

Report of the Committee on the Law

CAPCJ Fall Meeting 2023

Committee Mandate and Membership

The Committee on the Law continues to monitor federal legislation in the areas of criminal and family law within the jurisdiction of provincial courts, and circulates legislative updates.

Below is a complete list of Committee members, with appointment dates. Since the last report of the Committee in Spring 2023, Judge Cameron Gunn of the New Brunswick and Judge Lane Wiegers of Saskatchewan have stepped down as long time members of the Committee. Many thanks to them for their years of invaluable contributions to the work of the Committee. Welcome to Judge Joëlle Roy, Judge Shane Russell and Judge Pashovitz who have kindly agreed to join our Committee on behalf of Quebec, Nova Scotia and Saskatchewan, respectively.

Legislative Activity

The Committee monitors the Parliament of Canada for new legislative developments as described above, and issues advisories as required. The Committee does not distribute an advisory until the Bill has passed the final stage of the legislative process.

There are four Bills being monitored by the Committee that are at various stages of progress before the House of Commons or the Senate:

- C-21, omnibus firearms legislation;
- C-40, establish an independent body to be called the Miscarriage of Justice Review Commission;
- C-48, bail reform; and
- S-12, changes to the sex offender registration provisions.

Participation in the Uniform Law Conference of Canada

The Uniform Law Conference of Canada is the oldest law reform body in Canada. The Chair of the Committee represents the CAPCJ as a delegate to the annual conference and participates in the confidential discussions regarding law reform proposals but does not vote. This year the meetings were held from August 21-25. CAPCJ advanced two resolutions respecting proposals for law reform.

- 1) Resolution Can-CAPCJ2023-01 (Fitness to Stand Trial): That Justice Canada, in consultation with the provinces and territories, review with a view of possible amendments, Part XX.1 of the Criminal Code to allow the court to consider the issue of fitness of the accused to stand trial at any stage of the proceedings. [As Passed].

Note that I amended the resolution from what was originally submitted at the request of Justice Canada to expressly state that Justice Canada will consult with Provinces and Territories during its review of the relevant provisions.

By way of background, section 672.23 CC precludes fitness to stand trial being considered after a verdict is rendered. Decisions of courts in a number of jurisdictions have determined this limitation to be a *Charter* section 7 violation. Some courts have “read in” an amendment for the particular accused, or have otherwise found a way to make an order. See [R v CWW, 2023 BCPC 17 \(and cases referred to therein\)](#); [Canada \(Attorney General\) v. Balliram, 2003 CanLII 64229 \(ON SC\)](#); [R v Morrison, 2016 SKQB 259](#); [R. v Jaser, 2015 ONSC 4729](#). In [R. v. Li, 2017 ONCA 509](#), the Ontario Court of Appeal highlighted the issue, without having to address it, as follows:

[36] Section 672.23(1) provides jurisdiction to conduct a fitness hearing “before a verdict is rendered.” Given my conclusion that the trial judge did not err in failing to conduct a formal fitness hearing, I need not consider whether there is jurisdiction to embark upon a fitness hearing after verdict. This issue has arisen in a number of trial decisions: see R. v. Jaser, 2015 ONSC 4729; R. v. Nehass, 2016 YKSC 63; and R. v. Morrison, 2016 SKQB 259, 31 C.R. (7th) 362. This jurisdictional issue was not argued in this case. I express no view on the matter.

Helpfully, after the resolution was submitted but before the ULCC meetings, the Quebec Court of Appeal addressed this issue in [Côté c. R. 2023 QCCA 988](#), stating:

[115] I would like to add one final comment after these rather lengthy reasons. The appellant's situation is not as unusual as it may seem. It appears that there are other ongoing cases before the Quebec Court where the issue of assessing the mental state of an accused at the sentencing stage is still being raised. Since the implementation of a legislative framework for individuals with mental disorders, various Canadian courts have had to intervene in one way or another to protect the fundamental rights of offenders awaiting sentencing. The concerns raised by the Committee in 2002 remain relevant, and I hope they will be reconsidered by Parliament as soon as possible, in the name of protecting the fundamental rights of all individuals who have to deal with this legal gap.

- 2) Resolution Can-CAPCJ2023-02 (Probation Order): That Justice Canada, in collaboration with provinces and territories, review subsection 732.1(2) of the *Criminal Code*, which mandates that certain conditions be included in probation orders, with a view of possible amendments with the aim to modernize these provisions and address any disproportionate impacts on marginalized communities. This review might also consider whether similar amendments are advisable with respect to other similar provisions (e.g., sections 83.3, 742.3, 810, 810.01, 810.011, 810.02, 810.1, and 810.2). [As Passed]

Note that I amended the resolution from what was originally submitted at the request of Justice Canada, to expressly state that Justice Canada will consult with Provinces and Territories during its review of the relevant provisions and to include in its review a consideration of similar conditions that are mandatory for other community-based sentences and orders.

By way of background, the probation provisions of the *Criminal Code* state:

Compulsory conditions of probation order

(2) *The court shall prescribe, as conditions of a probation order, that the offender do all of the following:*

(a) *keep the peace and be of good behaviour;*

(a.1) *[Repealed, 2019, c. 25, s. 297]*

(b) *appear before the court when required to do so by the court; and*

(c) *notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.*

This subsection creates a number of challenges. For instance:

- The mandatory condition requiring an offender to advise of changes of address “in advance” disadvantages those who are homeless and will not likely know in advance where they will be staying.
- The required condition “keeping the peace and be of good behaviour” is a nebulous condition that adds a broad “layer of sanction” that could attract penal consequences (albeit in the context of judicial interim release, see observations in [R. v. Zora, 2020 SCC 14](#) at para. 94).
- The option of “notifying the court” regarding the matters listed in s. 732.1(2)(c) seems unnecessary given that there will necessarily be a probation officer to monitor the order.

It would be more consistent with the individualized nature of sentencing if these conditions were optional, not mandatory. Provisions respecting other community-based sentences and orders include similar mandatory conditions.

As amended, both resolution passed unanimously (there was one abstention on Resolution Can-CAPCJ2023-02 (Probation Order)).

Finally, Team West was unable to defend its title from last year and was defeated by Team East in the Annual ULCC Baseball Game.

Yours respectfully,
Eric Tolppanen, Chair

Committee Membership by Province (Current to September 12, 2023)

Eric Tolppanen (appointed December 21, 2021)	AB	eric.tolppanen@albertacourt.ca
Geoffrey Bayly (appointed March 30, 2022)	MB	Geoffrey.Bayly@mbpc-cpmb.ca
Jeremy Guild (appointed May 16, 2022)	BC	JGuild@provincialcourt.bc.ca
Phyllis Harris (appointed ??)	NL	PhyllisHarris@provincial.court.nl.ca
Luc Labonté (appointed ??)	NB	luc.labonte2@gnb.ca
Jeannie Scott (appointed December 27, 2022)	NWT	Jeannie_Scott@nwtcourts.ca
David Orr (appointed ??)	NL	dorr@provincial.court.nl.ca
Bryce Pashovitz (appointed September 12, 2023)	SK	bpashovitz@skprovcourt.ca
Ferhan Javed (appointed August 8, 2022)	ON	Ferhan.Javed@ocj-cjo.ca
Joëlle Roy (appointed July 18, 2023)	QC	joelle.roy@judex.qc.ca
Shane Russell (appointed July 29, 2023)	NS	??