

The Bail Reform Act Revisited*

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About fifty years ago, I began my research on the bail system in Canada. My book, *Detention Before Trial*, was published in 1965 and played a role in bringing about the Bail Reform Act of 1971. That Act introduced a number of significant changes in the system of pre-trial release, which I had found was operating in an “ineffective, inequitable, and inconsistent manner.” That description is, unfortunately, still true today. Practices vary widely across the country, and the number of people being held in custody has increased dramatically over the past twenty-five years. This article explores the factors that may have led to this increase, examines ways of helping to solve the problem, and concludes that pre-trial release practices across Canada require careful re-examination.

L’auteur a commencé sa recherche sur le système de mise en liberté sous caution au Canada il y a environ cinquante ans. Son livre, *Detention Before Trial*, publié en 1965, a joué un rôle dans l’élaboration de la Loi sur la réforme du cautionnement (1971). Cette loi a apporté de nombreux changements importants au système de mise en liberté avant procès qui, selon l’auteur, fonctionnait de façon inefficace, inéquitable et non uniforme. Malheureusement, cette description s’applique toujours aujourd’hui. Les pratiques dans le domaine varient beaucoup à l’échelle du pays et le nombre de personnes détenues a augmenté de façon significative au cours des 25 dernières années. Dans cet article, l’auteur examine les facteurs qui peuvent avoir contribué à cette augmentation et cherche des façons de solutionner ce problème. Il conclut que les pratiques en matière de mise en liberté avant procès au Canada ont besoin d’un réexamen attentif.

Exactly 50 years ago I started collecting material on the bail system in Canada. Three years later — in June 1965 — my book, *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates’ Courts*, was published.¹ The

* This article originated as a talk at the Fourth National Symposium, *Re-Inventing Criminal Justice*, held in Victoria B.C. in January 2012. The Symposium was about Canada’s remand population and bail process. The article draws on chapter 6 of Professor Friedland’s memoirs, *My Life in Crime and Other Academic Adventures* (Osgoode Society and University of Toronto Press, 2007).

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¹ *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates Courts* (University of Toronto Press, 1965).

study was part of the growing concern throughout North America about civil rights. The U.S. Attorney General's Committee on Poverty and the Administration of Federal Criminal Law had criticized the bail system and other aspects of the U.S. justice system, arguing that "one of the prime objectives of the civilized administration of justice is to render the poverty of the litigant an irrelevancy."²

My study attracted a lot of attention. The *Globe and Mail* published three lengthy excerpts from the book and, through its editorials, repeatedly called for reform of the system.³ Reform was supported by the McRuer Commission on Civil Rights⁴ and the 1969 Ouimet Committee on criminal justice and corrections⁵.

John Turner, the minister of justice at the time, took up the ideas and legislation, the *Bail Reform Act*,⁶ was passed in 1971 and came into force in 1972 as part of the *Criminal Code*. I worked on the draft legislation along with John Scollin of the Department of Justice and a very young Irwin Cotler, Turner's executive assistant.

My study of the bail system had come about while I was searching for material for a criminology course I was about to teach at Osgoode Hall Law School. By chance, I came across a 1959 article by Professor Caleb Foote of the University of Pennsylvania in the American journal *Federal Probation*; the article discussed empirical studies he had done with his students on bail practices in the cities of Philadelphia and New York.⁷ I wondered what a Canadian study would show and decided to examine Canadian bail practices.

With the help of a team of law students, I examined, retrospectively, six thousand cases tried in the Toronto magistrates' courts — all the cases that had commenced between September 1961 and February 1962. Magistrates handled 95% of the indictable and 100% of the summary *Criminal Code* offences.

My conclusion to the study was that release practices before trial operated in an "ineffective, inequitable, and inconsistent manner."⁸

Sadly, it appears that this is still true in Canada today. Practices vary widely across the country and the numbers being held in custody have, in the past twenty five years, increased dramatically. The remand prisoners in custody at any one time

² *Report of the Attorney-General's Committee on Poverty and the Administration of Federal Criminal Justice* (1963) at p. 6.

³ See, e.g., *Globe and Mail*, 21 June 1965.

⁴ *Report of the Royal Commission Inquiry into Civil Rights* (1968).

⁵ *Report of the Canadian Committee on Corrections (Toward Unity: Criminal Justice and Corrections)* (1969).

⁶ *Bail Reform Act*, R.S.C. 1970 (2d Supp.), c. 2.

⁷ Caleb Foote, "The Bail System and Equal Justice" (1959) 23 *Federal Probation* 43, referring to Foote, "Compelling Appearance in Court: Administration of Bail in Philadelphia" (1954) 102 *University of Pennsylvania Law Review* 103,1 and Foote, "A Study of the Administration of Bail in New York City" (1958) 106 *University of Pennsylvania Law Review* 693.

⁸ *Detention Before Trial*, *supra* note 1 at p. 172.

doubled between 1986 and 2000,⁹ and almost doubled again between 2000 and 2010.¹⁰ Today, there are more remanded persons in provincial institutions at any one time than there are sentenced persons in those institutions.¹¹ As with persons sentenced to incarceration, the number of Aboriginal persons in the remand population is greatly disproportionate to their numbers in the population.¹² It should also be noted that the affect of incarceration pending trial — even of a short duration — can have a serious impact on female inmates and their ability to care for their children.¹³

I also found in my study that the conditions in institutions for persons held in custody pending trial were deplorable. The Don Jail was, at the time, the main holding facility for the City of Toronto, and was generally far worse than provincial or federal facilities for persons sentenced to imprisonment. I argued that “if persons must remain in custody pending trial, there is no reason why steps cannot be taken to minimize the punitive aspects of detention by providing special remand centres and not imposing any needless restrictions on activities.”¹⁴ In the ensuing 50 years very little has been done to remedy the situation — even though new regional detention centres have been built.¹⁵ In many cases, because of overcrowding, conditions now appear to be as bad as — or worse than — they were in the early 1960s.

The cost of keeping persons in custody pending trial is, of course, high. Most of it will be born by the provinces. The recent Drummond Report on the Reform of Ontario’s Public Services specifically took note of the “substantial increase in remand, particularly in the Greater Toronto Area,” and urged the Ontario government “to address the growing challenge of increased custody remand.”¹⁶

⁹ Sara Johnson, “Custodial Remand in Canada, 1986/87 to 2000/01” *Juristat*, Canadian Centre for Justice Statistics, Statistics Canada — Catalogue no. 85-002-XIE, vol. 23, no. 7, at pp. 6-7.

¹⁰ Lindsay Porter and Donna Calverley, “Trends in the Use of Remand in Canada” *Juristat* Article, Statistics Canada, at p. 7, released 17 May 2011.

¹¹ Porter and Calverley at p. 20. Note, however, that the statistics include persons awaiting sentence. Statistics Canada does not break down the number of such persons in the data. The persons awaiting sentence were also included in the statistics in the two previous footnotes, showing data from 1986, 2000, and 2010, so the increase would likely be roughly the same whether the persons awaiting sentence were included or not. Persons awaiting sentence are, however, in a different category than those awaiting trial, where the presumption of innocence applies, and so the comparison with the numbers awaiting trial with sentenced persons may be less dramatic than it first appears. It would be good if Statistics Canada was able to break down the data.

¹² Presentation by Jonathan Rudin, Program Director, Aboriginal Legal Services of Toronto, at the Symposium, “What are the Major Effects of Pre-trial Detention on the Aboriginal Community?”

¹³ Presentation at the Symposium by Kim Pate, Executive Director, Canadian Association of Elizabeth Fry Societies.

¹⁴ *Detention Before Trial*, *supra* note 1 at p. 108.

¹⁵ *My Life in Crime and Other Academic Adventures* (Osgoode Society and University of Toronto Press, 2007) at pp. 106-107.

¹⁶ Commission on the Reform of Ontario’s Public Services, *Public Services for Ontarians: A Path to Sustainability and Excellence* (2012) (Don Drummond, chair), c. 14.

Building new institutions is particularly expensive. A new remand detention centre in Edmonton which is about to open has cost the province of Alberta over half a billion dollars to construct, and in a few years it will likely be inadequate to handle the number of remanded persons.¹⁷ Some of the enormous costs of incarceration of accused persons awaiting trial can be far better spent on supervision of released persons and other techniques of control. The money could better be used by mental health agencies to handle the many mentally ill accused persons caught up in the criminal justice system.

My study supported the statement of one American writer that “we first administer the major part of the punishment and then enquire whether [the accused] is guilty.”¹⁸ This continues to be true — indeed even truer — in Canada today. The widespread use of detention before trial is not consistent with the presumption of innocence, which the Supreme Court of Canada told us in the 1992 *Pearson* case¹⁹ is applicable to the pre-trial process. But “one is not forced to rely on a notional presumption,” I stated in *Detention Before Trial*, “when one knows that there is, in fact, a reasonable likelihood that the accused may be innocent.”²⁰ I showed in my study that 24 percent of those brought to court were not convicted.

What else did I find fifty years ago? One important finding was that being held in custody before trial affected the trial itself, both as to the punishment received and the likelihood of being convicted, even when the variables were controlled. This important finding was recognized by a unanimous Supreme Court of Canada decision in 2003.²¹

The relationship between custody and the result of the case reinforces the view of defence counsel that “the bail hearing is often the single most important step for an accused person in the criminal process.”²²

Some other findings included the fact that the summons was, at the time, not widely used in Canada. Over ninety percent of persons charged with criminal offences were arrested rather than summoned and about eighty-five percent of those arrested were held in custody until their first court appearance.²³

The *Bail Reform Act* tried to change this by giving the police a limited power to give an appearance notice rather than arrest a person, and giving the officer in charge the additional power to release an arrested accused. The *Bail Reform Act*

¹⁷ Presentation at the Symposium by Jim Cook, Executive Director, Alberta Corrections, “Always Room at the Inn?”

¹⁸ Ernst Puttkammer, *Administration of Criminal Law* (University of Chicago Press, 1953) at p. 69.

¹⁹ *R. v. Pearson*, 1992 CarswellQue 17, 1992 CarswellQue 120, [1992] 3 S.C.R. 665, 17 C.R. (4th) 1, 77 C.C.C. (3d) 124.

²⁰ *Detention Before Trial*, *supra* note 1 at p. 172.

²¹ *Ell v. Alberta*, 2003 SCC 35, 2003 CarswellAlta 915, 2003 CarswellAlta 916, [2003] 1 S.C.R. 857, 11 C.R. (6th) 207; see also *R. v. Hall*, 2002 SCC 64, 2002 CarswellOnt 3259, 2002 CarswellOnt 3260, [2002] 3 S.C.R. 309, 4 C.R. (6th) 197, 167 C.C.C. (3d) 449.

²² Sidney Linden in Martin Friedland, “Criminal Justice in Canada Revisited” (2004) 48 *Criminal Law Quarterly* 419 at p. 435, n. 98.

²³ *Detention Before Trial*, *supra* note 1 at p. 174.

also tried to put pressure on the police to not arrest accused persons by the potential threat of a civil action when there was no necessity to arrest the accused or to continue to hold him or her in police custody.²⁴

The data that Tony Doob and his colleagues have collected show that about fifty percent of accused persons in Ontario do not appear in court in custody for their first court appearance,²⁵ which means that fifty percent are summoned, given an appearance notice, or released by the police. This aspect of the *Bail Reform Act*, therefore, seems to have had an important impact on the criminal process. But is this true across the country? It would be good to have Canada-wide data. The present legislation restricts the ability of the police to release persons to certain classes of crimes. There is no good reason why the police should not have wider powers to release accused persons. Every person released by the police is one less person caught up in the bail process in court. Quebec seems to have developed a workable system of Crown attorneys being available at all hours to discuss possible release by the police of accused persons. Individual officers may therefore be less concerned than they otherwise might be about assuming the risk of release in such cases.

At an accused's first court appearance in my study, a magistrate would hold the accused in custody without bail or set an amount for bail that had to be deposited before the accused was released. Bail in Canada in those days — as in the United States today — meant the deposit of money or property, rather than, as in England, the person or persons who would supervise the accused if released.

"The tragedy of this preoccupation with money," I wrote, "is that a large percentage of persons are unable to raise the bail that is set . . . Thus, the ability of the accused to marshal funds or property in advance determines whether he will be released."²⁶ Although some bail bondsmen operated in the Toronto courts, they did so illegally. We had the American system of security in advance, but the English system prohibiting bondsmen. It is no wonder that a high percentage of accused were kept in custody pending their trials.

The *Bail Reform Act* tried to significantly reduce security in advance by permitting cash bail as an exceptional condition, almost a last resort. Has cash bail disappeared? I see many references to cash bail in an Alberta study, but none to the use of sureties,²⁷ and I understand that cash bail is still widely used in some other provinces, such as Quebec.²⁸ Unfortunately, we do not have Canada-wide figures. Why not completely eliminate the deposit of cash bail from the *Code*? It is too easy to use and keeps accused persons in custody — often only for short periods of

²⁴ *Criminal Code*, s. 495.

²⁵ Anthony Doob, "Bail and Remand: One Problem or Two," presented at the Symposium. See also Cheryl Webster, Anthony Doob, and Nicole Myers, "The Parable of Ms Baker: Understanding Pre-trial Detention in Canada," (2009) 21 *Current Issues in Criminal Justice* 79.

²⁶ *Detention Before Trial*, *supra* note 1 at p. 176.

²⁷ Kathy Murphy, *Short Term Remand Study* (Alberta Solicitor General and Public Security, 2011).

²⁸ See *R. v. Anoussis*, 2008 QCCQ 8100, 2008 CarswellQue 8409, 242 C.C.C. (3d) 113, 60 C.R. (6th) 144 (C.Q.), where Justice Patrick Healy tried to limit the use of cash bail.

time — who are not able to deposit the money.

The *Bail Reform Act* set up a carefully constructed scheme to guide the person deciding whether, or on what terms, the accused should be released. The justice should start with the least onerous form of release — that is, that the accused would simply give an undertaking to appear without conditions. If the prosecutor can show that this is not adequate, the next level required is an undertaking with conditions, then a recognizance without sureties, and so on. Cash bail is far down the list.

Under the Act, an accused could be completely denied release in certain circumstances. There is no dispute about the first ground, that is, if detention is necessary to ensure the accused's attendance in court. A more controversial reason to deny release set out in the *Bail Reform Act* was if there is a "substantial likelihood that the accused will, if . . . released from custody, commit a criminal offence involving serious harm."²⁹

Overall, the Act was a good piece of legislation, described by Justice G. Arthur Martin as "a liberal and enlightened system of pre-trial release."³⁰

After the Act came into force, however, Crown attorneys and the police claimed that they were having difficulty in keeping dangerous people in custody. Pressure groups started to emerge seeking tougher bail laws, such as the twelve hundred police wives who attended a meeting in Toronto in 1973 and formed an organization for that purpose.³¹

Two major changes resulted. One was to drop the words "involving serious harm" so that an accused could be denied bail if there was a substantial likelihood that, if released, the accused would commit *any* criminal offence, not just an offence "involving serious harm."

The second major change was to shift the onus of proof from the Crown to the accused in a limited number of cases to show why he or she should not be detained in custody.³² The reverse onus, for example, was applied when the accused was alleged to have committed an offence while released on another charge. Another was allegedly being involved in trafficking in narcotics, which unfortunately has had the effect of disproportionately targeting certain minorities. Other offences have been added, such as offences committed with a firearm. The gun-related reverse onus provisions will again affect certain minority groups, particularly Aboriginals.

I suspect that the reverse onus provisions have significantly contributed to the dramatic increase in the number of persons held in custody in Canada in the last twenty years.

The reverse onus has had a wider impact than just for those offences on the list. Justices of the peace are no doubt confused about the whole bail system and are not applying the *Bail Reform Act* with the spirit that was intended. Many justices are understandably risk averse. There will be far less criticism in keeping an accused in custody or releasing the person with stringent conditions than in releasing the accused without such conditions.

²⁹ See *My Life in Crime*, *supra* note 15 at p. 103.

³⁰ *R. v. Bray*, 1983 CarswellOnt 60, 32 C.R. (3d) 316, 2 C.C.C. (3d) 325 (C.A.).

³¹ *My Life in Crime*, *supra* note 15 at p. 103.

³² *Criminal Code*, section 515(6).

In Ontario, sureties are now required by justices of the peace at bail hearings almost as a matter of course.³³ The requirement of finding sureties appears to have taken the place of security in advance — in Ontario at least — making it difficult for accused persons to be released. It is not easy for most accused persons to find sureties willing to forfeit money if the accused does not show up for trial or comply with the conditions of release.

Another problem is that there are usually many conditions applied to release, and breach of a condition is not only an offence under section 145 of the *Criminal Code*, it is also a reverse onus offence. This again increases the number of persons being held in custody pending trial. There are many such administration of justice charges in the system. Can we not find a way of cutting down on unnecessary conditions and charges, such as by limiting conditions to those that clearly relate to whether the accused will show up for trial or will engage in criminal conduct, and limiting further criminal charges to serious breaches of conditions?

Should we eliminate some or all of the reverse onus provisions and place the burden on the Crown, as the *Bail Reform Act* originally proposed and as the Law Reform Commission of Canada later recommended?³⁴

If the reverse onuses cannot be eliminated, should we limit the reverse onus provisions to serious cases in the area of trafficking and guns? In any event we should stop the expansion of reverse onus cases. Where does one stop?

A further issue is the use of bail verification systems — first used in New York City — which seems to have had good results in Ontario. In such a system a government-supported agency acts as the surety in supervising the person released. British Columbia successfully uses probation officers for supervision of released persons. Why shouldn't the bail verification system be expanded?

What affect has the elimination of the so-called two-for-one rule had on the number of persons held awaiting trial? Its elimination will likely cut down on the number of persons who were content to spend time in custody because of the extra credit they believed they would get. Thus, the new legislation might result in more guilty pleas, fewer court appearances, and a reduction in the numbers in custody awaiting trial. But, could almost the same result have been achieved by the more neutral and arguably fairer rate of 1.5 days for each day in custody? After all, a person in custody pending trial cannot count that time as time served before applying for parole or as good behaviour that would result in earlier release from a sentence.³⁵

The decrease in the numbers awaiting trial because of the elimination of the two-for-one rule may be offset, however, by the new mandatory minimum sentences, which may discourage persons from pleading guilty and result in more persons remaining in custody awaiting trial. It is probably too soon to say what effect the recent and proposed changes will have on the numbers incarcerated pend-

³³ See Nicole Myers, "Shifting Risk: Bail and the Use of Sureties" (2009) 21 *Current Issues in Criminal Justice* 127.

³⁴ Law Reform Commission of Canada, *Compelling Appearance, Interim Release and Pre-trial Detention* (Working Paper 57) (1988) at pp. 37-38.

³⁵ Section 3.1 of Bill C-25, *An Act to Amend the Criminal Code* (limiting credit for time spent in pre-sentencing custody).

ing trial.

Finally, I will say something about the person who decides the bail issue. A few years back I spent some time at Toronto's Old City Hall to try to get a rough impression of the current workings of the bail system. Everything looked the same as it did 50 years ago with respect to the bail court. I did not spot a computer in the room. Everything was still done with written forms being passed back and forth as if in a Dickens or Kafka novel. The one thing that was different — to my surprise — was that the person heading the drama was not a provincial court judge, but rather a justice of the peace, the overwhelming majority of whom in Ontario are not legally trained and who may not in practice enjoy the same degree of independence, confidence, and authority as provincial court judges. Justices of the peace may therefore be more inclined than provincial court judges to play it safe and not take the risk of releasing an accused without sureties and stringent conditions.

When I did my study many years ago it was the magistrate who set bail and justices of the peace who handled the details involving the acceptance of cash or sureties. It is strange that in Ontario a provincial court judge is not dealing with these hearing, as in other provinces. In England, district court judges handle many bail matters, and in Canada a superior court judge deals with bail in cases that cannot be tried by a provincial court judge. Other provinces do not rely so heavily on justices of the peace. In Alberta, justices of the peace are legally trained.

In other courtrooms in Toronto I saw provincial court judges holding preliminary hearings, in general a relatively undemanding and far less crucial step in the criminal process. Surely it should be justices of the peace who handle preliminary hearings, with provincial court judges — where possible — handling bail hearings. Could the use of justices of the peace for this task in Ontario be the reason why Ontario has next to the highest percentage of remand persons — sixty-seven percent of all incarcerated persons — at any one time in provincial institutions? Shouldn't provincial court judges be more involved in decision-making with respect to detention before trial?

It is clear that pre-trial release practices across Canada require careful re-examination.

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