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Via email: just@parl.gc.ca

Randeep Sarai, M.P.
Chair, Justice and Human Rights Committee
House of Commons
Sixth Floor, 131 Queen Street
Ottawa, ON K1A 0A6

Dear Randeep Sarai:

Re: Study of Canada's Bail System

I am writing on behalf of the Canadian Bar Association's Criminal Justice Section (CBA Section) in response to the Justice and Human Rights Committee's invitation to participate in its study of Canada's bail system. We appreciate the opportunity to make submissions on this important issue.

The CBA is a national association of over 37,000 members, including lawyers, law students, notaries and academics, and our mandate includes seeking improvement in the law and the administration of justice. The Criminal Justice Section consists of a balance of Crown and defence counsel from every part of the country.

We briefly recap general principles applying to bail review and then address some issues of concern.

GENERAL PRINCIPLES

The *Charter* Right to Reasonable Bail and the Presumption of Innocence

Section 11(e) of the *Canadian Charter of Rights and Freedoms* guarantees the right to reasonable bail and the presumption of innocence.

In 2018, the CBA Section supported many of the amendments to the bail regime in Bill C-75 (now S.C. 2019, c. 25), that codified two longstanding principles pertaining to bail: the principle of restraint and the ladder principle.

1. Principle of Restraint

The principle of restraint is codified in *Criminal Code* section 493.1, which states that a judicial official shall give primary consideration to the accused's release at the earliest reasonable opportunity and on the least onerous applicable conditions while considering grounds in subsections 498(1.1) or 515(10).

2. Primary, Secondary and Tertiary Grounds for Detention

Criminal Code subsection 515(10) describes the justification for detention in custody. It states that bail may be denied in three situations:

- Primary ground: where it is “necessary to ensure his or her attendance in court” (flight risk);
- Secondary ground: where it is “necessary for the protection or safety of the public” (risk of re-offence); or
- Tertiary ground: where it is “necessary to maintain confidence in the administration of justice” (public confidence).

The tertiary ground considers the gravity of the offence, the circumstances of the offence including whether a firearm was used, and the potential for a lengthy term of imprisonment on conviction.¹

Criminal Code subsection 498(1.1) describes the circumstances in which a peace officer may decide not to release the person on reasonable public interest grounds.²

3. Circumstances of Aboriginal Accused or Vulnerable Populations

Criminal Code subsection 493.2 requires judicial officials making bail decisions to give particular attention to the circumstances of accused persons who are Aboriginal (Indigenous) or who belong to a vulnerable population. It acknowledges the over-incarceration of those populations who are overrepresented in the criminal justice system, as recognized by the courts for many years.

4. Crown Onus vs. Reverse Onus Offences

“Crown onus” offences require that an accused be released unless the Crown prosecutor shows cause why the detention of the accused is justified (*Criminal Code* subsections 515(1) and (2)). Subsection 515(6) sets out a lengthy list of “reverse onus” offences, in which the burden rests on the accused to show cause why the accused's detention is not justified.³

¹ See *Criminal Code*, R.S.C. 1985, c. C-46, ss 515(10): [online](#)

² (a) that it is necessary in the public interest that the person be detained in custody or that the matter of their release from custody be dealt with under another provision of this Part, having regard to all the circumstances including the need to

- (i) establish the identity of the person,
- (ii) secure or preserve evidence of or relating to the offence,
- (iii) prevent the continuation or repetition of the offence or the commission of another offence, or
- (iv) ensure the safety and security of any victim of or witness to the offence; or

(b) that, if the person is released from custody, the person will fail to attend court in order to be dealt with according to law.

³ See *Criminal Code*, R.S.C. 1985, c. C-46, ss. 515(6): [online](#)

5. Ladder Principle

The ladder principle requires the officer, justice or judge to give primary consideration to releasing the person at the earliest reasonable opportunity and on the least onerous conditions appropriate in the circumstances. If the Crown proposes an alternative form of release, it must show why this form is necessary (*Criminal Code* subsection 515(2.01)). Each rung of the ladder must be considered individually and must be rejected before moving to a more restrictive form of release.⁴

ISSUES FOR CONSIDERATION

The CBA Section cautions against a reactionary approach to isolated tragic incidents, or media attention on certain events, that do not necessarily reflect a growing or widespread problem. We suggest a nuanced approach to consider any bail reform proposal, and any changes should be grounded in sound evidentiary support in the scientific literature, as well as the principles outlined in SCC bail jurisprudence. Similarly, statistics not cited to a source, or without sufficient supporting information should be viewed with caution and given limited, if any, weight. Anecdotal evidence is not more reliable.

Recent Statistics Canada information on the crime severity index and its percentage change⁵ shows the increase in the violent crime severity index between 2017 and 2021 is a modest one, including a drop in 2020 during the first year of the pandemic and the first full year after the passage of Bill C-75. There was also a noticeable drop in the youth violent crime severity index in 2020, and a drop, though a less significant one, in 2021. According to the Canadian Centre for Justice and Community Safety Statistics, the increase of 5% in the violent crime severity index in 2021 was “primarily driven by a relatively large rise in the rate of level 1 sexual assault,” which accounted for “40%” of the increase (level 1 involves assault of a sexual nature that violates the sexual integrity of the victim). Thus, while the increase in level 1 sexual assault may be concerning, it is not at the higher end of the spectrum in terms of severity of sexual assaults.

1. Codifying further “reverse onus” offences

An accused in a “Crown onus” situation can still be detained following a contested bail hearing. Experienced Crown and defence lawyers can attest to this daily occurrence, in every busy courthouse across Canada. It means that the Crown has met its onus of showing cause why a person should be detained, in appropriate cases. Even though it is well understood that pre-trial detention should be the exception, and not the rule, it is still not unusual for persons to be detained after a “Crown onus” bail hearing, where the court is not satisfied as to the sufficiency of a release plan to mitigate the risk of further offences being committed.

A reverse onus places the burden on the accused to show why they should be released. However, it makes little practical difference whether certain offences are categorized as “Crown onus” or “reverse onus.” In either case, the Crown has the tools to either show cause why the accused should be detained, in appropriate cases, or argue that the accused has not shown cause why they should be released. Practically speaking, where the accused is alleged to have caused serious violence, in violent offences where the accused has a criminal record for serious violence, and in cases involving guns, reverse onus or not, it is an uphill battle for an accused to be granted release. The Crown may set out tertiary ground concerns in these circumstances, which the court is obliged to consider.

⁴ See *R. v. Antic*, 2017 SCC 27; *R. v. Zora*, 2020 SCC 14.

⁵ Crime severity index and weighted clearance rates, Canada, provinces, territories and Census Metropolitan Areas, Statistics Canada, 2022, [online](#).

As for section 95 firearm offences, given the legal concept of “possession,” if police find several persons in one location where a firearm is found (i.e., a vehicle, a house, or other building) they are usually charged with the same offence, even though evidence of firearm possession may be weaker against some accused. Thus, it is not a given that because a person is charged with possession of a prohibited firearm, this should automatically lead to detention or a presumed reverse onus simply by virtue of the offence. There are circumstances that strongly suggest the accused was in actual possession of the found firearm. There are also instances where the accused may have no real connection to the found firearm other than the fact that they happened to be a passenger in a vehicle that was not their own, or an occupant of a household with several other persons.

A decision of the lower court on release or detention can be reviewed by a superior court on application by either the Crown or the accused. A Crown application is not uncommon. In many circumstances, a bail review is more easily and quickly brought by the Crown since the defence generally has more limited (or no) resources to order transcripts and retain counsel to conduct a bail review.

A review of existing bail provisions demonstrates that a wide array of relevant factors is considered, including whether a firearm was used or involved, the accused’s criminal record, which will include consideration of their record of compliance with past court orders and any prior violent conduct, among others. In our view, there is no need to add language to the *Code* to underscore principles that are well understood and implemented daily by the judiciary. Moreover, it will have no discernible impact on preventing tragic incidents such as the recent officer-related shootings, as it will neither add nor change how bail decisions are made. We suggest that a focus on redirecting greater resources to and reinforcing social supports to assist members of marginalized and vulnerable populations would be more conducive to addressing the underlying roots of crime and preventing the commission and escalation of such offences.⁶

2. Ensuring judges have relevant information on a bail hearing or bail review

The CBA Section sees no evidence that judicial officials routinely receive less than the requisite information needed to reach a fair decision, or that this is a problem that requires statutory correction. To the contrary, a Crown in a contested bail hearing will invariably supply the Court with the accused’s criminal record, a list of outstanding charges, and occurrence reports, where appropriate, to show a pattern of continuing criminal conduct. A judicial official can and often does make inquiries of the Crown and defence during a hearing on any questions they have or relevant information they believe has not been supplied.

3. Seriousness of offence and relevance of prior criminal record

Many offences encompass a wide spectrum of conduct. The seriousness of an offence is not defined by a mandatory minimum sentence. The maximum sentence is generally a better indicator of its understood seriousness. A history of violent conduct reflected by a prior criminal record can include offences arising out of a bar brawl, a fight between patrons at a sporting event, or an altercation between two individuals of no fixed address in a shelter, where conflict can arise due to environmental conditions related to homelessness. In every case, context, and meaningful and accurate information about the proven or admitted circumstances of past offences where the accused was found guilty, is important, rather than viewing a person as a printout of their past offences.

⁶ The Toronto Star, *What to do about the overrepresentation of Indigenous peoples*, Editorial, (Nov 2017): [online](#).

Assessing the seriousness of a person's past record by considering past sentences must also consider the fact that marginalized, disadvantaged and vulnerable populations, including Indigenous persons, tend to receive more severe sentences including incarceration, compared to persons of greater privilege and resources.⁷

An offender before the court may meet multiple criteria of "reverse onus" issues enumerated in section 510(6). When this occurs, a court will consider these factors when determining whether the accused has met their onus in showing why they should be released on bail.

Importantly, persons with a prior criminal record are still presumed innocent of the charges laid against them, until proven guilty. This presumption applies at every stage of the criminal justice process, including and especially the bail stage.

4. Consideration of *Gladue* factors for bail

Some police service representatives have suggested that *Gladue*⁸ may be overused or exploited in consideration of bail. The CBA Section is unaware of any evidentiary support for this claim. Again, we caution against relying on anecdotal evidence, especially to consider whether major reforms to the bail provisions are necessary.

As to the absence of proof of Indigenous heritage and the possibility of it being inappropriately used by self-identifying accused, this issue is well known to the Courts and can be used to weigh an unverified claim of Indigenous status. Judges' concerns on this issue are reflected in reported sentencing decisions over the years, as agencies preparing *Gladue* reports will typically state whether they are able to verify Indigenous heritage and, if not, they can decline to supply a report.⁹

As observed by the British Columbia Court of Appeal in a recent decision:

...applying *Gladue* principles will not necessarily lead to a reduced sentence. There is no automatic heritage-based discount: *Gladue* at para. [88](#); *Ipeelee* at paras. [71](#), [75](#); *Mero* at para. [73](#). Generally, the more serious or violent the crime, the more likely it will be, as a practical matter, that the terms of imprisonment will be the same for an Indigenous and a non-Indigenous offender: *Gladue* at para. [33](#); *R. v. Wells*, [2000 SCC 10](#) at paras. [42-44](#); *Ipeelee* at paras. [84-85](#); *Mero* at para. [73](#).¹⁰

This reasoning may be extrapolated to the bail stage. For all of the above reasons, it cannot be said that *Gladue* considerations at the bail stage contributes to inappropriate release of accused persons.

We hope these observations will be helpful in your deliberations.

Yours truly,

(original letter signed by Julie Terrien for Kevin Westell)

Kevin Westell
Chair, Criminal Justice Section

⁷ Library of Parliament, Research Publications, Indigenous People and Sentencing in Canada: [online](#)

⁸ *R. v. Gladue*, 1 S.C.R. 688.

⁹ See, for example, *R. v. M.J.*, 2013 ONSC 6803 as but one example.

¹⁰ *R. v. Kehoe*, 2023 BCCA 2