jury. The Supreme Court of Canada addressed this issue in *Tran*, stating that:

> [i]n a jury trial, the judge is the gatekeeper and judge of the law and must therefore put the defence to the jury only where there is evidence upon which a "reasonable jury acting judicially" could find that the defence succeeds…This necessarily requires

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26 *Ibid.* at para 34.

27 Canadian examples, both from over 30 years ago, include *R v Fraser*, [1979] AJ No. 17 (Alta. Supreme Court); *R v Andes*, [1980] OJ No. 812 (C.A.)

28 See, for example, CBA submission on Bill C-38, *Civil Marriage Act* (Ottawa: CBA, 2005).

29 *Supra* note 16.

> that there be a sufficient evidential basis in respect of *each component of the defence* before it is left to the jury: the evidence must be reasonably capable of supporting the inferences necessary to make out the defence before there is an air of reality to the defence.[30] (emphasis added)

The Court unequivocally ruled that an accused cannot invoke the provocation defence where the homicide was motivated by "honour" or revenge, foreclosing the risk suggested as requiring redefinition of the defence.[31]

In addition to being unnecessary, the proposed changes in Bill S-7 could result in trial management problems. The Bill's amended definition of provocation would create uncertainty and additional complexity in murder trials, with the inevitable and undesirable consequences of longer trials, more court delays and increased court administration costs.

"Air of reality" assessment

The trial judge must assess whether there is an "air of reality" to a provocation defence asserted by the accused before the defence is put to a jury. Currently, it is relatively straightforward for a trial judge to make that determination about a claim that the deceased's actions constitute a "wrongful act" or "insult", although these triggering events are not themselves defined in the *Code*.

This initial gatekeeping assessment would be far more complicated under the amended definition of provocation proposed by Bill S-7. A trial judge would have to determine whether there is an "air of reality" to an allegation that the conduct of the deceased "would constitute an indictable offence under [the *Criminal Code*] that is punishable by five or more years of imprisonment."[32] It is unclear what evidence would be required to establish an "air of reality" to an accused's assertion that the deceased's conduct would constitute an indictable offence for which incarceration for five years or more could have been imposed.

Procedural and evidentiary considerations

New procedural issues will likely arise from the proposed amendments to section 232 of the *Code*. At what stage of a murder trial would evidence be heard on whether the deceased's conduct amounts to an indictable offence? What is the specific structure for trial judges to

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30 *Supra* note 21 at para 41.

31 *Ibid*.

32 Bill S-7, *supra* note 1, clause 7(1).

conduct the "air of reality" assessment? For example, will evidence specific to that assessment be heard in a pre-trial motion or a *voir dire*? In our view, each option for conducting the "air of reality" assessment is fraught with complexity and would add significant time to criminal trials.

Given the more restrictive definition of provocation proposed by Bill S-7, the "air of reality" assessment will likely necessitate an extensive evidentiary record and lengthy legal submissions from Crown and defence counsel. Paradoxically, at this stage of a murder trial, there will be an inversion of roles for Crown and defence counsel. The defence will effectively need to prove that the victim committed a serious indictable offence to come within the ambit of the amended definition of provocation. Unless in agreement with the accused's assertion of provocation, the Crown will effectively be required to defend the deceased – all in the context of a trial for the most serious criminal offence, murder.

Further, it is unclear if the Crown will be permitted to call evidence in defence of the deceased, and, if allowed, what the permissible scope of this evidence will be. This is especially important if the Crown's responding evidence has no material bearing upon any other issues at trial.

Considering these complex procedural and evidentiary issues, the ultimate issue of whether provocation is made out – an issue properly left for the jury to assess – will probably be determined by the trial judge's ruling at the "air of reality" stage.

Burden of proof

The burden of proof the accused must meet to establish an air of reality to the claim that the deceased committed an indictable offence immediately before being killed is not specified. Must the defence prove the deceased's indictable offence on a balance of probabilities or beyond a reasonable doubt, prior to the trial judge determining the "air of reality" issue? The amended definition of provocation may result in the trial judge's finding, as gatekeeper, effectively usurping the role of the jury.

Jury's role

Presuming the trial judge does allow the provocation defence to be put to the jury, there is still uncertainty about the nature of the instructions the judge would provide to the jury. Jurors would need to be instructed on whether they are required to make specific factual findings about the degree of culpability of the deceased, and whether the deceased would have been found guilty if tried for the indictable offence being alleged by the accused.

Again, the burden on the accused to prove that the deceased's conduct amounts to an indictable offence is unclear (whether a balance of probabilities or beyond a reasonable doubt).

Self defence

Under Bill S-7, the deceased's conduct would have been very serious for the accused to successfully raise the partial defence of provocation. Indeed, the threshold is that the conduct of the deceased would amount to an indictable criminal offence with liability of incarceration for five years or more. Given the seriousness of the conduct against the accused, it would likely also support an argument for self-defence.

It is difficult to conceive of circumstances where an "air of reality" would exist for the amended definition of provocation but not for self-defence. In other words, the proposed provocation defence would effectively be subsumed under the self-defence regime, and would no longer exist as a stand-alone defence under the *Code*. Provocation would become a "lesser and included defence." Given this similarity, an accused could likely advance self-defence as the principal defence, with provocation as an alternative if self-defence is rejected by the jury.

IV. *CIVIL MARRIAGE ACT* AMENDMENTS

The CBA supports adding section 2.1 to the *Civil Marriage Act*, to state that "[M]arriage requires the free and enlightened consent of two persons to be the spouse of each other."[33] We agree that steps to reduce the incidence of forced marriage are laudable.

Forced marriage has been considered by the UN Committees on the Rights of the Child, and the Elimination of Discrimination against Women and the negative consequences of this practice highlighted:

> 20. In some contexts, children are betrothed or married very young and in many cases, young girls are forced to marry a man who may be decades older. In 2012, UNICEF reported that almost 400 million women aged 20-49 around the world were married or had entered into union before they reached 18 years of age.[1] Therefore the CEDAW and CRC Committees have been giving a particular attention to cases where girls have been married against their full, free and informed consent, such as when they have been married too young to be physically and psychologically ready for adult life or making conscious and informed decisions and thus not ready to consent to marriage. Other examples include cases where the guardians have the legal authority to consent to marriage of girls in accordance with customary or statutory law and in which girls are thus married contrary to the right to freely enter into marriage.

33 *Supra* note 1, clause 4.

> 21. Child marriage is often accompanied by early and frequent pregnancies and childbirth, resulting in higher than average maternal morbidity and mortality rates. Pregnancy-related deaths are the leading cause of mortality for 15-19 year old girls (married and unmarried) worldwide. Infant mortality among the children of very young mothers is higher (sometimes as much as two times higher) than among those of older mothers. In cases of child and/or forced marriages, particularly where the husband is significantly older than the bride, and where girls have limited education, the girls generally have limited decision-making power in relation to their own lives. Child marriages also contribute to higher rates of school dropout, particularly among girls, forced exclusion from school, increased risk of domestic violence and to limiting the enjoyment of the right to freedom of movement. Forced marriages often result in girls lacking personal and economic autonomy, attempting to flee or commit self-immolation or suicide to avoid or escape the marriage.[34]

Underage marriage, however, is potentially distinct from forced marriage, and deserves further consideration. The question of whether there should be a prescribed age below which no person should be permitted to contract to marriage under any circumstances is complex. The suggested minimum age of 16 is currently in federal legislation that applies only to the province of Quebec. In the other provinces and territories, a minimum age is not specified, and there is some debate about the minimum age to marry at common law.

The proposed amendments to section 2.2 of the *Civil Marriage Act* would create a new national minimum age of 16 for marriage, and no marriage could be contracted for anyone younger. Under their exclusive power to make laws on the solemnization of marriage, the provinces and territories could prescribe additional requirements, such as the need for parental or judicial consent for marriages between the national minimum age and the age of majority.

The UN Committee on the Rights of the Child, in its General Comment No. 18, recently reaffirmed that forced marriage occurs anytime at least one of the parties involved is under the age of 18 years**,** or one of the parties does not have the capacity to express full, free and informed consent to the marriage. In exceptional circumstances, the UN Committee contemplates that a marriage of a mature, capable child below the age of 18 may be permitted, if the child is at least 16 years old, the marriage is endorsed by a judicial authority based on legitimate exceptional grounds defined by law, and there is evidence of the child's maturity

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34 Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices, 4 November 2014, CEDAW/C/GC/31-CRC/C/GC/18, at 7.

without deference to cultures and traditions.[35] The UN Committee provides no guidance on what the legally-defined exceptional circumstances might be.

Another option would be to avoid specifying a minimum age of marriage in favour of prioritizing an individual child's evolving capacities and autonomy in making decisions, but including safeguards such as a requirement for parental or judicial consent. This is consistent with article 12 of the *Convention on the Rights of the Child*, that a child capable of forming his or her own views have the right to express those views freely in all matters affecting him or her, with due weight being given to the child's views in accordance with his or her age and maturity.[36]

Hybrid positions are also possible. Accepting 16 as a minimum age below which no marriage shall be contracted, but adding an exception allowing marriages of mature and capable young persons between the ages of 14 and 16 with parental or judicial approval, is one example.

Bill S-7's proposal to set a minimum age of 16 for marriage with no exceptions is inconsistent with international practice and children's human rights instruments. In most member countries of the Organisation for Economic Co-operation and Development (OECD), persons can marry before the "marriageable age" (the minimum age a person is allowed by law to marry), subject to parental consent. In many countries, persons can also marry prior to reaching the common marriageable age, in special circumstances and with permission from the courts.

This discussion highlights the need for further information and deliberation on this complex issue. Careful consideration must be given to whether establishing a minimum age below which no marriage can be contracted, backed by criminal sanction, is preferable to a consent-based regime, supplemented by parental approval or judicial oversight.

V. CONCLUSION

Violence against women and children happens in all cultures and across all communities. Canada's government is responsible for addressing this and related problems, and fulfilling its international commitments to protect women and girls. However, the amendments proposed by Bill S-7 raise legal concerns that warrant careful deliberation before the Bill becomes law.

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35 *Ibid.*

36 *Supra* note 13, art 12.

The proposal for a new category of inadmissibility based on engaging in polygamy is unnecessary, and would effectively prevent women and children in forced polygamous relationships from immigrating to Canada. Current immigration law has several mechanisms that prevent the immigration of polygamous persons to Canada, and the practice of polygamy is rare in Canada. The applicable definition of "polygamy" is overly broad and ill-defined, which makes its application to immigration law unpredictable and difficult to apply in practice. If the goal is to protect women and children, this amendment should not become law.

The CBA urges Parliament not to modify the provocation defence without a comprehensive assessment and public consultations. Canadian courts have been clear that the defence cannot apply to "honour killings," in the sense that homicide is not legally justifiable by cultural or religious beliefs that are contrary to fundamental Canadian values, including gender equality. Additionally, it would be practically and legally challenging to apply the defence as proposed in Bill S-7, particularly in proving whether the deceased had committed an indictable offence.

The CBA supports the addition of section 2.1 to the *Civil Marriage Act*, which would require free and enlightened consent to contract into marriage. We raise questions about whether a prescribed minimum age to contract into marriage is preferable to a consent-based regime. Further study is required.

The CBA offers our legal expertise, assistance and unique perspective to assist the government with further consultation or reviews.