THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

September 29, 2023

Via email: lcjc@sen.parl.gc.ca

The Honourable Brent Cotter
Chair, Standing Senate Committee on Legal and Constitutional Affairs
The Senate of Canada
Ottawa, ON K1A 0A6

Dear Senator Cotter:

Re: Bill C-48 — Proposed changes to strengthen Canada's bail system

The Criminal Justice Section (CBA Section) appreciates the opportunity to comment on Bill C-48, *An Act to amend the Criminal Code (bail reform)*. The *Criminal Code* amendments create new situations where a reverse onus would apply in a bail hearing.

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.

The CBA Section's March 2023 letter to the House of Commons Justice and Human Rights Committee, attached as Appendix A, outlines general principles applying to bail review. In this letter, the CBA Section raises three discrete concerns with Bill C-48.

Proposed Amendment to s. 515(6)(b.1): Prior Discharges for Intimate Partner Violence

Bill C-48 expands the existing reverse onus for repeat intimate partner violence. It adds to *Criminal Code* s. 515(6)(b.1) a prior discharge of an offence in the commission of which violence was used, threatened, or attempted against any intimate partner. While the CBA Section understands the purpose to further protect victims of intimate partner violence, it believes that this amendment is impractical.

The *Criminal Records Act* requires that discharge records be removed from the Canadian Police Information Centre (CPIC) after one year for an absolute discharge, and after three years for a conditional discharge (s. 6.1(2)).[1] Moreover, no record of a discharge shall be disclosed, "nor shall the existence of the record or the fact of a discharge be disclosed to any person, without the prior approval of the Minister", after those time periods expire (s. 6.1(1)).

[1] *Criminal Records Act*, online.

It is unclear whether Bill C-48's amendment contemplates this apparent conflict with the *Criminal Records Act*, and whether *any* prior discharge, even those purged from CPIC and non-disclosable, would therefore put the alleged offender in a reverse onus situation. We anticipate that this conflict will result in confusion and protracted litigation on the admissibility of the records during bail hearings, thus creating further bail delays in an already overburdened and under-resourced system.

Carving out an exception specifically for intimate partner violence would be ill-conceived. A discharge is a finding of guilt, not a criminal conviction, and it does not result in a permanent criminal record. Purging CPIC's information after the time periods expire therefore puts the individual in the legal position of having no criminal record.

An offender charged with another similar offence in the legal retention period , would likely be in breach of a probation order imposed on a conditional discharge. Even if the offender were absolutely discharged in the previous year, this information would be known to the police and Crown at the bail hearing.[2] As the law stands, nothing prevents the Crown from referring to this relevant information in a bail hearing, and the recent conduct would undoubtedly be relevant to the judicial officer, regardless of whether it is a "Crown onus" or "reverse onus".

Furthermore, a discharge is only imposed under s. 730 of the *Criminal Code*, which states not only that it be in the best interests of the accused, but that it not be contrary to the public interest.[3] Discharges, whether absolute or conditional, are not imposed for serious criminal offences. They typically are imposed on first time offenders where the criminal conduct is low level in severity. It is challenging to obtain a discharge where any injuries were sustained by the victim. On the other hand, criminal convictions for past intimate partner violence, as opposed to discharges, are indicative of the level of severity of the past offence.

In our view, adding prior discharges for intimate partner violence in this subsection will have no real practical effect on offenders during the retention period and will conflict with the *Criminal Records Act* for offenders whose records should be purged after the prescribed retention periods. We believe this amendment should be removed.

Proposed Addition of Section 515(6)(b.2)

Bill C-48 adds a new category of reverse onus offences, which would include individuals charged with serious repeat offending involving firearms and other weapons:

> with an offence in the commission of which violence was allegedly used, threatened or attempted against a person with the use of a weapon, and the accused has been previously convicted, within five years of the day on which they were charged for that offence, of another offence in the commission of which violence was also used, threatened or attempted against any person with the use of a weapon, if the maximum term of imprisonment for each of those offences is 10 years or more.

This amendment includes those who have previously been sentenced to significant jail-time for a serious violent offence, as well as anyone who received a suspended sentence." This could capture a broad spectrum of conduct, including individuals whose prior criminal conduct may not have been especially serious. This would have the unintended and undesirable effect of significantly overburdening the bail system and creating more delays. We suggest that this amendment be removed.

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[2] While CPIC records are supposed to be purged within these time periods, the practical reality is that prior discharges are often known to local police and Crown offices, and references to the discharges still often appear in disclosure.

[3] Justice Law, online.

Proposed Amendments to Section 515(6)(a)(vi): Inclusion of Section 95 (possession) Offences

The CBA Section acknowledges the harmful impact of serious crimes committed with firearms. However, the inclusion of all individuals who are charged with a s. 95 offence in the reverse onus provisions is problematic in our view.

As explained in the CBA Section's March 2023 letter to the House of Commons Justice and Human Rights Committee, attached, where multiple persons are found by police in one location where a firearm is found (i.e., a vehicle, a house, or other building), all of the "found-ins" are typically charged with possession of that firearm, even though the evidence of actual "possession" of the firearm may be tenuous for most of those individuals. Thus, even though a person is charged with "possession" of a prohibited firearm, this should not necessarily result in an automatic "reverse onus" simply by virtue of the offence. In many instances, 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. Given this potential overreach, we suggest that the amendment be removed.

Final Observations

Finally, the CBA Section respectfully reminds the Committee that *all individuals*, including persons with a prior criminal record and regardless of its nature, 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. For further elaboration, please see our March 2023 letter.

Yours truly,

(*original letter signed by Julie Terrien for Kyla Lee)*

Kyla Lee
Chair, Criminal Justice Section

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

March 27, 2023

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]

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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 change[5] 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.

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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.

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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

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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