THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

April 12, 2017

Via email: JUST@parl.gc.ca

Anthony Housefather
Chair, Justice and Human Rights Committee
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Mr. Housefather:

Re: Bill S-217, *Criminal Code amendments (detention in custody)*

The Canadian Bar Association's Criminal Justice Section (CBA Section) appreciates the opportunity to comment on Bill S-217, *Criminal Code* amendments (detention in custody). The CBA is a national association of over 36,000 lawyers, law students, academics and notaries, and our mandate includes seeking improvements in the law and the administration of justice. The CBA Section consists of a balance of Crown and defence counsel from every province and territory in Canada, practitioners who are in criminal courts on a daily basis.

The CBA Section does not support passage of Bill S-217. We believe it is constitutionally vulnerable, unnecessary and contrary to current efforts to improve justice and justice efficiencies.

Anyone charged with an offence has a constitutional right under section 11(e) of the *Charter of Rights and Freedoms* "not to be denied reasonable bail without just cause". In *R. v. St. Cloud*, Justice Wagner of the Supreme Court of Canada said:

> It is important not to overlook the fact that, in Canadian law, the release of accused persons is the cardinal rule and detention, the exception... To automatically order detention would be contrary to the "basic entitlement to be granted reasonable bail unless there is just cause to do otherwise" that is guaranteed in section 11(e) of the Charter. This entitlement rests in turn on the cornerstone of Canadian criminal law, namely the presumption of innocence... These fundamental rights require the justice to ensure that interim detention is truly justified having regard to all the relevant circumstances of the case.[1]

[1] [2015] 2 S.C.R. 328, at para. 70.

Bill S-217 would increase court delays at a time when they are already recognized as a pressing concern. It proposes to replace section 518(1)(c) of the *Criminal Code* with a section stating that the prosecutor *shall* (rather than *may*) lead evidence of the accused's prior criminal records, pending trials, previous breaches under section 145, the strength of the Crown's case or that the accused has previously failed to appear in court.

Requiring Crowns to lead particular evidence at bail hearings rather than relying on their sound exercise of discretion as to what is appropriate in each case would delay bail hearings unnecessarily, lengthen the time for those hearings, put more matters over for future consideration[2] and result in more people held awaiting bail. Apart from unfairness to the individual accused, delayed bail hearings have also led to charges being stayed, costs awarded against the Crown and sentence reductions.[3]

Bill S-217 is likely to attract constitutional scrutiny as interfering with the proper exercise of prosecutorial independence and discretion, core underlying principles of the administration of justice.[4] The Bill could also be seen as interfering with the independence of provincial and territorial Attorneys General. In *Miazga v. Kvello Estate*, the Supreme Court of Canada held that the independence of the Attorney General is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched.[5]

We believe that Bill S-217 is unnecessary for several other reasons, including that:

- section 518(1)(c) already permits evidence on four of the five items listed in the proposed new section. The new fifth consideration (a history of failing to appear) is routinely considered by prosecutors.
- section 515(10)(a) already provides for detention to ensure attendance at court and is used when an accused is seen as a risk not to appear. This is often determined by considering a past history of failing to appear in court as required.
- criminal records can help to assess whether a person is likely to commit other offences and Crowns already lead those records. Any record is also routinely factored into decisions about bail or detention.
- current section 515(10)(b) already provides for detention for public protection or safety reasons, or if an alleged offender is deemed likely to commit other offences or interfere with the administration of justice.

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2 Crowns in the CBA Section report frequent problems in obtaining up to date information from the CPIC system, particularly for records outside the province or territory. We question the Bill's potential impact if Crowns are seen as responsible for guaranteeing the accuracy of that information.

3 See, for example, *R. v. Zarinchang*, 2010 ONCA 286 (CanLII), a trial judge stayed proceedings due to a delayed bail hearing. The Court of Appeal set aside the stay, but told the accused he could bring a new stay application, and costs were awarded against the Crown for the bail delay. Damages have also been recognized as an appropriate response to a delayed bail hearing: *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28. See also, *R. v. S.B.*, 2014 ONCA 527 (CanLII); *R. v. Rashid*, 2009 CanLII 9745 (ON SC) as examples of potential problems.

4 See, for example: John Edwards, *The Law Officers of the Crown* (London: Sweet and Maxwell, 1964); *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372; See also Binnie J., in *R. v. Regan*, [2002] 1 S.C.R. 297, at paras. 157-58 (dissenting on another point).

5 [2009] 3 SCR 339 at para 46. Note also the Court's decision in *R. v. Cawthorne* [2016] 1 SCR 983.

- if an accused is on bail for an indictable offence and is charged with another indictable offence, a reverse onus already applies (section 515(6)(a)), resulting in ongoing detention unless the accused shows cause for release.
- prosecutors routinely advise courts as to whether the Crown or accused bears the onus of seeking release or detention.

In sum, we believe that Bill S-217 would not help to improve the criminal justice system, but would be more likely to impede fairness, prosecutorial independence and discretion, and justice efficiencies. We recommend that it not be considered further for inclusion into Canadian criminal law.

Yours truly,

(original letter signed by Gaylene Schellenberg for Loreley Berra)

Loreley Berra
Chair, CBA Criminal Justice Section