CANADIAN CRIMINAL JUSTICE ASSOCIATION

BRIEF

Considering Bail Reform and the Repercussions of Bill C-48[1]

44th Parliament, 1st Session
April 2024

Background on the Canadian Criminal Justice Association (CCJA)

The CCJA is one of the longest serving non-governmental organizations of professionals and lay-persons interested in criminal justice issues in Canada, having begun its work in 1919 and having testified before various Parliamentary committees on numerous occasions. Our Association consists of approximately 200 members from across the country and publishes the *Canadian Journal of Criminology and Criminal Justice*, and the *Justice Report*. We also organize and host the Canadian Congress on Criminal Justice every second year.

Purpose of Brief

We appreciate the opportunity to provide our comments and advice on bail reform. This Brief aims to evaluate the current state of bail, along with the repercussions of and likely impact of Bill C-48. The Brief considers the risks of increasing reverse onus provisions and the likely impact on marginalized accused.

Summary of Bill C-48

Bill C-48, *An Act to amend the Criminal Code (bail reform),* was introduced on May 16, 2023, was subsequently passed by both Houses of Parliament, and received Royal Assent on December 5, 2023 (S.C. 2023, c. 30). It came into force 30 days later. The Bill made several amendments to the *Criminal Code* with the goal of addressing

[1] On February 26, 2024, the Canadian Civil Liberties Association (CCLA) released its Report entitled "Still Failing: The Deepening Crisis of Bail and Pre-Trial Detention in Canada". At that time, the present Brief was in the final stages of development and hence, the Report was not considered in the preparation of this Brief. Nevertheless, the Report covers much of the same ground as our Brief and adds to the analysis and evidence in helpful ways. We commend it to our readers: https://ccla.org/wp-content/uploads/2024/02/CCLA_Bail-Reform-Report-2024.pdf

concerns about violent repeat offenders, weapon offences, and gender-based violence. The Bill creates new reverse onus bail provisions for any person charged with a serious offence involving violence and use of a weapon, who has previously been convicted of a similar offence.

Further, Bill C-48 expands the current reverse onus provisions pertaining to firearm offences and for offences involving intimate partner violence.[2] Bill C-48 also adds express considerations and requirements for the courts when deciding whether to grant bail. Judges are now legislatively mandated to take into consideration whether the accused has a history of violent offences, and to provide a statement indicating consideration has been given to the safety of the community and victims.

Recent History of Bail Jurisprudence

Section 11(e) of the *Canadian Charter of Rights and Freedoms*

Section 11(e) of the *Charter* states that any individual charged with an offence has the right to not be denied "reasonable bail without just cause". [3] This right instills the presumption of innocence during pre-trial and ensures one's liberty rights are not unjustly violated. If the accused is placed under unnecessary restrictions a section 11(e) breach may be made out.

Under section 515(10) of the *Criminal Code*, there are three grounds that permit denying bail to an accused. They are when detention is necessary to ensure one attends court, for public safety, or to maintain confidence in the administration of justice.[4] Typically, the Crown must prove one or more of these grounds to remand an accused individual. However, certain offences contain a reverse onus. A reverse onus requires the accused to prove detention is not justified and is an exception under section 11(e).

R v Antic

In 2017, the Supreme Court of Canada (SCC) considered bail reform in the case of *R v Antic*. The Court emphasized the need to ensure bail provisions are applied "consistently and fairly" nationally.[5] Additionally, the SCC reiterated how courts must respect the presumption of innocence as it is a necessary principle of criminal law.

Antic provided guidelines for courts to consider when applying the provisions to a contested bail hearing. These principles include:

- the presumption of innocence and section 11(e) of the *Charter*
- defaulting to an unconditional release

---

[2] Bill C-48, *An Act to amend the Criminal Code (bail reform),* 1st Sess, 44th Parl, 2021.
[3] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 91(24) at section 11(e). [*Charter*]
[4] *Criminal Code*, RSC 1985, c. C-46 at section 515(10).
[5] *R v Antic,* 2018 SCC 27 at para 66 [*Antic*]

- the use of the ladder principle
- Crown justification of more onerous forms of release or remand.[6]

These principles highlight the SCC's explicit statement that the favoured position is release at the earliest opportunity and on the least onerous grounds.

Bill C-75

In 2019, Parliament passed Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts* (Royal Assent on June 21, 2019: S.C. 2019, c. 25). Some of the amendments in the Act were to modernize and streamline the bail regime, while ensuring public safety, and to help maintain public confidence in the criminal justice system. This bill increased police and court discretion when imposing conditions of release to encourage the release of individuals with the least onerous conditions. Bill C-75 addressed disproportionate impacts bail has on vulnerable populations and requires judges to take Indigenous status into consideration in making bail decisions. The maximum term of imprisonment for repeat offences involving intimate partner violence was increased. Judicial discretion was also expanded to deal with administration of justice offences involving failure to comply with conditions of release.

Analysis

Current Statistics on Bail

Bail has been inaccurately described as a "catch-and-release-system", perhaps because more accused are being released on their own recognizance following the SCC decision in *Antic*.[7] In many instances these individuals are re-arrested and returned to court.[8]

In 2021/2022, 70.5% of individuals in Canada's provincial and territorial jails were detained in custody pending trial.[9] This means that in 2021-2022, roughly 14,415 individuals were held in remand custody awaiting their trial.[10] The percentage (or rate) of the provincial prison population that are there on remand (i.e. awaiting trial or sentencing) may be even higher in Ontario now according to the results of a CTV News Freedom of Information request indicating that, on average last year, 82% of people in Ontario provincial custody were in pre-trial detention.[11] However, violent crime has remained lower than it was 15 years ago, despite a slight recent increase.[12]

---

[6] Ibid., at para 67.
[7] Rachel S & Carolyn Yule (2022) "Unbreaking Bail?: Post-Antic Trends in Bail Outcomes" Cambridge University Press 37:1.
[8] Lindsay Porter & Donna Calverley, (2011) "Trends in the Use of Remand in Canada" Ottawa: Juristat, online: Statistics Canada.
[9] Statistics Canada (2023) "Average counts of adults in provincial and territorial correctional programs".
[10] Ibid.
[11] https://toronto.ctvnews.ca/the-vast-majority-of-people-in-ontario-jails-last-year-were-awaiting-a-trial-data-shows-1.6747988
[12] Nicole Myers (2023) "The crisis in Canada's bail system is not one of laxity" *The Globe and Mail*.

Presumptively innocent people are being denied their liberty while awaiting trial. The increase in the remand population has serious negative consequences, such as increased deaths in custody, poor mental health, and drug overdoses.[13] These individuals are living in overcrowded conditions, often double-bunked, and the conditions of these facilities are disturbing.[14] Further, the environment in these provincial facilities is made harsher by a lack of programming, labour disputes, and frequent lockdowns.[15]

Purported Strengths of Bill C-48

A proper functioning bail system is imperative to maintain confidence in the criminal justice system and the administration of justice. The Government of Canada introduced Bill C-48 to promote community safety and reinforce public confidence in the administration of justice. Bill C-48 claims to target repeat offenders by creating reverse onus provisions making it more difficult to obtain bail for accused charged with violent or weapon related offences. The provisions are also intended by the Government to address the risks associated with intimate partner violence in hopes of protecting the public and greater community. Further, it will expressly require judges to consider an accused person's history of violence and community safety concerns in all bail decisions.[16] Whether or not the Government's intentions in enacting Bill C-48 are realized by the amendments remains to be seen. When asked in the Standing Senate Committee to share the evidence on which the amendments are based, the Minister of Justice was unable to provide any.[17]

Weaknesses of the Bill

Bill C-48 was rushed through the House of Commons with little debate and little consideration of its impact. The proposed amendments may seem to be an intuitively appealing solution; however, the consequences may do more harm than good. Bill C-48 lacks evidence-based research to support the premise that the proposed amendments will better protect the public and reduce violent crime.[18] More research is needed to understand the impact increased reverse onuses will have on marginalized accused.

These amendments will likely cause an increased number of individuals to be denied bail and be held longer in pre-trial custody. These amendments cause concern as they will impede an accused's *Charter* rights to reasonable bail.[19] Additionally, provisions pertaining to intimate partner violence appear overly broad. The mandatory dual

---

[13] Tracking (Injustice) (2022) "Ontario Deaths in Custody on the Rise" Canadian Civil Liberties Association.
[14] *R v Morant*, 2013 ONSC 1969 at paras 52, 55.
[15] R v Summers, 2014 SCC 26, at para 28.
[16] Bill C-48: Proposed changes to strengthen Canada's bail system" (2023) The Government of Canada.
[17] Kristy Kirkup & Sean Fine, *Critics Question Fast-Tracking of Bill C-48* (September 2023), online: The Globe and Mail < https://globe2go.pressreader.com/article/281556590438751>.
[18] *Supra*, note 2.
[19] Ibid., (Kim Pate Third Reading).

charging in cases of domestic violence, combined with the reverse onus, may have a widening effect that captures the victims, as well as the perpetrators. When looking specifically at indigenous women, this is a severe issue. It is not uncommon for survivors of domestic violence to be charged after defending themselves against their violent partners; it is also not uncommon for said survivors to enter a guilty plea just so they can return home.[20] Indigenous women are more likely to face intimate partner violence and criminalization; more of which we discuss below.

Presumption of Innocence and the Reverse Onus

The reverse onus provisions are arguably in direct conflict with the presumption of innocence.[21] Section 11(d) of the *Criminal Code* reflects our belief that individuals are law-abiding members of the community until proven otherwise.[22] In a reverse onus proceeding, the presumption is that the accused person will be detained while awaiting their trial. The accused must demonstrate to the court that they should be released by showing that there is no just cause for their detention. These presumptions place additional burdens on accused individuals to prove why they should be released from jail, and this burden will be doubly difficult for unrepresented and disadvantaged individuals to meet.

Dangers of "Fast Tracking" the Bill

Bill C-48 was fast tracked through the House of Commons in an unprecedented manner. Because of this, it was not studied in committee before it was passed by the House, a concern expressed by the Canadian Civil Liberties Association and others.[23] The Bill was pushed through with unsubstantiated assertions that it will provide certain benefits or protections to the public. The current Minister of Justice, Arif Virani, has said this legislation will address public concerns regarding violent offenders and weapon-based offences.[24] However, again, no supporting empirical evidence has been provided to date.

Those in favour of the Bill have argued that a previous study on bail reform by the House of Commons Justice Committee, where possible impacts on marginalized Canadians were discussed, was considered by government in drafting the bill. The fact that this Committee Report was a consideration during the drafting of the bill does not counter the argument that the legislation was not properly studied in the House, nor backed up by evidence. The Department of Justice did not present at Committee the scientific evidence to justify the reverse onuses created. This causes the CCJA serious

---

[20] Barbara Schlifer Commemorative Clinic, CAEFS, Luke's Place & et al, "Coalition calls for Senators to recognize the real crisis facing Canada's bail system instead of making bail more difficult to obtain", online: < https://caefs.ca/wp-content/uploads/2023/12/2023-10-02-Bill-C-48-submission-press-release-FINAL.pdf>

[21] Nicole Myers (2016) "Eroding the presumption of innocence: Pre-trial detention and the use of conditional release on bail." The British Journal of Criminology 57:3: 664–83.

[22] *R v Oakes*, [1986] SCJ No 7, 1 SCR 103 at para 29.

[23] *Supra*, note 17.

[24] Ibid.

concern about the possible impacts of the legislation.

Equity considerations

While the Minister of Justice provided a Charter Statement for Bill C-48, the statement only looks to section 11(e).[25] The Charter Statement does not address equality rights under section 15, an important consideration for the implementation of this legislation.

Implementing new reverse onuses and proposing stricter release conditions will only deepen the "inequities in the justice system".[26] It is likely that a wealthy individual, or one with family willing to help them, will be more able to rebut the reverse onus, whereas an individual from an impoverished background will not. It is known that black accused are overrepresented in custody. Specific data regarding custody of racialized individuals is quite limited; however, previous studies have shown that Black accused are statistically more likely to be detained pre-trial.[27] These are very important considerations when implementing new laws that will increase the number of accused held without bail.

An additional consideration is that of Indigenous women. Lawyer Christa Big Canoe of the Indigenous Bar Association states that the implementation of this bill is likely to lead to more Indigenous women being incarcerated.[28] Consider the practice of "dual charging", where police are called to a domestic violence scenario and charge both "participants". Dual charging results in women in violent relationships potentially becoming swept up in the criminal justice system with a reverse onus.[29] Indigenous people already do not receive bail at the same rate - a consideration that Parliament must consider when imposing additional reverse onuses. An additional factor is that women are more likely to use weapons, whether a frying pan or a kitchen knife, to defend themselves during a domestic dispute.[30] This will likely result in additional reverse onuses and an increased number of women, including indigenous women, to be incarcerated just for defending themselves.

Furthermore, pre-trial custody can have an adverse effect on those who suffer from poor mental health and can lead to individuals pleading guilty, even if they are not factually guilty, just to be released from prison. Other problems to consider are loss of

---

[25] Bill C-48: An Act to amend the Criminal Code (bail reform), Charter Statement (November 2023).
[26] *Supra*, note 17.
[27] Government of Canada, "Black people in criminal courts in Canada: An exploration using the relative rate index", (March 2023); online: < https://www.justice.gc.ca/eng/rp-pr/jr/rrbb-bbrr/results-resultats.html#:~:text=While%20data%20on%20Black%20people,Kellough%20%26%20Wortley%2C%202002)>.
[28] Fraser Needham, *First Nations lawyer says new bail legislation unfairly targets Indigenous women* (September 2023), online: APTN News < https://www.aptnnews.ca/national-news/first-nations-lawyer-says-new-bail-legislation-unfairly-targets-indigenous-women/>.
[29] Ibid.
[30] *Supra*, note 19.

employment, breakdown of family relationships, lack of treatment in remand facilities and the health risks associated with incarceration. These are all concerns that will increase with additional reverse onus provisions.

Canada's *Youth Criminal Justice Act* [31]

Canada's *Youth Criminal Justice Act* (YCJA) is a model for the reform of the *Criminal Code* bail provisions. One of the problems that Parliament wanted to address in passing the YCJA was the over-use of incarceration, including pre-trial detention. The previous youth criminal justice legislation (the *Young Offenders Act*) used the *Criminal Code* bail provisions in youth proceedings. The YCJA removed the applicability of the Code's grounds for detention and inserted a separate, more restrictive, and more explicit set of grounds for detention. They made it more difficult to detain youths charged with less serious offences.

YCJA bail provisions

Examples of differences between the YCJA provisions and the Code provisions include:

- The YCJA contains a threshold provision that limits the types of alleged offenders who may be eligible for detention. The court has no authority to detain unless the youth is charged with a *serious offence* (an indictable offence for which the maximum adult sentence is 5 years or more) or has a history that indicates a pattern of previous findings of guilt or outstanding charges. In contrast, the Code allows detention of "an accused who is charged with an offence."
- Unlike the Code provisions, the "secondary ground" in the YCJA requires a substantial likelihood of a serious offence if the youth is released. In contrast, the Code refers to a substantial likelihood of any criminal offence or interference with the administration of justice, a much lower standard.
- Unlike the Code provisions, the "tertiary ground" in the YCJA can be used only if (a) the youth is charged with a "serious offence"; (b) the first two grounds do not apply; and (c) there are "exceptional circumstances" justifying detention on this ground. The most common administration of justice offences are outside the meaning of "serious offence" and cannot be a basis for detention under this ground.
- Under the YCJA, the onus is on the Crown in all cases (s. 29(3)). The reverse onus provisions of the Code do not apply under the YCJA. So, unlike the Code (s. 515(6)), in cases such as failure to appear in court or failure to comply with a release condition, the onus does not shift to the youth to show why he or she should not be detained.

Use of pretrial detention under the YCJA and the Code

Recent research on the experience under the YCJA suggests that there are lessons to be learned from the YCJA for those interested in a more restrained use of pretrial

[31] For a more complete discussion of the YCJA and the experience under the Act, see R. Barnhorst, "Achieving Restraint in the Use of the Criminal Justice System: Canada's Youth Criminal Justice Act", *Criminal Law Quarterly, vol. 72 (2024)* (forthcoming).

detention in the adult system. Under the YCJA, the use of pretrial detention has been dramatically reduced and is much lower than the use of pretrial detention under the Code. Over the period of 2002/03 to 2020/21, under the YCJA, the average number of youths in detention dropped by 77% and the youth detention rate (the number of youth detained per 10,000 in the population) dropped by 70%. Over the same time period, the average number of adults in detention increased by 47% and the adult detention rate increased by 14%. Although the legislation is not the only explanation for this difference, it is likely that it was a significant factor.

It is noteworthy that the decreased use of detention under the YCJA was not accompanied by an increase in the youth crime rate or youth crime severity. In fact, between 2000 and 2020, the youth crime rate decreased by 69% and youth crime severity decreased by 59%.

Comparative (international) analysis

Norway

Norway does not have a bail system. As part of the *Norway Criminal Procedure Act 1981*, individuals accused of minor crimes are released on their own recognizance, whereas individuals accused of serious or violent crimes are automatically remanded into custody.[32] An important distinction is that while incarcerated, the individual has full access to their family, and they have access to a government paid lawyer.[33]

Australia

Australia has a similar bail system to Canada and has been having similar debates regarding bail reform. Australia is currently dealing with the highest incarceration rate they have had in the past 100 years and there is a disproportionate number of vulnerable people being remanded.[34] Australian scholars have emphasized the issue of pre-trial incarceration leading to health issues for the accused (both physically and mentally), the economic expense of increasing incarceration, and the impact remand has on procedural fairness and due process.[35]

Other Countries to Consider[36]

The bail system in the United Kingdom may also be a reasonable comparison to

[32] Norway 2016 Human Rights Report, United States Department of State: Country Reports on Human Rights Practices for 2016, online: < https://www.state.gov/wp-content/uploads/2019/01/Norway-1.pdf>.
[33] Ibid.
[34] Isabelle Bartkowiak-Théron & Emma Covin, "Understanding the impact of bail refusal on the Australian public health system" (2022) 7:4 J of CSWB.
[35] Ibid.
[36] For further consideration: *Bail* (November 2023) online: The Crown Prosecution <https://www.cps.gov.uk/legal-guidance/bail>; *Bail and release from custody arrangements: consultation* (November 2021) online: Scottish Government <https://www.gov.scot/publications/consultation-bail-release-custody-arrangements-scotland/pages/4/>; *Bail and Remand* (November 2015) online: Irish Penal Reform Trust <https://www.iprt.ie/site/assets/files/6363/iprt_position_paper_11_on_bail_and_remand_s ml.pdf>;

Canada. However, each country in the United Kingdom operates their bail system differently and while further study of such may be of assistance, to do so properly is outside the scope of this Brief.

Conclusion

Bill C-48 is a reactive legislative response to perceived problems with Canada's bail system and should not be relied upon to solve the current public confidence crisis concerning Canada's bail system. The amendments lack empirical data to support the contention that the changes will better protect the public and reduce violent crime. In fact, these amendments may exacerbate the issues faced in the bail system. Expanding reverse onus provisions will make it more difficult for some individuals to obtain bail, and the increasing remand populations may lead to a rise in several adverse effects, such as deaths in custody. More evidence-based research should be undertaken when crafting amendments to Canada's bail system that carefully balance the protection of society with an individual's constitutional right to not be denied reasonable bail without just cause.

Recommendations

1. The Department of Justice should be required to conduct a thorough study of the assertions made that the amendments enacted in Bill C-48 would decrease violent offences, with a view to identifying any evidence that supports or refutes those assertions. The results of that study should be made public. We further recommend that this study be undertaken immediately following the implementation of the Bill and prior to the five-year period referenced in section 2 of Bill C-48.

2. The Government of Canada should fund an <u>independent</u> review of possible *Charter* implications and constitutional violations of the changes enacted by Bill C-48. While a Charter statement was published by the Department of Justice, it is deficient and does not consider how the Bill will impact vulnerable Canadian populations.

3. The Government should provide funding for Statistics Canada, in consultation with the Department of Justice, to improve the collection and analysis of data relating to bail in Canada.

4. The Government of Canada should undertake a broad-based initiative to study and directly address concerns regarding remand populations across the country, including the significant increases in the size and rate of these populations and the overrepresentation of racialized individuals. In addition, in collaboration with federal, provincial and territorial Attorneys and Solicitors General, the provincial and territorial governments should immediately undertake an evidence-based review of local contributing factors to remand populations and implement operational amendments to reduce time spent on remand, including the provision of more

alternative bail options, such as bail supervision programs and other community-based programming. Emphasis should be given to relying less on sureties because disadvantaged individuals are less likely to be able to provide one.

5. Section 28.1 and section 29 of the *Youth Criminal Justice Act* should be considered as a model for reforming the *Criminal Code* bail provisions.

6. Consideration should be given to implementing a two-tiered bail system. That is, if the goal of Bill C-48 is to detain more "violent offenders" pre-trial and given the high and rising rates of remand inmates in provincial and territorial prisons across the country, in order to achieve a better balance, there should be a focus on releasing more "non-violent" offenders from pre-trial custody.