THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

# Bill C-14: Bail and Sentencing Reform Act

**CANADIAN BAR ASSOCIATION**
**CRIMINAL JUSTICE AND CHILD AND YOUTH LAW SECTIONS**

**February 2026**

66 Slater St., Suite 1200, Ottawa, ON, Canada K1P 5H1
**tel/tél**. 613 237-2925 • **tf/sans frais** 1-800 267-8860 • **fax/téléc**. 613 237-0185 • cba.org • info@cba.org

## PREFACE

The Canadian Bar Association is a national association representing 40,000 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 Section and Child and Youth Law Sections, with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Policy Committee and approved as a public statement of the CBA Criminal Justice Section and Child and Youth Law Sections.

# TABLE OF CONTENTS

## Bill C-14: Bail and Sentencing Reform Act

# Bill C-14: Bail and Sentencing Reform Act

## I. INTRODUCTION

I am writing on behalf of the Canadian Bar Association's Criminal Justice and Child and Youth Law Sections (CBA Sections) about Bill C-14, the *Bail and Sentencing Reform Act*, introduced on October 23, 2025. We appreciate the opportunity to comment on Bill C-14 and raise areas of concern, including maintaining judicial discretion in sentencing for sexual offences, such as the discretion to impose a conditional sentence order (CSO), to allow for those truly rare and exceptional circumstances. We also support amendments to the *Youth Criminal Justice Act*[1] (*YCJA)* that improve procedural fairness and youth privacy. while warning that several changes risk expanding custody, reducing judicial discretion, and curtailing fair trial rights.

The CBA is a national association of 40,000 members including lawyers, notaries, academics, and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The Criminal Justice Section consists of a balance of Crown and defence lawyers from all parts of the country. The Child and Youth Law Section considers issues related to children's rights and best interests.

## II. CONDITIONAL SENTENCE ORDERS

The CBA Sections support the Supreme Court of Canada's (SCC) established approach to sentencing for sexual offences against children[2], which generally excludes CSOs due to the gravity of these crimes. Nonetheless, we advocate for a clear framework that permits such orders only in truly exceptional circumstances, ensuring judicial discretion in rare cases where it is justified. Bill C-14 would remove the CSO availability for certain sexual offences, including the offence of sexual assault when prosecuted by indictment. We understand that the rationale responds to the concern of an offender serving their sentence at home in the same community where their victim resides and demonstrates that perpetrators of serious sexual offences will face serious consequences for their actions.

---

1 S.C. 2002, c.1, online.

2 *R. v. Friesen*, 2020 SCC 9, online.

The CBA Sections acknowledge that sexual violence causes profound and often lifelong trauma to victims and survivors, as well as serious harm to society. They further recognize that the prospect of an offender convicted of sexual offences serving a sentence in the community may be troubling and may impede a survivor's recovery yet maintains that this option should remain available for the rare, exceptional cases in which such a sentence is appropriate.

The CSO has been in the *Criminal Code (*the *Code)*[3] since 1996. It was introduced, in part, to address overincarceration in Canada, particularly for Indigenous offenders. It allows judges to sentence an offender to "jail" in the community.

It is a statutory requirement that, before imposing a CSO, the court is satisfied that serving a sentence in the community does not endanger the community's safety and is consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 of the *Code*.[4] These include:

- denunciation of unlawful conduct and the harm done to victims or to the community
- deterrence of the offender and other persons from committing offences
- the separation of offenders from society, where necessary
- the rehabilitation of offenders
- the provision of reparations for harm done to victims or to the community, and
- the promotion of a sense of responsibility and acknowledgment of harm done to victims or to the community.[5]

Other relevant sentencing principles in s. 718.2 of the *Code* include the principle that "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."[6]

Bill C-22, *An Act to amend the Criminal Code and the Controlled Substances Act*,[7] recently restored CSO availability for a variety of offences. Prior restrictions to CSO availability coincided with an increase in systemic delay, and increasing overincarceration of Indigenous persons.[8] It was a

---

3 R.S.C. 1985, c. C-46, online.

4 Section 742.1(a) of the *Criminal Code.*

5 Section 718 of the *Code.*

6 Section 718.2(e) of the *Code*.

7 S.C. 2022, c. 15.

8 Department of Justice, Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses, November 2024, online. See also: Department of Justice, State of the

shift in criminal law policy, intended to improve the system and permit more tailored sentences. CSOs also have the potential, generally, to reduce the costs of overincarceration.

Unfortunately, overcrowding in prisons has only increased over time, along with a general deterioration in the quality of prison conditions.[9] Many Ontario institutions are "dangerously overcrowded", with some operating at over 150% of their intended capacity.[10]

## A. The importance of maintaining judicial discretion in sentencing

As appropriately explained by the SCC, sentencing is very much an individualized exercise, that seeks to answer whether: "For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the *Criminal Code*?"

The CBA Sections have long supported maintaining judicial discretion in sentencing, including the appropriate use of CSOs. In its 2011 submission on Bill C-10 (*Safe Streets and Communities Act*)[11], the CBA Criminal Justice and Municipal Law Sections advocated against enacting CSO limits for certain enumerated offences and those carrying a maximum penalty of 14 years or more. The Sections argued that limiting CSOs, "…would result in restrictions that are far too broad, often arbitrary and inflexible, and could well result in sentences that are, simply put, unjust."[12] In the CBA's 2022 submission on Bill C-5[13], it similarly argued that *Code* restrictions on CSOs were discriminatory, overbroad and failed to achieve their objective.[14]

The CBA Sections acknowledge that a CSO for serious sexual offences would be a rare and exceptional sentence – as it should be. As explained by the Ontario Court of Appeal in *R. v. R.S.*[15]. CSOs will "rarely, if ever, be proportionate in the context of violent sexual assault cases", and the sentencing objectives of deterrence and denunciation will normally require penitentiary

---

Criminal Justice System Dashboard; Department of Justice, online. The Experience of Indigenous Peoples with the Criminal Justice System, online.

9 Brendan Kennedy, "Ontario's jail conditions are inhumane and disgraceful, judges say. Criminals are serving shorter sentences as a result", *Toronto Star* (July 11, 2025), online.

10 Office of the Ombudsman of Ontario, Annual Report 2024-2025, 2025, pgs. 4-5, 25-28, online.

11 CBA Criminal Justice Section, Submission on Bill C-10, *Safe Streets and Communities Act*, October 2011 at p. 16, online.

12 *Ibid*, at p. 16.

13 Bill C-5, *An Act to Amend the Criminal Code and the Controlled Drugs and Substances Act*, 44th Parliament, 1st Session, online at C-5 (44-1) - LEGISinfo - Parliament of Canada, online.

14 CBA Criminal Justice Section, Submission on Bill C-5, *Criminal Code and Controlled Drugs and Substances Act Amendments,* February 2022 at p. 11, online.

15 2023 ONCA 608, online.

sentences in the 3 to 5 year range for such offences.[16] Absent a highly mitigating factor, the forced penetration of another person will typically attract a sentence of at least three years.[17] However, the Court of Appeal also acknowledged that there are circumstances where departing from the range of three to five years, either above or below, will be "entirely appropriate".[18] For more serious forms of sexual assault, the typical sentence will be even higher, and the likelihood of a CSO even more remote.

Nevertheless, the CBA Sections maintain that judicial discretion in sentencing for sexual offences, including the discretion to impose a CSO, must be maintained to allow for those rare and exceptional circumstances, as elaborated upon below.

## B. Broad spectrum of conduct captured by the offence of sexual assault

Sexual assault is a hybrid offence, meaning the Crown may elect to proceed summarily or by indictment. Even when prosecuted by indictment, the offence may capture conduct at the lower end of the severity spectrum—such as kissing, "groping," or non-penetrative touching over clothing—for which the Crown would typically proceed summarily. However, where a complainant's allegations span a broad range of conduct, the Crown may elect to proceed by indictment. In such cases, an accused might be acquitted of the most serious allegations but convicted of less serious conduct that nonetheless meets the legal definition of sexual assault. Depending on the proven facts and the offender's circumstances, including any risk of reoffending, a CSO may well be an appropriate sentence.

## C. Consideration of "the most vulnerable offender" / reduced moral culpability

The SCC stated the following in *R. v. Friesen*[19], when discussing the need to increase sentences for sexual assaults against children:

> [91] These comments should not be taken as a direction to disregard relevant factors that may reduce the offender's moral culpability. The proportionality principle requires that the punishment imposed be "just and appropriate . . . and nothing

---

16 *R. v. R.S., supra* note 15, at para. 4, online. *R. v. A.J.K.,* 2022 ONCA 487, at para. 68, online.

17 This is not to diminish the harm caused by non-penetrative sexual assault or suggest that it is "less intrusive", particularly in regard to offences against children. See *Friesen,* at paras. 143-146, online.

18 *R. v. A.J.K., supra* note 16, at para. 77, online. See also commentary of the British Columbia Court of Appeal with regard to sexual offences against children in *R. v. C.K.,* 2023 BCCA 468, at paras. 104-108, online.

19 2020 SCC 9, at para. 91, online.

> more" (*M. (C.A.)*, at para. 80 [20](emphasis deleted); see also *Ipeelee*, at para. 37[21]). First, as sexual assault and sexual interference are broadly defined offences that embrace a wide spectrum of conduct, the offender's conduct will be less morally blameworthy in some cases than in others. Second, the personal circumstances of offenders can have a mitigating effect. For instance, offenders who suffer from mental disabilities that impose serious cognitive limitations will likely have reduced moral culpability (*R. v. Scofield*, 2019 BCCA 3, 52 C.R. (7th) 379, at para. 64[22]; *R. v. Hood*, 2018 NSCA 18, 45 C.R. (7th) 269, at para. 180[23]).[24]

The most vulnerable offender should be considered to determine whether a CSO remains available. Offenders have increasingly complex histories and traumatic backgrounds, for many reasons. Some have been victims of or exposed to sexual or physical abuse, from an early age, themselves. Some may have cognitive limitations. Some have dependents, such as disabled or aged family members, who may otherwise experience significant hardship if the offender was sentenced to incarceration in an institution.

For Indigenous offenders, other *Gladue* factors[25] must be considered, such as: "the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples".[26] Meanwhile, consider that Indigenous women are disproportionately represented as victims of physical and sexual violence.[27] As with all victims of violent crimes, the safety and long-term trauma of Indigenous sexual violence victims, especially in remote areas, must be carefully weighed. Indeed, s. 718.04 of the *Code* specifically mandates that, when imposing a sentence involving the abuse of a person vulnerable due to personal circumstances – including because the person is Aboriginal and female – the court shall give primary consideration to the objectives of denunciation and deterrence.[28]

---

20 Online

21 Online

22 Online

23 Online

24 See also *R. v. Bertrand Marchand*, 2023 SCC 26, at para. 73, online.

25 *R. v. Gladue,* [1999] 1 S.C.R. 688, online.

26 *R. v. Ipeelee,* 2012 SCC 13, at para. 60, online. The Supreme Court cautioned that this does not necessarily mean that, on their own, these issues will necessarily result in a "different sentence" for Indigenous persons, but that they provide the necessary context for understanding and evaluating the case-specific information presented by counsel.

27 Department of Justice, JustFacts: The Overrepresentation of Indigenous People in the Criminal Justice System, November 2024 online. See also *R. v. Barton*, 2019 SCC 33, at para. 198, online.

28 Section 718.04 of the *Code*

Where there are exceptionally compelling mitigating circumstances, or factual findings of diminished moral blameworthiness, and an assessment of a low risk to reoffend, particularly for an early guilty plea, a CSO may be the just and appropriate sentence in the circumstances.[29] Depending on the situation, for some individuals, removing the option for a CSO would lead to an unjust outcome.

## III. AMENDMENTS TO *THE YOUTH CRIMINAL JUSTICE ACT*

### A. Definition of violent offence

The CBA Sections understand that the proposed definition of "violent offence", in subsection 2(1) of the *YCJA*[30] will affect the types of sentences available for young persons, including reducing non-custodial options for certain offences.[31] By specifying that the offence must result in bodily harm, the proposed amendment expands access to non-custodial and deferred sentences for offences such as uttering threats, or other offences that did not cause bodily harm but had the potential or intent to do so. Conversely, it also captures offences such as s. 271, home invasions or driving offences where bodily harm is not specified as an element of the offence, but where bodily harm occurs during the commission of the offence.

The CBA Sections support provisions that preserve judicial discretion to impose appropriate and proportionate sentences. While acknowledging that this clarification may expand sentencing options in some cases and limit them in others, it ultimately restricts courts' ability to craft meaningful, individualized sentences for youth, including the use of deferred sentences for violent offences. As a result, it should be expected that the limitations prescribed by the proposed definition will increase the rate of custodial sentences for youth, particularly marginalized, racialized and Indigenous youth and increasingly, female youth, who are disproportionately sentenced to incarceration at a higher rate than their nonracialized and marginalized cohort.

---

29 See *R. v. Maslehati*, 2024 BCCA 207 at paras. 113-115, referring to *R. v. M.K.M.*, 2024 BCSC 575 at paras. 79–82, online as an example of the application of *Gladue* principles in reducing the offender's moral blameworthiness.

30 S.C. 2002, c.1, online.

31 59 Paragraph (a) of the definition *violent offence* in subsection 2(1) of the *Youth Criminal Justice Act* is replaced by the following: (a) an offence *in the commission of which* a young person causes bodily harm; the provision online, previously read as: (a) an offence committed by a young person that includes as an element the causing of bodily harm online.

The CBA Sections endorse changes that increase the availability of deferred sentences for youth – even for violent offences causing bodily harm – where such sentences can provide meaningful consequences, protect the public, and offer rehabilitative opportunities within a structured framework.

## B. Provisions concerning bail

The CBA Sections support expanding s. 9 to ensure that prior offences evidence is inadmissible to prove prior offending behaviour in all courts of justice, rather than being limited to youth courts. [32] This proposed amendment reinforces the foundational objectives of the YCJA, particularly rehabilitation, reintegration, proportionality, and privacy.

The addition of proposed ss. 108.1(1-4) is appropriate, as it establishes a clear statutory foundation to a young person's right to apply for judicial interim release (bail) when their deferred sentences or community supervision sentences are being reviewed. This subsection appears to codify what youth courts have previously interpreted from common law principles and incorporated in *Criminal Code* provisions regarding youth-specific procedural availability[33].

The CBA Sections are concerned about the expanded circumstances proposed in s. 29(1)[34] that allow a youth justice court or a justice to impose more conditions on a release order. This measure risks allowing conditions to be imposed too readily, potentially leading to net-widening and unnecessary criminalization of young persons for breaches of technical or low-risk conditions.

---

[32] 60 Section 9 of the Act is replaced by the following:

Evidence of measures is inadmissible

9 Evidence that a young person has received a warning, caution or referral mentioned in section 6, 7 or 8 or that a police officer has taken no further action in respect of an offence, and evidence of the offence, is inadmissible for the purpose of proving prior offending behaviour in any proceedings before a court in respect of the young person, online.

[33] Section 108.1 is added as follows:

Applicable provisions — detention and release

108.1 (1) If the case of a young person is referred to the youth justice court under section 108 for a review under section 103 or 109 and the young person is remanded to custody under section 102 or 106, sections 28 to 31 apply, with any necessary modifications, to an application for their release from custody until the completion of the review by the youth justice court, online.

[34] Section 29(1), online.

## C. Sentencing Considerations

The CBA Sections appreciate the intent behind proposed ss. 49.1(1) and (2)[35] to enhance transparency by requiring the youth justice court to provide reasons for any credit granted for time spent in detention. However, requiring the court to state on the record the term of custody that would otherwise have been imposed if the youth's time in custody were added to the sentence could be misused to justify the imposition of an adult sentence, even where the court has already determined that a youth sentence is appropriate, taking into account the time served.

The CBA Sections recommend a provision that explicitly states that the above section is not intended to undermine the objectives of the YCJA and must not be used to justify elevating a youthful offender to an adult sentence. The YCJA principles – that the least onerous sentence appropriate in the circumstances should be imposed, including youth sentences, and that youthful offenders should be separated from adult offenders wherever possible – should be referenced. Doing so would provide greater protection for young persons while clearly prescribing the limits on the intended use of this provision.

- The CBA Sections recommend that s. 109.1[36] be further clarified to add due process into the calculation of when the youth is deemed to be unlawfully at large. For greater certainty, the crystallizing event should be when the warrant for arrest on suspension is issued by a justice or judge. This clarification would allow for procedural fairness and oversight given the heightened vulnerability of youth and would accord with the practice taking place in most jurisdictions. Further, it would be analogous to the process being used when CSOs for adults have been suspended.
- At a broader level, the CBA Sections remain concerned that the YCJA and the proposed amendments increasingly rely on custodial measures, with custody being used in place of vital social supports such as mental health services and housing. These issues arise not only at sentencing but also during bail hearings. There appears to be a growing trend toward incarcerating vulnerable youth, often influenced by their environments and surrounding people, without adequate funding for the community-based supports that would enable them to remain safely in their communities.

## D. Transfer of youth sentences

The CBA Sections support the proposed provisions under s. 57(1) and 58(1), which expand the ability to transfer youth sentences and make interprovincial arrangements.

---

35 Online

36 Section 109 states that the time a youth is unlawfully at large will not count toward any custody or supervision order.

## E. Access to records provisions

The CBA Sections are concerned that proposed amendments to the YCJA below would prohibit the disclosure or production of police investigative records, in which no charges are laid or extrajudicial measures taken, to defence counsel. Further, the Crown would be prohibited from disclosing that such records exist to defence counsel. This has significant implications for an accused's constitutional right to make full answer and defence and can impede the Crown's duty to disclose all relevant information, whether inculpatory or exculpatory.

71 Section 115 of the Act is amended by adding the following after subsection (1.1):

## F. For greater certainty

(1.2) For greater certainty, the police force may keep a record of an investigation in respect of an offence alleged to have been committed by a young person even if the investigation did not result in a charge or extrajudicial measures were not used to deal with that young person.

72 (1) Subsection 119(2) of the Act is amended by adding the following after paragraph (a):

(a.1) if an extrajudicial measure, other than an extrajudicial sanction, is used to deal with the young person, the period ending two years from the day on which the decision to use the extrajudicial measure is made;

(a.2) if the young person is the subject of an investigation referred to in subsection 115(1.2), two years from the day on which the young person ceases to be the subject of the investigation;

(2) Section 119 of the Act is amended by adding the following after subsection (4):

**Records — certain investigations**

(4.1) Access to a record kept in respect of an investigation referred to in subsection 115(1.2) is to be given only to the following persons for the following purposes:

(a) a peace officer or the Attorney General, in order to make a decision under this Act in respect of the young person to whom the investigation relates; and

(b) a peace officer, for the purpose of investigating an offence.

**Evidence of investigation — inadmissible**

(4.2) Evidence that forms a part of a police investigation referred to in subsection 115(1.2) in respect of a young person is inadmissible for the purpose of proving prior offending behaviour in any proceedings before a court in respect of the young person.

More broadly, the framework requires additional scrutiny in both criminal and civil contexts. In criminal proceedings, undisclosed investigative records may contain exculpatory information, alternative-suspect evidence, context relevant to voluntariness or reliability, or material bearing

on credibility – none of which would be accessible to the defence under the new restrictions.[37] In civil matters, youths may be investigated for alleged dangerous driving, impaired driving, arson, mischief, or sexual assault without charges being laid, and these investigations often intersect with subsequent litigation. Under the proposed regime, records of such investigations may be inaccessible even with a court order, limiting the availability of relevant evidence.

The CBA Sections recognize that the amendments include safeguards intended to preserve youth privacy: a limited two-year access period (s. 119(2) (a.2)); access restricted solely to peace officers and the Attorney General for defined purposes (s. 119(4.1)); and an evidentiary bar preventing these materials from being used to prove prior offending behaviour (s. 119(4.2)). These protections are consistent with core YCJA principles. However, they must be balanced against the need for meaningful judicial oversight and the constitutional imperatives associated with disclosure.

Given the heightened vulnerability and privacy interests of young persons, and the foundational importance of the right to make full answer and defence, the CBA Sections believe that any

---

37 There are a variety of scenarios in which investigative records pertaining to a young person, who may be a complainant or a witness in a prosecution against an accused, even where they do not lead to charges being laid, may be relevant to the defence. For example:

Scenario 1: Accused A is on trial for a criminal offence. Young Person B was investigated in relation to the offence but released without charge. Young Person B told police that he saw person C commit the crime. The records in relation to Young Person B's investigation, including his own statement, would be unproducible and inaccessible to counsel for Accused A. Counsel would never become aware of the existence of this statement.

Scenario 2: Accused A is charged with a criminal offence. The complainant is a Young Person, B. Young Person B has a history of making reports to police that police have determined to be unfounded, although in their discretion, the police have chosen not to lay charges of public mischief against Young Person B. Counsel for Accused A would not know of the history of the complainant's history of false reports, as the investigative records would be inaccessible to the defence, and the Crown would be unable to alert defence counsel as to their existence.

Scenario 3: Accused A is charged with a criminal offence pertaining to a complainant, Young Person B. Young Person B alleged that Accused A assaulted him on a certain date and time. There are no witnesses to the alleged assault and no other corroborative evidence. At the time of the alleged offence, Young Person B was in fact detained by police in another jurisdiction on an unrelated investigation. Young Person B was released without charge. However, this information would remain unavailable to counsel for Accused A.

Scenario 4: Accused A is on trial for a criminal offence. The complainant is a Young Person, B. The case rests upon the credibility of Young Person B. Young Person B was investigated for being in contravention of their release order on outstanding charges, as well as contravention of conditions of their probation order. During the investigation, Young Person B makes an allegation against Accused A which forms the substance of the charge against him. Police release Young Person B with a warning but choose not to lay charges against B. Counsel for Accused A would be unable to cross-examine Young Person B on a potential motive to fabricate allegations against A in connection with the police investigation of their own conduct.

All these scenarios raise the serious specter of the potential for wrongful conviction, if defence counsel is unable to obtain access to such records, or even be made aware of the existence of such records. The difficulty with the proposed amendments is that they leave no opportunity for defence counsel to request access by way of application to the court, or for a court to grant access to such records.

restriction on access to youth investigative records should include a mechanism for judicial review and, where appropriate, court-ordered disclosure. A statutory pathway for judicial oversight would better align the proposed amendments with both the objectives of the YCJA and the constitutional requirements governing criminal procedure.

### G. Privacy considerations

Regarding s. 115(1.2), the CBA Sections submit that the retention of investigative records may assist future identification of an actual offender, which appears to be the provision's intended purpose. At the same time, it risks preserving information that could prompt renewed scrutiny of youth who were not charged or were otherwise innocent. The provision should explicitly account for this risk and incorporate safeguards to prevent such unintended consequences. The wording should indicate that this provision be used solely for the narrow purpose of identifying an actual perpetrator in a future investigation, and not to reopen or reconsider past interactions with youth who were not charged. This could be reinforced through mandatory review periods, and with a clear provision on destruction of the record following the two-year record-keeping period.

**Other specific changes recommended**

- In s. 110 (4.1): change "police officer" to "peace officer", to provide consistency across provisions.
- In s. 110(4.1)(a): change "or" to "and" and add "further", i.e., modify "the young person has committed or is likely to commit an indictable offence" to: "the young person has committed and is likely to further commit an indictable offence". This change would provide greater certainty that the young person is, *and continues to be*, a danger. We would also recommend adding a judicial oversight provision, like those found in other sections where peace officers act without prior judicial authorization in emergency situations – an extraordinary measure that should be rare and scrutinized *post facto*. If such a provision is added, the peace officer should be required to report to a judicial officer within a prescribed period, ideally within 24 hours after the dangerous behaviour, and should be required to provide details justifying the extraordinary action. The 24-hour time frame aligns with other YCJA provisions that require *prior* judicial authorization after 24 hours.

## IV. NEW "REVERSE ONUS" BAIL PROVISIONS AND APPLICABILITY OF THE "LADDER" PRINCIPLE TO REVERSE ONUS OFFENCES IN BAIL HEARINGS

In the CBA Sections' experience, reverse onus provisions and changes to the ladder principle are unlikely to produce the intended deterrent effect and raise concerns about *Charter* compliance.

More importantly, without parallel investments in court resources and case management systems, these reforms risk making the bail process less efficient by increasing the complexity and length of bail hearings and contributing to broader systemic delays.

The CBA Sections have consistently opposed reverse onus provisions, viewing them as unnecessary in practice and disproportionately harmful to Indigenous accused and others who have historically faced barriers to obtaining release for reasons unrelated to public safety.

There are currently conflicting lines of authority with respect to the applicability of the "ladder" principle to bail hearings where the accused is in a reverse onus.[38] Bill C-14 would codify the line of cases that conclude that the "ladder" principle does not apply in reverse onus situations.

The CBA Sections acknowledge that logically speaking, in a reverse onus situation, the onus is on the accused to justify their release and propose appropriate conditions that sufficiently mitigate the public safety risk at issue. As the burden in these cases does not lie with the Crown, it would make sense that the "ladder" principle, which prohibits the imposition of a more onerous form of release unless the Crown shows cause why this more onerous release is appropriate, would not apply.

However, the CBA Sections are of the view that a more nuanced approach to release in a reverse onus situation is appropriate. The intent of the "ladder" principle is to ensure the constitutional right to reasonable bail for all accused persons, which is closely tied to the presumption of innocence. The protection of this right must be maintained, and removing the applicability of the "ladder" principle to reverse onus situations effectively removes this constitutional protection.

There is a wide variety of circumstances where an accused person may find themselves in a reverse onus situation, including more serious situations, such as being alleged to have committed an indictable offence while on release for a serious offence or when charged with an offence involving a firearm. However, a reverse onus also applies when an accused person is before the court on minor offences (e.g. shoplifting) and then comes back before the court for breaching bail conditions for failing to attend court or report to a bail supervisor or an alcohol-dependent person attending a liquor store contrary to their conditions. A strict removal of the "ladder" principle to such circumstances would require the court to begin their analysis at the

38 Loose-leaf updated 2019, release 1 at 6.11 ("The Ladder Principle"), online.

highest rung on the ladder (i.e. full house arrest with sureties), even though less onerous conditions may clearly be appropriate in the circumstances.

The CBA Sections support a nuanced approach to bail in reverse onus situations that allows the court to analyze the specific situation before it. This requires an analysis of the offence(s) the accused is charged with, including the sentence they might receive for it, the strength of the Crown's case, the reason the accused is in a reverse onus, and the specific public safety risk(s) at issue (including the accused's past performance on bail). For example, it could apply when a person on release is subsequently charged with a serious violent offence or a firearms offence. This would further ensure that court resources are saved to give maximum consideration to the most serious of offences.

A nuanced approach will ensure the constitutional right to reasonable bail; that a more onerous form of release is not imposed in inappropriate cases, while also ensuring that in more serious cases, where the public safety risk is high, that the accused must continue to justify their release on the strictest of conditions. This nuanced approach was endorsed by the B.C. Supreme Court in *R v. Adem*[39], at para 113:

Where one lands in terms of detention or release and what rung of the ladder an accused lands on in a reverse onus situation is a more nuanced assessment. In my view, it may be more accurate to describe the process for reverse onus situations as a multifaceted and contextual assessment of whether the proposed release plan sufficiently addresses the concerns enumerated in s. 515(10) of the Code[40], such that the accused is releasable.

## V. CONCLUSION

We have identified key concerns and recommendations regarding Bill C-14. Our comments focus on ensuring that proposed reforms maintain a fair, balanced, and evidence-based approach to sentencing and youth justice. We urge Parliament to carefully consider the potential unintended consequences of limiting judicial discretion and to uphold principles of proportionality, rehabilitation, and procedural fairness that are foundational to Canada's criminal justice system.

39 2023 BCSC 1813 at para. 113, online.

40 Online