

# Assessments and Analyses of Canada's Bail System

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This *Research in Brief* is based on publicly available data from a number of Justice Canada, Canadian government (federal and provincial/territorial), academic and community organization studies and publications released from 2009 to 2018, as well as information from various media sources. Preliminary findings from a Justice Canada study are also presented.

## **Bail problems are a national issue<sup>1</sup>**

Considering the extent and impact of current issues facing the Canadian bail system, stakeholders and experts (e.g., Office of the Correctional Investigator, Canadian Civil Liberties Association, academics, court workers) have noted that national leadership and a coordinated approach across the country are required to address bail issues. Indeed, the recent Senate Committee on Legal and Constitutional Affairs is in “agreement that there is need for reform of the bail process and of the manner in which accused persons are detained on remand.” Some areas for leadership and reform may come from investments in bail infrastructure and support, legal reform, and ensuring the availability of treatment, rehabilitation, and occupational programs at the bail/remand stage.

## **Academics, community organizations, and court workers argue that a cultural shift towards risk aversion has resulted in a bail system that is overly punitive**

Concerns have been voiced with the increased focus placed on risk avoidance and risk management within the bail system. A risk averse mentality has influenced key decision makers, police officers, and the courts. This has limited the use of decision-maker's discretion and contributed to the practice of not releasing accused who

<sup>1</sup> The Canadian Press. (2016, April 28). Canada's Bail System Creating a Number of Problems, Justice Documents. *Huffington Post*. Retrieved from [http://www.huffingtonpost.ca/2016/04/28/canada-lacks-full-picture-of-issues-related-to-bail-justice-documents\\_n\\_9799534.html](http://www.huffingtonpost.ca/2016/04/28/canada-lacks-full-picture-of-issues-related-to-bail-justice-documents_n_9799534.html); Rayson, S. D. (2014). Canada's bail system in need of reform: Manishen. *AdvocateDaily*. Retrieved from <http://www.advocatedaily.com/profile/canadas-bail-system-in-need-of-reform.html>; Canadian Civil Liberty Association and Education Trust. (2014). *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention*. Retrieved from <https://ccla.org/cclanewsites/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf>; Standing Senate Committee on Legal and Constitutional Affairs, Senate of Canada. (2017). *Delaying Justice is Denying Justice: An urgent need to address lengthy court delays in Canada* (Final report). Retrieved from: [https://sencanada.ca/content/sen/committee/421/LCJC/Reports/Court\\_Delays\\_Final\\_Report\\_e.pdf](https://sencanada.ca/content/sen/committee/421/LCJC/Reports/Court_Delays_Final_Report_e.pdf)

present non-trivial levels of risk to re-offend, even those who allegedly committed minor offenses.<sup>2</sup>

Recent comparative research has shown how Canadian prosecutors may be preoccupied with risk management and placing onerous restrictions on accused people when released on bail, while court practitioners in England are concerned with quick bail processes, minimizing custody, and reducing costs associated with courts and prisons. Generally, this finding underscores the suite of factors at play in bail courts, the importance of court culture, and the practitioner and policy priorities when it comes to the role of the criminal justice process. As part of the court culture, defence and Crown relationships have been observed in Canadian bail courts to be full of contentions and coloured by prolonged negotiations. When bail decisions are made, information about risk, a bail plan, a surety, and mitigating risk are often presented to secure a release. When release does occur, it is usually after defence agrees to restrictive bail conditions which often involve some form of supervision.

Further, bail observations in Canada have illustrated how bail usually takes more than one appearance, contributing to delay and efficiency concerns in Canada's criminal courts.<sup>3</sup>

Analysts have also highlighted how legislative reforms have resulted in onerous release orders (including increasing the use of sureties, multiple conditions, bail supervision programs, and monetary assurances), often unrelated to the offence allegedly committed, which are being imposed on accused who are not detained. The extent of the situation challenges the presumption of innocence.<sup>4</sup>

### **Various stakeholders have warned that the impacts of current bail issues result in further criminalization of vulnerable populations**

A number of bail provisions have been identified by academics, community organizations, and court workers as having unintended consequences on vulnerable populations. For instance, reverse onus provisions, which place the responsibility on the accused for proving why they should be released, were noted as challenging for those with mental health issues or those that are not represented by counsel.<sup>5</sup> The requirements for sureties and/or monetary assurances were also described as

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<sup>2</sup> Webster, C. (2015). *Broken Bail in Canada: How We Might Go About Fixing It*. Research and Statistics Division, Department of Justice Canada; John Howard Society of Ontario. (2013). *Reasonable Bail?* Retrieved from <http://www.johnhoward.on.ca/wp-content/uploads/2014/07/JHSO-Reasonable-Bail-report-final.pdf>; Ireton, J. (30 May 2016). Lawyers, advocates call for bail reform to ease jail overcrowding. *CBC News*. Retrieved from <http://www.cbc.ca/news/canada/ottawa/lawyers-advocates-call-bail-reform-jail-overcrowding-1.3603208>; Makin, K. (8 June 2012). A case for bail reform. *The Globe and Mail*. Retrieved from <http://www.theglobeandmail.com/news/national/a-case-for-bail-reform/article4244210/>

<sup>3</sup> Grech, Diana. (2017). *Culture before law? Comparing bail decision-making in England and Canada*. PhD Dissertation. School of Law, University of Leeds.

<sup>4</sup> Webster, C. (2015). *Broken Bail in Canada: How We Might Go About Fixing It*. Research and Statistics Division, Department of Justice Canada.; Myers, N.M. (2009). Shifting Risk: Bail and the Use of Sureties, *Current Issues in Criminal Justice*, 21(1): 127-147; John Howard Society of Ontario. (2013). *Reasonable Bail?* Retrieved from <http://www.johnhoward.on.ca/wp-content/uploads/2014/07/JHSO-Reasonable-Bail-report-final.pdf>; Canadian Civil Liberty Association and Education Trust. (2014). *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention*. Retrieved from <https://ccla.org/cclanewsites/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf> (Includes stakeholder interviews); Lauzon, J. (14 March 2016). Julie Lauzon: When bail courts don't follow the law. *National Post*. Retrieved from <http://news.nationalpost.com/full-comment/julie-lauzon-when-bail-courts-dont-follow-the-law>; Rayson, S. D. (2014). Canada's bail system in need of reform: Manishen. *AdvocateDaily*. Retrieved from <http://www.advocatedaily.com/profile/canadas-bail-system-in-need-of-reform.html>

<sup>5</sup> Webster, C. (2015). *Broken Bail in Canada: How We Might Go About Fixing It*. Research and Statistics Division, Department of Justice Canada; Canadian Civil Liberty Association and Education Trust. (2014). *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention*. Retrieved from <https://ccla.org/cclanewsites/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf>.

impediments to release for individuals with lower income.<sup>6</sup> The use of abstention conditions, such as requiring accused with substance abuse problems to abstain from alcohol/drugs, were said to set people up with substance abuse and mental health issues for failure once released on bail. More specifically, abstention conditions can invite breaches of conditions.<sup>7</sup> Finally, recent research on youth bail conditions showed that on average, youth have seven conditions placed upon them and there are differences in the quantity and quality of conditions based on the gender of the accused.<sup>8</sup>

The impact of bail issues has been noted for Indigenous people who face many intersecting problems.<sup>9</sup> A recent study conducted with 692 key Indigenous justice stakeholders by the Indigenous Policy and Program Innovation Hub highlighted the extent of the impact of current issues surrounding bail on Indigenous people.<sup>10</sup> Indigenous Court Workers have confirmed that various socio-economic, psychological or family factors regularly contribute to a high prevalence of bail breaches and administration of justice offences (AOJOs) among Indigenous people accused of crime.<sup>11</sup>

Other analysts of bail issues have noted that important legal principles have gone unrealized at the bail stage when dealing with Indigenous people.<sup>12</sup> More specifically, there is concern that Gladue principles or systemic considerations that should be taken into account are not adequately being interpreted and applied at the bail/judicial interim release stage. For instance, overlooked are systemic issues such as institutional bias, policing trends, and bail practices that disproportionately impact, and have consequences, on Indigenous people.

Further highlighting the impact of bail on Indigenous people, a recent Justice Canada study on guilty pleas used insights from members of various working groups and committees working with Indigenous people in the criminal justice system<sup>13</sup> to expose how Indigenous accused may plead guilty due to a variety of different factors, including bail-related factors. When Indigenous accused are denied bail, they may want to 'get it over with,' to get out of remand, and receive a reduced

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<sup>6</sup> Webster, C. (2015). *Broken Bail in Canada: How We Might Go About Fixing It*. Research and Statistics Division, Department of Justice Canada; Legal Aid Ontario. (2017). *A legal aid strategy for bail*. Retrieved from <http://www.legalaid.on.ca/en/publications/paper-legal-aid-strategy-for-bail-2016-11.asp>.

<sup>7</sup> Webster, C. (2015). *Broken Bail in Canada: How We Might Go About Fixing It*. Research and Statistics Division, Department of Justice Canada; John Howard Society of Ontario. (2013). *Reasonable Bail?* Retrieved from <http://www.johnhoward.on.ca/wp-content/uploads/2014/07/JHSO-Reasonable-Bail-report-final.pdf>; and Canadian Civil Liberty Association and Education Trust. (2014). *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention*. Retrieved from <https://ccla.org/cclanewsites/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf>.

<sup>8</sup> Spratt, J. B., & Manson, A. (2017). YCJA bail conditions: "Treating" girls and boys differently. *Canadian Criminal Law Review*, 22(1), 77.

<sup>9</sup> Canadian Civil Liberty Association and Education Trust. (2014). *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention*. Retrieved from <https://ccla.org/cclanewsites/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf>; Legal Aid Ontario. (2017). *A legal aid strategy for bail*. Retrieved from <http://www.legalaid.on.ca/en/publications/paper-legal-aid-strategy-for-bail-2016-11.asp>.

<sup>10</sup> Indigenous Policy and Program Innovation Hub Over-representation Database, 2016. N = 692. Department of Justice Canada.

<sup>11</sup> Public Works and Government Services Canada & Orsi, M.M. (2013). *Administration of Justice Offences among Aboriginal People: Court Workers' Perspective*. Research and Statistics Division, Department of Justice Canada.

<sup>12</sup> Rogin, Jillian. (2017). *Gladue and bail: The pre-trial sentencing of Aboriginal people in Canada*. *The Canadian Bar Review*, 95, 325-356; Sylvestre, Marie-Eve. (2016). "Moving Towards a Minimalist and Transformative Criminal Justice System": Essay on the Reform of the Objectives and Principles of Sentencing. Ottawa, ON: Research and Statistics Division, Justice Canada.

<sup>13</sup> This includes members of the Indigenous Court Work Program Tripartite Working Group and FPT Permanent Working Group on Legal Aid, and Crown counsel from the FPT Heads of Prosecutions Committee.

sentence in return.<sup>14</sup> Bail, therefore, not only impacts the processing and efficiency of the criminal justice system, but it is possible to have a differential and consequential impact on different groups, especially Indigenous and vulnerable groups.

### Most stakeholders criticize the bail process for its inefficiencies

Issues of timeliness of the bail process have been demonstrated by academics and community organizations,<sup>15</sup> confirmed by court workers,<sup>16</sup> and recognized by several jurisdictions through the implementation of reviews or action plans.<sup>17</sup> There is widespread concern about bail courts being routinely delayed due to adjournments for a variety of reasons (e.g., finding sureties, retrieving information, and seeking legal advice) which results in unproductive court proceedings and longer wait times in remand.

Inefficiencies in the bail process have been further noted with the use of stringent release orders that may essentially set up the accused for failure by imposing unattainable requirements or multiple onerous conditions. This can result in breaches and thus inundate the criminal court system with administration of justice offence charges.<sup>18</sup>

Inefficiencies are not the only concern as many studies have highlighted the serious problems associated with an increasing number of accused persons held in jails while awaiting bail hearings and trials. For example, there may be: potential *Charter* violations of accused persons; increases in the numbers of presumptively innocent people in custody; increases in costs; increases in exposure to criminal and criminogenic behaviours; and increases in the negative custodial impact on vulnerable populations.<sup>19</sup> There is the added issue of the lack of programming in the bail

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<sup>14</sup> Bressan, A., & Coady, K. (2017). Guilty pleas among Indigenous people in Canada. Ottawa, ON: Research and Statistics Division, Department of Justice Canada. Available online: [http://publications.gc.ca/collections/collection\\_2018/jus/J4-62-2017-eng.pdf](http://publications.gc.ca/collections/collection_2018/jus/J4-62-2017-eng.pdf)

<sup>15</sup> Webster, C. (2015). *Broken Bail in Canada: How We Might Go About Fixing It*. Research and Statistics Division, Department of Justice Canada; John Howard Society of Ontario. (2013). *Reasonable Bail?* Retrieved from <http://www.johnhoward.on.ca/wp-content/uploads/2014/07/JHSO-Reasonable-Bail-report-final.pdf>; Canadian Civil Liberty Association and Education Trust. (2014). *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention*. Retrieved from <https://ccla.org/cclanewsites/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf>; Myers, N.M. (2015). Who Said Anything About Justice? Bail Court and the Culture of Adjournment. *Canadian Journal of Law and Society*, 31(1): 127-146.

<sup>16</sup> Grech, D.C. (2011). *Explaining Inefficiency in an Ontario Bail Court: Perspectives of Criminal Defence Lawyers* (Master's Thesis). Department of Criminology, University of Ottawa; Ireton, J. (30 May 2016). Lawyers, advocates call for bail reform to ease jail overcrowding. *CBC News*. Retrieved from <http://www.cbc.ca/news/canada/ottawa/lawyers-advocates-call-bail-reform-jail-overcrowding-1.3603208>; Smith, D. (23 January 2017). "Government looking to nix bail reform bill." *Law Times*. Retrieved from <http://www.lawtimesnews.com/201701235893/headline-news/government-looking-to-nix-bail-reform-bill>.

<sup>17</sup> Irving, N. L. (2016). *Alberta Bail Review: Endorsing a Call for Change*. Retrieved from [https://justice.alberta.ca/programs\\_services/criminal\\_pros/Documents/AlbertaBailReview-REPORT.pdf](https://justice.alberta.ca/programs_services/criminal_pros/Documents/AlbertaBailReview-REPORT.pdf); Seymour, A. (1 December 2016). Province to see bail reforms, more judges and prosecutors hired: attorney general. *Ottawa Citizen*. Retrieved from <http://ottawacitizen.com/news/local-news/province-to-see-bail-reforms-more-judges-and-prosecutors-hired-attorney-general-announces>; BC Justice Reform Initiative. (2012). *A Criminal Justice System for the 21<sup>st</sup> Century*. Retrieved from <http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/cowperfinalreport.pdf>.

<sup>18</sup> Webster, C. (2015). *Broken Bail in Canada: How We Might Go About Fixing It*. Research and Statistics Division, Department of Justice Canada.; Myers, N.M. & Dhillon, S. (2013). The Criminal Offence of Entering Any Shoppers Drug Mart in Ontario: Criminalizing Ordinary Behaviour with Youth Bail Conditions. *Canadian Journal of Criminology and Criminal Justice*, 55(2); Sprott, J.B. & Myers, N.M. (2011). Set Up To Fail - The Unintended Consequences of Multiple Bail Conditions, *Canadian Journal of Criminology and Criminal Justice*, 53(4): 404-423; John Howard Society of Ontario. (2013). *Reasonable Bail?* Retrieved from <http://www.johnhoward.on.ca/wp-content/uploads/2014/07/JHSO-Reasonable-Bail-report-final.pdf>.

<sup>19</sup> Standing Senate Committee on Legal and Constitutional Affairs, Senate of Canada. (2017). *Delaying Justice is Denying Justice: An urgent need to address lengthy court delays in Canada* (Final report). Available online: [https://sencanada.ca/content/sen/committee/421/LCJC/Reports/Court\\_Delays\\_Final\\_Report\\_e.pdf](https://sencanada.ca/content/sen/committee/421/LCJC/Reports/Court_Delays_Final_Report_e.pdf); Webster, C. (2015).

environment. For example, while sentenced offenders are supervised and placed in rehabilitation programming, people in detention in the remand environment are unlikely to receive the type of attention/programming/service needed to address their rehabilitation or treatment needs.<sup>20</sup>

### **Many Canadians support initiatives aimed at reforming the bail regime and the response to AOJOs<sup>21</sup>**

A survey conducted by Justice Canada in 2016 highlights that young Canadians believe the Criminal Justice System is not fair to people in jail awaiting trial. Further, the majority of the Canadian public are in favor of increasing bail releases if there is a low risk to public safety (75%) and Canadians are in favor of not charging individuals with a criminal offence for administrative offences that do not include criminal activity (68%).

### **Young people believed that an accused should remain in the community on bail for all types of offences<sup>22</sup>**

A youth engagement project by Justice Canada, in partnership with the Students Commission of Canada, showed that young people believe that an accused should remain in the community on bail for all types of offences (with some conditions) while awaiting trial. This is preferred over being remanded to jail.

When it comes to bail determinations, young people wanted caregiving responsibilities and lived realities of people (like poverty, mental health needs, and employment circumstances) to be considered when judges place conditions on an accused person on bail. Further, youth thought that accused persons should have greater supports to help them meet reasonable bail conditions, for example referrals to support services or rides to court. Youth felt that appropriate resolution of a breach of conditions requires individualized responses, including examination of personal circumstances, as well as the reason for and nature of the breach.

### **Canadian Bar Association supports bail reform but expressed caution with proposed provisions of bail reform initiatives**

In a 2008 letter to the Department of Justice Canada, the Canadian Bar Association's National Criminal Justice Section confirmed their support of initiatives aiming to simplify procedures surrounding bail and acknowledged that increasing releases by police is a promising avenue to address current bail issues.<sup>23</sup> However, they cautioned that increasing police officers' authority to release accused with conditions may lead to further complications in the bail systems if these officers are not properly trained. As such, they urged that such initiatives be paired with appropriate training

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*Broken Bail in Canada: How We Might Go About Fixing It.* Research and Statistics Division, Department of Justice Canada; Canadian Civil Liberty Association and Education Trust. (2014). *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention.* Retrieved from <https://ccla.org/cclanewsites/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf>; Statistics Canada (2017). Trends in the use of remand in Canada, 2004/2005 to 2014/2015. Available online: <https://www.statcan.gc.ca/pub/85-002-x/2017001/article/14691-eng.htm>.

<sup>20</sup> Standing Senate Committee on Legal and Constitutional Affairs, Senate of Canada. (2017). *Delaying Justice is Denying Justice: An urgent need to address lengthy court delays in Canada* (Final report), June 2017. Retrieved from [https://sencanada.ca/content/sen/committee/421/LCJC/reports/Court\\_Delays\\_Final\\_Report\\_e.pdf](https://sencanada.ca/content/sen/committee/421/LCJC/reports/Court_Delays_Final_Report_e.pdf)

<sup>21</sup> National Justice Survey 2016, Informed-Choice, N = 1,863. Research and Statistics Division, Department of Justice Canada.

<sup>22</sup> Justice Canada. (2018). *Research at a Glance: Bail and Administration of Justice Offences (AOJOs)*. Ottawa, ON: Research and Statistics Division, Department of Justice Canada. Retrieved from <http://www.justice.gc.ca/eng/rp-pr/jr-rg-rc/2018/june01.html>

<sup>23</sup> Canadian Bar Association. (29 January 2008). *Re: Proposed bail reform provisions*. Retrieved from <http://www.cba.org/CMSPages/GetFile.aspx?guid=2b57d0e1-8b7d-4f2c-bf52-b71cddfd0f32>.

resources. The Canadian Bar Association's 2018 comments on Bill C-75<sup>24</sup> also support bail-related amendments and efforts to encourage more expedient hearings, ensure consistency with existing case law, discourage the use of cash deposits and sureties, encourage a more streamlined process, and confront the increasing rates of pre-trial detention.<sup>25</sup>

### **Victims of crime and advocates have voiced their desire for bail legislation that effectively protects Canadian citizens**<sup>26</sup>

Following various events of tragic deaths in the community at the hands of accused released on bail, victims and advocates have raised their discontent with current bail provisions and have suggested that amendments be made to the *Criminal Code* to restrict bail releases for certain individuals (e.g., as part of former bill S-217, defeated in June 2017<sup>27</sup>).

While there is limited research and data on the frequency and type of offences committed on bail, victim groups have various concerns when it comes to bail. This includes the need to carefully consider victims in the bail process, maintain flexibility and responsiveness in the bail process, enhance safety and security measures, enshrine rights in the Canadian Victims Bill of Rights, and ensure supports, information, policies, and practices are available to victims and keep victims safe.<sup>28</sup>

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<sup>24</sup> In March 2018, the Government introduced 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. Among the many goals of Bill C-75, it proposes to: modernize and clarify bail provisions; provide an enhanced approach to administration of justice offences, including for youth; and provide additional measures to reduce criminal justice system delays and to make criminal law and the criminal justice system clearer and more efficient. See: Department of Justice Canada. (2018). Legislative Background – An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts (Bill C-75). Retrieved from: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/c75/p3.html>

<sup>25</sup> Canadian Bar Association. (2018). *Submission on Bill C-75 Criminal Code and Youth Criminal Justice Act amendments*. Retrieved from <https://www.cba.org/CMSPages/GetFile.aspx?guid=2058601f-9ae0-4dbb-9e8b-7e829462213b>.

<sup>26</sup> CBC News. (26 January 2017). Saskatoon Woman Asks Prime Minister About Bail Reform Bill. *CBC News*. Retrieved from <http://www.cbc.ca/news/canada/saskatoon/saskatoon-woman-asks-prime-minister-about-bail-reform-bill-1.3953887>; Mills, B. (6 May 2013). *Letter to Honourable Robert Douglas Nicholson – Re: Private Members Bill on Bail Reform*. Retrieved from <http://sisters-in-solidarity.com/blog/?p=1060>.

<sup>27</sup> Amendments in this Bill aimed to expand the grounds for detention prior to trial and require the Crown to share an accused's criminal record as part of a bail application, among other provisions.

<sup>28</sup> Office of the Federal Ombudsman for Victims of Crime. (2017). *Bail reform: Getting fair outcomes for victims in Canada's criminal justice system*. Ottawa, ON: Office of the Federal Ombudsman for Victims of Crime. Retrieved from [http://publications.gc.ca/collections/collection\\_2018/jus/J84-5-1-2017-eng.pdf](http://publications.gc.ca/collections/collection_2018/jus/J84-5-1-2017-eng.pdf)