Charter: A Course S3E1– BAIL and Section 11(e) of the Charter

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Music:

Charter a course, I will charter a course, if we can just get the country to trust us. Charter a course, southeast, west and north, and along the way we may find justice.

Cheryl:

Hello and welcome to Charter a Course, a podcast created by the David Asper Centre for Constitutional Rights at the Faculty of Law at the University of Toronto. I'm your host, Cheryl Milne, and I'm the Executive Director of the Asper Centre.

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Our podcast focuses on leading Canadian constitutional cases and current constitutional law issues, highlighting strategic aspects of constitutional litigation and exploring what it's like to practice in this area of law. It is our hope that over the course of this episode, you will learn something about an aspect of Canadian constitutional law and litigation that interests you. So, let's get started. I wish to first acknowledge this land from which our podcast emanates.

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For thousands of years, it has been the traditional land of the Huron-Wendat, the Seneca, and the Mississaugas of the Credit. Today, this meeting place is still the home to many Indigenous people from across Turtle Island, and we are grateful to have the opportunity to work here.

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Today, our constitutional conversation focuses on Section 11E of the Canadian Charter of Rights and Freedoms. We previously discussed Section 11 in our episode on jury fairness and the Charter. Section 11E of the Charter provides that any person charged with an offence has the right not to be denied reasonable bail without just cause. We are privileged to be joined by two guests from the University of Windsor Faculty of Law.

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who have been actively involved in recent political and academic discourse surrounding bail in Canada, Jillian Rogin and Danardo Jones. Both Jillian and Danardo have recently appeared before the House of Commons Justice Committee to discuss the state of Canada's bail system, and we are excited to continue the conversation here. Jillian Rogin is currently the clinic professor and runs the Clinic Academic Credit Program at Community Legal Aid and Legal Assistance of Windsor. She is also a practicing criminal defense lawyer.

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Danardo Jones joined the University of Windsor Faculty of Law as an assistant professor in January 2021. Professor Jones has years of criminal law experience having worked as a staff lawyer at various legal aid organizations across Eastern Canada and Ontario. He was also the director of legal services for the African Canadian Legal Clinic. In this episode, with the help of Danardo and Jillian, we will begin by understanding bail,

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exploring the idea of the ladder principle as discussed in the Supreme Court of Canada case R. v. Antic and the government's legislative response to that case. And lastly, we will discuss the current political discourse surrounding bail reform and whether the federal Liberal government's new bail reform legislation, Bill C-48, is compliant with the Charter. Later in this episode's Practice Corner, we will be joined by a practicing lawyer who will take us through what it's like in bail court.

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and what happens during a typical bail hearing. So thank you so much for joining us for this conversation, Danardo and Jillian. Let's begin. So let's start with a bit of background. For someone who is unfamiliar with the court system, what is bail? What does it mean to be denied bail? And Danardo, we'll start with you.

Danardo:

Okay, thank you. So when someone is accused of a crime and held in custody, bail,

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or what's referred to in the criminal code as judicial interim release, can grant that person freedom until their trial or some other form of resolution. This freedom may come with conditions such as avoiding contact with complainants or co-accused and staying within certain geographic boundaries. Some of these conditions can be quite onerous. For instance, the wearing of a GPS monitoring device.

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curfew or house arrest or the need for, most often referred to as a surety, someone, whether a family member or a friend who's willing to sign bail for you and supervise you while you're out on bail. Now the bail system encompasses three key dimensions. So there's a common law dimension, there's a legislative dimension, there's also a constitutional dimension as well.

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Now its fundamental focus is on preserving the liberty and ensuring access to justice. The right to bail recognizes that the state is constitutionally burdened with establishing an accused person's guilt before unduly or unjustly denying or abridging their right to liberty. It recognizes, perhaps most importantly, the inherent power imbalance between the accused person and the state.

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So essentially the bail system operationalizes some of our most basic Charter values. For example, the presumption of innocence, the right to reasonable bail, the right to life, liberty and security to a person. And I would contend that it's perhaps the most important stage of the criminal process because decisions made at this juncture will impact the accused throughout the rest of the process and even afterwards. Now bail...

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can only be denied on specific grounds. These grounds will include whether or not the individual will abscond or not appear in court, so-called primary grounds. The secondary grounds relate to the substantial likelihood of the person committing further crimes. And finally, the tertiary grounds consider whether releasing the individual

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would undermine public confidence in the administration of justice. Now the primary purpose of bail is to manage risk, but risk in accordance with those three grounds, the primary grounds, secondary and tertiary grounds. So it's crucial to avoid considering anything that's extraneous to the system when deciding whether to grant bail. Now this includes biased assumptions that unfairly label certain individuals such as Indigenous and black.

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or black accused people as higher risk. In fact, the Supreme Court of Canada has warned lower courts to avoid relying on factors that's extraneous to the bail system when determining who gets bail. Now these factors can take the form of entrenched attitudes around race and risk and the so-called nexus between race and risk. And also we need to consider how we come to know and construct risk.

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and more importantly how risk is often associated with race. There are salient questions that we, bail jurists, need to seriously consider. Now a bail hearing is governed under part 16 of the Criminal Code. There's a lower evidentiary threshold and oftentimes, at least in Ontario, these hearings are presided over by Justices of the Peace.

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The Crown or prosecutor often has the onus to show why the person should not be released but in certain situations the accused person must also show why they should be released. These are what's sometimes called reverse onus situations. So, in some cases the Crown and the defense lawyer will agree that the accused person should be released and this proposition will be made to

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the justice of the peace or the judge and they will determine whether or not it's appropriate. In other situations the Crown may want the person to be released but the defense takes objection to the conditions that they're being released on or at least the proposed conditions. Those hearings are called bifurcated hearings. So the person is releasable but the conditions...

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defense takes the position that the conditions are not reasonable. And in other situations, the Crown may flat out just seek the person's detention, and then there will be a contested hearing. So factors are what's considered in a bail hearing.

Cheryl:

Well, I'd like to give Jillian a chance to jump in here, and I just want to point out, sort of, you've mentioned how important the presumption of innocence and the sort of Charter rights are as associated with bail, and how important...

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Bail is, I think a lot of, in law school, bail is often not even something that's really taught when we talk about criminal law, yet it's so essential. Jillian, can you just comment on how important that presumption of innocence is, and where bail both is implicated sometimes with respect to convictions, as well as sentencing?

Jillian:

So I think when Danardo...

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Professor Jones says that bail is the most important part of the criminal legal process. I would agree, as do many scholars, academics, lawyers. And the reason that it's so important is because it often is determinative of the outcome of the charges. So, bail denial often results in false guilty pleas, or in other words, wrongful convictions. And even onerous bails that later result in breach charges.

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make it more difficult to get bail and also result in guilty pleas. And so it can be quite a coercive process, the whole bail process. And that's why it is considered the most important, one of the reasons why it's considered the most important part of the criminal legal process. In terms of the presumption of innocence, it's a cornerstone of our criminal legal system, but unfortunately...

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I mean, in its current manifestations, I'm not sure that the bail system actually breathes life into the presumption of innocence. I've always wondered, you know, after years of working with criminal accused who are in jail, sometimes for days, weeks, whether they have felt innocent or that they were presumed innocent. I would, I would guess that the answer to that question is a resounding no. In another

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way that the system does not honour the presumption of innocence, we now are in a situation in Canada where more than 70% of people who are in jail in provincial and territorial institutions have not been convicted of any crime. So the people in jail who are either awaiting their bail hearing or have been denied bail far outnumber those who have been convicted of any crime.

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And so, you know, there's a crisis, I would call it a crisis of mass incarceration, pretrial of mass incarceration in Canada, and that really implicates the presumption of innocence. And I think, as I said, really calls into question that this legal principle has any actual life in reality. I don't think it does. So those are some of the overarching principles of the presumption of innocence that should inform every single step of the entire legal

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process until conviction, but particularly it should animate the entire pretrial process of judicial and interim release and also police bails and other forms of pretrial proceedings.

Cheryl:

Before we get into the specifics of the case that I mentioned in the introduction, the R v Antic, Danardo, did you want to add anything to what Jillian has said?

Danardo:

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It's important for our listeners to be aware of what I would call the bail to sentencing pipeline, just how often this happens and also the pernicious nature of this particular phenomenon. When bail is unduly withheld or denied, for a lot of accused people, a reasonable response is to plead guilty.

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right? Despite, you know, the presumption of innocence, despite their right to a fair trial, despite all of these Constitutional rights, in that moment, it may seem reasonable for that person to enter a guilty plea. And unfortunately, for a while, this was not seen as a wrongful conviction. It's just recently that people have really been talking about it.

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But as someone that spent years practicing, and I think, you know, Jillian and I have spoken about this as well, we would often see this. And all of us as lawyers, it's not only, I would say, immoral, right? But it's an affront to our Charter.

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to allow this to continue but it happens every day in our bail courts. People being traversed from bail court right into plea court.

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And no one seems to want to do anything about this, even if the person is said to have entered their plea voluntarily, and there's some questions about what's voluntary when the bail system is overly punitive and overly onerous on particular individuals.

Cheryl:

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I think other factors that become implicated in all of this, including the right to counsel, whether they're actually getting good legal representation when they do have this quick move from bail court to sentencing court, as you've mentioned, Danardo, as well as this presumption of innocence and speedy trials. So if you're looking at a trial that's going to take months and or years to happen, not having bail means being in jail that much longer.

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So those are really, really important points. I want to now pivot to the case that I mentioned, which sets out some of the principles behind the conditions that can be attached to bail. And that's the R v Antic case, which was a case decided by the Supreme Court of Canada in 2017. And so, Jillian, can you explain why this case was significant?

Jillian:

Yeah, Antic was significant because the Supreme Court affirmed

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the ladder principle and provided some guidance about how that principle ought to be interpreted. And the ladder principle means that release is favoured at the earliest opportunity and on the least onerous grounds. The Crown has to show cause for each restriction sought and demonstrate that a less restrictive form of release was inappropriate. And that's the ladder principle. You have to go up the ladder and at each rung the Crown has to show cause why a more restrictive form of release is appropriate.

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In many ways, it's really a bit curious to me that the case was so significant, because really what the court did here was affirm the legislation that had been enforced since the Bail Law Reform Act in 1972. And the Supreme Court really just affirmed that the legislation ought to be followed. That's not their words. That's my interpretation of the Court. But the thing is that having spent so much time in the bail courts, the ladder principle, in my experience, is never followed.

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So there was a lot of cause for celebration when Antic came down. The presumptive form of release in the Criminal Code in section 515.1 of the Criminal Code is that all accused should be presumed to be releasable on an undertaking with no conditions. And in my years of experience as a duty counsel and also as a criminal defense lawyer outside of the duty counsel offices.

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I've conducted hundreds, maybe thousands of bail hearings, both contested and consent releases and I had, I recall one client who was ever released on an undertaking with no conditions. This is consistent with findings in the CCLA, the Canadian Civil Liberties Association report on bail, which over a certain time period observed 172 cases and no one.

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no one accused person observed during that time period was released unconditionally. And so what that means is that the presumptive form of release, an undertaking with no conditions, in my view is a legal fiction. It doesn't exist. It just doesn't exist. Which is why the Supreme Court was reiterating and affirming the ladder principle to say, hey, let's go back to the basics. This is the presumptive form of release and each and every step up the ladder must be

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demonstrated to be absolutely necessary. And that's only that will ensure Charter compliance and respecting the right, the 11E right to reasonable bail.

Cheryl:

So what was it that the bill review judge at Antic failed to do? How did they fail to follow the ladder principle?

Jillian:

So just by way of background, Kevin Antic was arrested in Windsor, Ontario and charged with several drug and firearm offenses.

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He is or was an Ontario resident, but spent much of his time in Michigan and had no assets in Canada. And the fact that he spent a lot of time in Michigan caused all of the levels of court and the Crown, and even the defense conceded that, you know, there was an issue of flight risk. So in this case, the bail review judge erred by requiring a cash deposit with a surety.

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and was also found to have erred by setting the cash deposit at $100,000, which was far beyond the means that Mr. Antic was able to secure. He eventually did secure that amount, but he spent a year in jail trying to come up with $100,000. And the quantum of bail, in order to be reasonable, and again, in order to comply with Section 11E of the Charter, the quantum has to be reasonable. It has to be something that is within the accused's means.

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There is not supposed to be certain numbers or certain offenses that require higher numbers. That's not how it's supposed to work, but in reality it was. So basically a cash deposit plus a surety is considered

one of the most onerous forms of release. And the bail review judge erred by failing to adhere to the ladder principle. There was no reason why a lesser form of bail, meaning in this case perhaps a surety with a monetary pledge as opposed to a deposit,

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was inappropriate. There was nothing to justify insisting on a cash deposit. In many ways, part of the reason for the error, I'm going to assume, was that there's an assumption that ordinarily resident, the former iteration of the Code that was at issue in this case, was a requirement, that a cash deposit plus a surety was required for anybody who didn't live within 200 kilometres of where they resided. And that was a mistake.

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That's not what the Court said. It said that you can, you're able to impose a cash deposit if the person is not ordinarily resident. It doesn't, and never did say that someone who's not ordinarily resident must pay a cash deposit. And that really speaks to the ignoring of the ladder principle. The bail review judge went right to a cash deposit plus a surety without consideration of prior lesser forms of release.

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Cheryl:

Could you just explain what a surety is?

Because, I mean, with bail, there's a lot of jargon, a lot of words like reconnaissance and reverse onus and surety and breach. Could you just start by explaining what you mean by surety?

Jillian:

Surety is a person who comes forward for an accused to promise the terms of the bail, to assure that the accused will abide by the terms of the bail and also attend court. And if usually...

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the surety is accompanied by monetary pledge, a promise of money if the accused fails to comply with any of the terms of the bail, commits further offenses or fails to attend court. The surety stands to lose that money. It actually comes from common law and it was designed to protect the money of the state, the sheriff's money, because it used to be that the sheriff would have to pay fines if an accused absconded for their trial. And so...

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The sheriff said, we don't like this having to pay fines, so we're going to offload that responsibility onto the family members and friends of the accused, and they'll have to assume the risk for this accused person and pay often hefty fines and forfeiture if there's any problems.

Cheryl:

And what is a recognizance? I know I've used that word, you haven't, but I just wanted to see if we can define that for the listeners as well.

Jillian:

Recognizance is a promise to the...

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to the Crown, basically, that you're going to be bound by certain conditions pending your trial.

Cheryl:

So then at the lowest end of the ladder is just a promise to appear and the person is released. Is that fair? And then what is at the highest end other than detaining? Obviously, if you don't get bail, that's the most extreme circumstances. But what are the kinds of conditions that are at that top of the ladder?

Jillian:

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So I think the most restrictive forms of release include a surety bail, especially what's called a residential surety bail, where the accused has to physically move from their own home and live at their surety's residence. And the most kind of restrictive, although very common, conditions attaching to bails are, include, might include house arrest and as Professor Jones.

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indicated that could include GPS monitoring where the accused has to wear electronic shackles on their feet to monitor their every move. There might be curfew conditions, no contact orders, alcohol or drug abstention conditions, conditions precluding the use of cell phones or the internet, conditions requiring accused people to attend medical or rehabilitative treatment. And then we see, I've seen in my daily life and also in the case law,

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a whole array of conditions because there's a lot of discretion that justices of the peace and judges have in terms of imposing any condition that's reasonable in the circumstances. So you might see, I've seen a condition of deposit your monthly check to your worker so that they can manage your money. And each and every one of these conditions is a criminal offence if it's not followed, if it's breached. And so...

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what conditions do is criminalize otherwise non-criminal conduct and the consequences of that are vast. You know, it impacts everything.

Cheryl:

So even if a person, for example, ultimately is found not guilty of the offense, they could end up having other offenses that relate to the bail as opposed to what they were originally charged with, is that...?

Jillian:

Yes, absolutely. And...

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each and every conviction on a person's criminal record for failing to comply with the term of their bail can result in a much more difficult time in accessing bail in the future. And that takes us back to coercive guilty pleas because often when a person is charged with a breach, the Crown might say, well, I won't revoke their whole bail if the person pleads guilty to this breach and will sentence them to time served. And so the accused is in a situation where

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the stakes are very high. If they don't plead guilty, they risk having their entire bail revoked and being in custody on two sets of charges until their trial. If they want to wait for a trial, they would be waiting in custody on the fail to comply charge and on the outstanding charges for potentially months. But if they plead guilty today, they're out. And so here we see the revolving door of pretrial detention where somebody pleads guilty to a breach, which further...

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impedes their chances of getting bail in the future because somebody who's failed to comply in the past is thought to be a risk of failing to comply in the future. And all of these mechanisms are impacted by race and indigeneity because of disproportionate policing. And then you have a massive cycle of white supremacy, to be frank, where upholding these norms and ignoring the fact that

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All of these, the whole bail system, conditions, sureties, release, denial, police, assessment of accused, every aspect is impacted by systemic racism.

Cheryl:

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And that goes back to that Charter provision that talks about reasonable bail and what are reasonable provisions. And so at the heart of this are some Charter rights that are routinely implicated in the bail

system. I want to turn now to Danardo and talk about what Parliament's response to the Antic decision was. And there was a Bill 75 that related to changes in the legislation and the Criminal Code. Can you just tell us a little bit more about that?

Danardo

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Yes, Professor Rogin discussed Bill C-75 essentially enshrined the ladder principle, which was reaffirmed in Antic. This notion of the lease-onorous form of bail on lease-onorous conditions. It also enshrined the restraint principle.

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we find the restraint principle articulated under section 493.1 and 493.2 of the Criminal Code. And essentially what it reminds bail jurists, it reminds them that you have to take into consideration the circumstances of the accused person who comes before the bail court. So going back to what Prof Rogin had mentioned

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The notion that the Crown or a Justice of the Peace is going to require that every single accused person present a surety is asinine because if we take into consideration the people that come before the bail courts and their social location, their circumstances, intellectually dishonest and immoral.

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to consider that they are not candidates for release because of their social circumstances, poverty, mental health, race, and so on. So 493.2 instructs Crowns, defense lawyers as well, and bail jurists to consider the circumstances of vulnerable populations and indigenous.

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particularly the indigenous population and other vulnerable populations who have historically been treated unfairly at the bail phase. Bill C-75 also empowers police officers to grant more what's sometimes called station bail. So essentially police officers being able to release accused people on whether it's a promise to appear or an undertaking.

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given to an officer in charge, right? We don't see a lot of that happening. You know, we see police officers bringing people before the court, you know, to show cause. That's the kind of the term or the phrase that's used in the legislation, essentially to go up for bail, right? Instead of them being released from the police station.

Cheryl:

So- Technically that means the Crown is supposed to show cause why-

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they can't be released, right?

Danardo:

Exactly.

Cheryl:

But it seems to me that it's sounding like it's really kind of reversed, and that it seems like the accused person has to show how they should or why they should be released.

Danardo:

And oftentimes, when an individual and accused person is brought before the bail court, even if it is a crown onus, giving what's usually required for someone to secure their release,

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it becomes ever so burdensome on the accused person. Now, for example, if someone needs to have an address or provide a surety, residential or non-residential, oftentimes we're talking about people who are estranged from family members. We're talking about people who are street involved and so on. And the requirement for a surety is tantamount to a detention order.

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Right? If that's what's required for the person to benefit from a consent release, or for that person to persuade a justice of the peace or a judge that they're releasable, that is tantamount to a detention order. You're asking the person to provide something that it's almost impossible for them to provide. And we all know this, but we pretend as if somehow this is a requirement in order to satisfy whether it's...

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primary or secondary grounds, right? The other thing that Bill C-75 did was it created reverse onus provisions for intimate partner violence offences, right?

Cheryl:

So... So could you just explain what a reverse onus is for us?

Danardo:

So reverse onus, let's go back to something Professor Rogin talked about earlier when we talked about the presumption of innocence. The presumption of innocence essentially says it is the state...

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who has the constitutional burden to establish an accused person's guilt before unduly or unjustly denying or abridging their right to liberty. There are, however, in the bail context, situations that essentially places a burden on the accused person to show why they should not be detained. Right? And at first blush,

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That seems quite unconstitutional. It seems to be in violation, not only of Section 11E, but also the right to be presumed innocent. But there's cases in the early 90's, Morales and Pearson, that says, well, there are situations where, you know, taking into consideration this balance that needs to be struck between the state

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being able to ensure public safety, but also an individual's right, to reasonable bail and right to be presumed innocent, there needs to be this balance struck. And in certain circumstances, in order to strike this fair balance, the onus has to be reversed. So the burden of showing why someone should be released before their trial falls on the shoulder of the accused person.

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So those are what's called reverse onuses. So there's a limited amount of situations in the Code under 515.6 that list situations that will reverse the onus. And we'll talk about this later on, but Bill C-48 actually increases that list.

Cheryl:

So before we turn to Bill C48, I just want to ask, I just want to sort of wrap up around Bill.

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C-75, which was in response to Antic. It was supposed to, as you mentioned, kind of reaffirm this ladder principle, although it did add this reverse onus with respect to intimate partner violence. Do you think that Bill C-75 made much of a difference in the practice of really kind of imposing conditions, particularly on vulnerable groups and Indigenous accused?

Danardo:

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At the risk of sounding pessimistic, no it hasn't and in fairness, in fairness we haven't had enough time with the legislation we really haven't had enough time we're talking about five, six years we have not had enough time to move away from or to perhaps get rid of the attitudes some of the attitudes that professor Rogin had talked about that's so deeply entrenched within the criminal process and especially at the bail phase it's really an attitudinal

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shift that needs to occur, more so than a legislative shift or even a jurisprudential shift. As Jillian said, Antic really reaffirmed what we've known for decades. But it's the attitude that needs to be shifted and it has not. And Bill C-75 hasn't been around long enough to really make a dent in that attitudinal shift. Hasn't been around long enough. For example, Bill C-75 were supposed to usher in

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a parallel process called judicial referral hearings. All the years I've been practicing, I've never seen one of these referral hearings done. And this referral hearing is supposed to be responsive to some of the issues that Jillian talked about with the so-called administration of justice offenses. Breaches, okay, that essentially people are saddled with a number of conditions that set them up to fail. And when these...

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these breaches which are criminal offenses come into play, a judicial referral hearing is supposed to set up this parallel system where the person doesn't have to be brought before the bail court, but they're brought before a judicial body, right, or a judicial officer I should say, a JP, a judge, and they can decide whether or not to take no action or to perhaps...

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add another condition to the person's existing release order or ask the person to essentially show cause for this system or this process to my knowledge and maybe Jillian can correct me if I'm wrong, I've never seen it used. And it's supposed to create a different less punitive methodology for

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dealing with cases of so-called administration of justice offenses. So that's something else that I think was quite progressive. One of the progressive reforms that Bill C-75 brought in, and it has not been used whatsoever.

Cheryl:

Jillian, do you want to jump in, in terms of the impact of Bill C-75 and anything that Danardo has mentioned?

Jillian:

I agree with what DiNardo has said, and I do think that we,

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Definitely need more data more evidence. We don't know what the in many ways broadly speaking We have no idea what the impact was of bill C 75 because it's been such a short period of time between then when it was enacted and Here we're finding ourselves in this situation where there there's proposed legislation to reform bail yet again without any indication of what the pros and cons are of C75

one thing I'll say about 493.2 A and B is that like Gladue, it seems that the courts are just struggling with how to apply these provisions and not focusing sufficient attention on the systemic structures, the systemic factors that impact the structure of the bail system itself. So conditions, sureties, there's been really no attention to over-policing and some of the most relevant factors instead, like Gladue,

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there seems to be a focus on the individual accused person's identities and their own traumas and their own issues, which to me is a misguided interpretation of both Gladue and of 493.2A and B.

Cheryl:

And just to explain, the Gladue case and then the provisions in the criminal code as a result of the Gladue case is about sentencing particularly Indigenous people in the criminal justice system as a way of trying to...

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deal with the over-representation of Indigenous people in the criminal justice system and to instruct judges to take into account those systemic issues that are in the background of Indigenous accused. So again, I mean, we talked about this a little bit. We did this episode on Sharma and talked about the over-representation of Indigenous women in particular.

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That this is a problem that was supposed to be alleviated by some of these provisions. And as you're saying, the provisions related to bail hasn't resulted in that, and neither have the sentencing provisions. I want to turn now to the latest iteration of bail reform. And I think we're taking a slightly different direction this time, which is Bill C-48. So, there are several high-profile incidents of individuals committing violent crimes while out on bail in the past year or so.

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and that it received a considerable amount of media attention, which is not unusual. And the spotlight in those media reports were about the relationship between release and community safety. Several premiers, for example, including the Ontario Premier Doug Ford, had urged that the federal government undertake further bail reform in response to this. And so the federal government did respond and tabled Bill C-48, which is new legislation aimed at further reforming...

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Canada's bail system. It's at first reading at the House of Commons. The main changes proposed in the legislation include creating a new reverse onus. So we've talked about that. To target serious repeat offenders, involving weapons in particular. Expanding the list of firearms. So there was a big focus on firearms in this bill. Broadening the reverse onus provision with respect to intimate partner violence.

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Clarifying the meaning of the terms prohibition order in an existing reverse onus offenses involving weapons and requiring courts to consider, again, the accused history, but this case in respect of convictions for violence and community safety and security concerns when making a bail decision. So let's start generally. What are your thoughts on these proposed reforms? And I'll start with you, Jillian, and then Danardo, you can jump in as well.

Jillian:

I think generally.

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that the proposed reforms will result in exacerbating the mass pretrial incarceration crisis that we're currently facing in Canada. And the people who are going to be disproportionately impacted this are going to be Indigenous people, Black people, racialized people. And here I want to focus on women. Indigenous women now make up half of this country's federal prison population, and we know that Indigenous women are disproportionately impacted by all forms of violence.

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Many women, Indigenous, Black and otherwise, are criminally charged when they respond to intimate partner violence, disproportionately from white women. What the new proposed legislation fails to understand is that all of the carceral laws aimed at addressing intimate partner violence criminalize Black and Indigenous women who are often charged or reciprocally charged with intimate partner violence-related offences. We have a whole lot of research focusing on the role of the police.

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on what have been called the unintended consequences of intimate partner violence related laws, including mandatory charging. And one report, many have found that women who are arrested either solely or duly charged for living with men who are abusive. We also know that detaining people, warehousing people, warehousing abusive people in cages does not promote long-term safety and will not make victims of violence safer.

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If restrictive bail measures, pre-trial custody, prisons, mass pre-trial custody, policing were capable of ameliorating crime, we would live in a crime-free society. We have, as Professor Jones has pointed out previously, like in the past, we have decades of data, reports, jurisprudence indicating that Black and Indigenous people disproportionately bear the brunt of harsh and punitive criminal laws, including bail laws. So making...

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bail laws more restrictive will work to further entrench systemic racism in the bail system and it's going to cause more harm in terms of exacerbating the pretrial mass incarceration crisis that we have. Pretrial custody itself causes harm and violence and we have to think about like who's harm, who's safety, who is

being harmed, who is being killed, whose safety matters. I think everybody's safety matters. But the reality is that we're focusing on high profile incidents.

42:16

involving including victims who are police officers, which matter, and we should be concerned about those safety concerns. But we also have to be concerned about the violence that jail causes. It's literally really a matter of life and death. Since 2010, 280 people have died in pretrial custody. So, you know, imagine what our bail laws might look like if each and every time one of those people died, Parliament convened to discuss

42:45

What are we going to do about this? And then we don't talk enough about police violence. There were 711 police use of force involved deaths between 2000 and 2022, which is more than 30 deaths per year on average. So, with this new legislation, whose safety are we talking about? Certainly not those who are in pretrial custody, languishing, being denied bail, being forced to plead guilty.

43:10

certainly not accused people, certainly not Black people, certainly not Indigenous people who are going to be disproportionately harmed by this. We really have to think about who's safety are we talking about and how do we go about achieving the goal of safety, which I agree, it's a goal. We all should be committed to that goal. The numbers of people in pretrial custody is already ballooning and we know that Canadian crime rates, including for violent crime, continues at this moment to be at historic lows, but...

43:38

bail is becoming more restrictive and more risk averse. And so for example, in Canada, 70.5% of the provincial jail population across Canada is in pretrial detention. The rate at which we use pretrial detention has more than doubled in the last 40 years. And the number of people in pretrial detention has quadrupled during that time. And so if reverse onus provisions and restrictive bail were capable of providing safety, we would already

44:08

be there. So, what the new legislation proposes is more of the same and it's going to equal more people in custody. Presently, the percentage of people in pretrial detention in Canada is 37% and that's among national incarceration overall, compared to 11% in England and 22% in the United States. These are statistics that should be internationally shameful, right?

44:38

The cost of keeping people in provincial and territorial jails, which is about $259 per inmate per day, per prisoner per day. So around $94,000 a year per person to keep them in pretrial custody. And keep in mind that for example, somebody who's a recipient of social welfare benefits like ODSP, the Ontario Disability Support Program, receives about $12,000 a year.

45:05

So, we're forcing people who live with disabilities, mental health issues, to live far below the poverty line. But yet, we're spending $94,000 a year to keep people in prison. And as many commentators have said, prison is becoming the biggest purveyor of mental health services in this country, which is entirely misguided. So restrictive bail laws really don't have anything to do with alleviating crime, but they rather tend to cause it. It's criminogenic.

45:34

we have to think about what kind of society we want to live in and what creates safety. Restrictive bail laws equals more prisons and more investment in prisons and policing. And it is of course Indigenous Black and racialized people, people with mental health issues, people living with substance abuse issues, who we're going to see further warehoused in institutions. So overall, I think that the new legislation is going to cause serious harm.

Cheryl:

46:04

So, Danardo, I want to give you a chance to talk about what you think the impact of this legislation is, but I also want to jump to the constitutional implications. So, the former Justice Minister, David Lametti, has given the opinion that while the Charter may be engaged with this new legislation, provision would be consistent with the Charter, and has given a list of reasons why they sort of targeted the reverse onus, for example.

46:32

provisions because those are the ones that have been most criticized. So, I just I want to turn to you and say what are your views about this legislation and do you think it passes Constitutional muster?

Danardo:

The reverse on is supposed to be rare. The Supreme Court of Canada has said as much and it's oftentimes constitutionally suspect. As I mentioned earlier it is only in recognition of this balance

47:01

this Charter, constitutional balance that needs to be struck between what Jillian had talked about in terms of public safety, but the recognition of the importance, the centrality of an accused person's Charter right, and that we should not tip the scale in favor of state objectives, whether it's public safety or otherwise, we should not tip it in favor of the state.

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you know, in a way that is unreasonable, right? So, reverse onuses that targets particular categories of criminal behavior or particular categories of criminal accused. We know based on policing practices that police tend to over-police particular populations and overcharge particular populations for

48:00

firearm related offenses. We've seen this particularly in the cases involving black accused people. We see it at the sentencing phase as well that, for most of, at least a disproportionate amount of the gun and drug convictions tend to be black offenders. Same thing at the bail phase. The lion's share of the accused people in gun and drug

48:30

charge categories tend to be black accused people. Bill C-48 seems to target, on the face of the bill, it definitely, you know, one would say, well, it's colourblind. And you kind of dig beneath it, you know, you're able to see some of the, let's say, unintended consequences of Bill C-48. Right? So in that regard.

48:58

it's constitutionally suspect. So if we think about who is being targeted, unfairly targeted by this bill, the other way in which it is constitutionally suspect is, again, it's an affront to the presumption of innocence. It is making it even more difficult to get bail, to secure bail. It is also an affront to Section 11E, right? Think about it.

49:28

If the objective or one of the objectives of Bill C-48 is to essentially keep bail out of the hands of particular individuals. That in and of itself is a breach of Section 11. Bail should not be kept out of the hands of particular individuals for extraneous reasons. Right? Keep in mind, there are narrow grounds for which bail can be denied.

49:57

Does the person pose a flight risk? Is there a substantial likelihood of reoffending or is person's release, would it call into question public confidence in the administration of justice, right? If the objective of this bill is to make it harder for people to secure bail or to use the sloganeering that's been thrown around, jail not bail.

50:27

Well, that's unconstitutional, right? So I'm concerned that some of the impacts, I should say, and Professor Rogin talked a lot about some of the impacts of Bill C-48. But I will add this. No one seems to talk about the collateral damage that comes with the unreasonable denial of bail. People lose jobs. People lose homes.

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It interferes with familiar relationships. It has an impact on, as I said earlier, people entering into improvident guilty pleas. So there are those collateral consequences of making it more onerous to get bail or completely restricting the right for someone to secure bail.

Cheryl:

51:21

I think it's fair to say that if this legislation goes through, there are definitely going to be some charter challenges. I think a number of organizations have made that clear. Criminal defense lawyers have made that clear. Jillian, what are your views on its constitutionality?

Jillian:

In Pearson, Justice Lamer, Chief Justice Lamer held, as Danardo said, you know, there is just cause to deny bail only if...

51:47

denial occurs in a narrow set of circumstances and it's necessary to promote the proper function in the system. And of course the Charter statement mentions those things. But we're no longer at a time when bail denial is happening in a narrow set of circumstances. And we've seen that slow erosion over time, whereas in Hall the tertiary grounds were considered constitutional because they were

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to be used by the Crown in exceptional circumstances. And then St. Cloud over time affirmed, no, no, no, it doesn't have to be exceptional. And so we see these kind of early Supreme Court bail decisions being eroded and in essence, the constitutional right of 11(e) itself being eroded. I think here that the legislation fails on both of those counts. I think that

52:42

adding and continuing to add further reverse onus provisions and continuing to add circumstances that will result in the bail denial. We are at a point where it's no longer occurring narrowly. This is very broad, including, you know, intimate partner violence where the past a past offense was discharged, right? That is now on the table. Weapons are really broad now. You know, it's no longer

53:09

The reverse onus provisions are no longer restricted to weapons that involve firearms or other prohibited devices, but it seems to me that it includes weapons as the criminal code understands weapons. Now I can tell you after many years in the bail courts, I've seen an empty plastic bag be called a weapon or a tea towel or, you know, and so here we're in a vast amount of circumstances that are now added into the legislation that could result in bail denial. I think that in itself is...

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beyond. I mean, I think it's blatantly unconstitutional.

Cheryl:

In case anybody thinks that those examples are facetious, the Criminal Code defines weapon as anything that anyone intends to use as a weapon or does use as a weapon. So it can include by definition, and

there are many, many cases in which really minor sort of household items have been found to be weapons. But then go ahead, Jillian, go on.

Jillian:

I could go on, you know, about that in particular issue. The other thing that it does is it

54:08

which is very concerning to me. It's any past history of violence, any assault, any threat, and that includes threats against the police. So assault police officer or, you know, and these charges are often used by police when they themselves have been violent. And there has been a number of reports and investigative reports that have found this, right? That people tend to be charged with assaulting a police officer, threatening a police officer. And that would now...

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be counted as a reverse onus provision if somebody had that in their history as a serious and violent offense. So serious and violent here is not circumscribed sufficiently, neither is weapon in my view in the new legislation such that it could pass constitutional muster. But I think that the second branch, which is extraneous purpose to the bail system is really crucial here. I think that there's no evidence, no new data on crime rates, no data about...

55:04

bail or research indicating that more reverse onus provisions are justifiable to respond to a specific pressing or substantial need or purpose. And really, I think the purpose of Bill C-48, I'm going to speak really frankly, is about political theatre. And I'm very hopeful that the Supreme Court agrees with me.

Cheryl:

So I want to start to wrap this up. And I want to give each of you sort of a...

55:30

an opportunity to provide sort of your last thoughts briefly on the bill. Is there something, Danardo, that you want to add as we sum up. We've been talking with Professors Jillian Rogin and Danardo Jones from the University of Windsor Faculty of Law about bail and Section 11E of the Charter. But over to you, Danardo, for sort of a last word.

Danardo:

So the true challenge is not whether the law of bail...

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is in need of reform. I would argue that the bail provisions and the most recent amendments that we saw in Bill C-75 have actually strengthened the bail system and have taken into consideration and balanced an accused constitutional right to bail and very real concerns around public safety. As I said before, many of these reforms have not been fully utilized. Perhaps it's a matter of

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lack of knowledge around what is available to both police, crowns, defense lawyers, and bail jurists. Now, what I would say is in desperate need of reform is some of the social infrastructure that needs to be put in place in order for people to actually, meaningfully have access to Section 11E. So, for example,

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people having access to shelter beds, people having access to treatment facilities, people having access to mental health care, and so on. This is what's missing. If we're worried about risk, and the bail system is all about managing risk, we're better capable, I think, of achieving that goal if we address some of these social deficits.

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that are a part of our community. And something that Jillian had mentioned, if we are willing to spend $90,000 to imprison someone with a mental health challenge, but we are reluctant to spend half of that or a fraction of that to actually address this mental health issue in a meaningful way, in a way that will...

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that will reduce the likelihood of this person engaging in any kind of reoffending and actually allow this person to live a pro-social life, it seems to me that's the best way to spend taxpayers money. That's what's missing. It's the social infrastructure. The law itself, I would argue, right, is fine. We have not had an opportunity to really see whether Bill C-75...

58:22

has addressed the attitudes that are so pervasive in our system. We haven't had that opportunity. And as Jillian had said, Bill C-75, all it did, and all Antic did, was really reaffirm what we've known for decades, and definitely reaffirmed or perhaps refocused our attention on some of the Charter affronting.

58:52

behavior that we've been seeing. That's what Antic really did was focused on, listen, section 11E, it's not about judicial benevolence. When a judge or a JP grants bail, it's not because they're being benevolent, it's because it's the accused person's right. So my last comment would be, we need to stop with, as Jillian said, this political theatrics, this noise.

59:21

We need to cut through this noise. It's very dangerous, this noise, because we're seeing legislative action being taken on the basis of noise, and that's concerning. And we need to get back the first principles.

Cheryl:

It's a good reminder in terms of bringing us back to Section 11E and the right of the accused person to reasonable bail without just cause.

59:50

Jillian, is there anything, a last word that you want to say or anything interesting that you're working on that you would like your listeners to know about?

Jillian:

I will first address my last comments with respect to Bill C-48. I think it's really important to shift our thinking and our language because I don't think we can talk about unintended consequences anymore. And that's how the collateral damage that Danardo has talked about raised.

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is often referred to, unintended consequences. But when we have decades of data and research, not all of it agrees with each other, but you know there's data and research and reports about the disproportionate impact of punitive and restrictive laws, including bail laws, on Indigenous and Black people. When we have decades about the dangers of carceral feminist interventions for Black and Indigenous women in particular, these can no longer be considered or talked about as unintended consequences.

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And Danardo and I both went to Parliament and said, this is what's going to happen if you do this, right? And they're doing it. And so even if they'd never heard of any of this research, at least there were some interventions. And many other people, not just us, Dr. Nicole Myers and the Elizabeth Fry Society and many others, talked about the damage that's going to be done. We have to understand that these are intentional now. They're not unknown. Maybe 40 years ago, we didn't have the research.

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whether that's a valid excuse, at that time, I'm not saying it is or it isn't. I'm saying now we know for sure that these kinds of laws have the potential and the real risk of causing serious harm to all of us, those who are impacted by them and as a society in terms of what we envision and how we conceptualize safety. And I'm really hopeful that that will come out in charter litigation. And in terms of what I'm working on, I just, Danardo talked about...

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the gross power imbalance between the state and the accused at the bail phase in particular. And I just wrote a paper on police created evidence and the reliance on it at bail hearings. And really the point of the article is to highlight just this one aspect of the ways in which the bail system is most heavily weighted in favor of the state. And that's one of like a million factors, right? But evidence is a really

important issue that we haven't discussed today. So that's something I'm working on. And I'm also working on a paper that looks at

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surety bails and argues for abolishing them, but really looks at the forfeiture proceeding aspects of surety bails, which is really under-studied, under-examined, and the risk that the families have accused people, the risk that they take and the impact on their livelihoods, even when they've done everything they can to assure the terms of the bail, they're still often subject to forfeiture proceedings and often do have to forfeit sums of money to the Crown. Thank you.

Cheryl:

01:02:44

And Danardo, is there anything that you're working on that you would like our listeners to know about?

Danardo:

I'm trying to convene a panel at the end of the summer, talking about a lot of what we've discussed over the last hour, some of the impacts of Bill C-48. You know, it's a cross-country panel, tend to focus a lot on the impacts of bail coming out of the GTA.

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greater Toronto area, but I had a privilege of practicing in a northern community in Labrador and I can tell you that the impacts of Bill C-48 is going to be felt perhaps heavier in Indigenous communities that we don't think about. And that causes me a great amount of concern. So this symposium or this discussion...

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will provide folks from these communities that their voices have long been silenced in criminal discourse, have an opportunity to educate us and warn us about the impacts of Bill C-48.

Cheryl:

Great. We look forward to the report of that workshop. And I want to thank both of you, both Professor Jillian Rogin and Professor Danardo Jones from the University of Windsor for taking the time today. I think...

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It's been very enlightening and it's certainly what you've been telling us is an appropriate and good counterbalance to the narrative that we hear in the media about how, I mean, you talked about the term

jail not bail and how that in and of itself is a breach of the Charter and section 11E, which is really supposed to be the other way around. So thank you again for taking the time. It's been...

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a very interesting conversation and will be joined in our practice corner by Teodora Pasca who will be talking about what it's like to be in the trenches and being a young lawyer doing bail hearings in the next segment. So thank you both.

Danardo:

Thank you for inviting us.

Jillian:

Yeah, thank you so much for having us.

Cheryl:

01:05:02

Welcome back. I'm pleased to welcome Teodora Pasca to our practice corner for this episode. Teodora is currently clerking at the Supreme Court of Canada for the Honorable Justice Sheila Martin. Prior to her clerkship, she was an associate at Daniel Brown Law, where she worked on both criminal trial and appeal files, including several bail hearings. She has a law degree, as well as a bachelor's and a master's degree in criminology from the University of Toronto and was called to the bar in 2022.

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I should note that any views or opinions she expresses in this segment are hers alone. So today we're going to speak with Teodora about what happens in typical bail hearings from the perspective of a criminal defense lawyer. So welcome, Teodora.

Teodora:

Thank you so much. I'm really happy to be here.

Cheryl:

Earlier in this episode, we heard from professors Jillian Rogin and Danardo Jones about what bail is and what the Charter and the Supreme Court have to say about that. But really, I'd like to speak to you more specifically about

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what happens in court and what are the things that you need to do to prepare for a bail hearing and what it's like to be a lawyer in that circumstance. So let's just start by discussing what is a bail hearing and where does it take place.

Teodora:

Okay, so a bail hearing is what happens after somebody gets arrested and is held in custody. There's a determination made by a judge or justice of the peace, which I'm going to just refer to as a JP, just because it's easier.

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as to whether they're going to be released into the community before their trial and if so under what conditions or whether they're going to have to stay in custody. Presumptively, for the most part, people should be released, and you have a constitutional right under Section 11E of the Charter to be released. You have the right to reasonable bail. But not everybody gets out and there's lots of different reasons why. Trial bails are always at the lower court level. I...

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I practice in Ontario and in Ontario it's the Ontario Court of Justice. I mean under the Criminal Code you have a right to a bail hearing within 24 hours of your arrest if a judge is available or otherwise as soon as practicable. Unfortunately, what I've learned in my short time in practice is that bail courts are extremely overloaded so that means that that doesn't always happen in practice and delay in getting a bail hearing and being released has led to a lot of Charter litigation and there are Charter remedies available for that.

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or Section 11E as well. You should also be aware that there's a separate system of bail for appeals. So, if somebody is convicted and they want to appeal their conviction, that all functions very differently in part because there's no longer a presumption of innocence at the appeal level. So there's a separate system, but I'm just going to focus on the trial bail system for the purpose of our chat today.

Cheryl:

Great. What considerations as a lawyer go into preparing for a bail hearing? And this I'm asking you to speak.

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From the perspective of a criminal defense lawyer who's been retained by a client, we also know that bail hearings are conducted by lawyers who are situated in the court, in the courthouse, known as duty counsel, who are provided by legal aid. But let's just talk about what considerations go into preparing for a bail hearing, and can you briefly describe that initial meeting with the client and the process for preparing?

Teodora:

Sure. So, imagine the client is in custody.

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You want to get them out, you need a plan to propose to the court as to how supervision is going to work so that the court can be confident that the person is going to show up to court, that they're not going to flee the jurisdiction, that they're not going to be a threat to public safety, and that the public confidence of the system will be served by them serving this pretrial time in the community as opposed to being in custody. So what that requires of a defense lawyer is you really have to think about

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what your bail plan is going to be. Like, where is this person going to live? Who are they going to live with? What is their relationship to that person? What kind of efforts are going to be made to supervise them? Do they need an exception, for example, to be able to go to work every day? Do they need to be doing mental health counseling? All of these things are things that you have to canvas with your client clearly to make sure that if they are released, they're released on conditions that they can follow and that they won't be in a position of breaching.

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And also to make sure that if you do have people in their life that can support them, they're doing what they can to make sure that the court is convinced that this is a safe person to release into the community. A very important feature of most bails, even before you start thinking about a hearing, is speaking with the Crown to determine whether they're going to consent to the client's release or whether they're going to oppose it. And sometimes that involves negotiating over conditions. So for example, maybe the Crown isn't happy

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proposed plan but would be okay with a plan that is more restrictive, in which case maybe the client can get out on different terms than you had in mind. But from my perspective, if the conditions are ones that you can agree on and the accused can follow, it's always better to obtain a consent release because then you circumvent the entire bail hearing process and it results in more certainty for that person that it can be released right away, essentially. If you're going to go ahead to a full hearing...

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You're going to have to think about whether sureties are involved, need to be prepared to question them because the Crown is probably going to question them as well. The judge or the JP might have some questions for them about what their relationship is to the accused and how they're going to supervise. And then finally, the last thing I'll mention is that at least in Ontario, there are certain bail hearings that can be designated by the Crown as special bail hearings because they require more court time than necessary for a typical bail.

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And those types of bail hearings require far more extensive preparation. It's essentially like not a mini trial of the allegations, but you know, you have opening submissions, you have witnesses questioned sometimes over the course of several days, and there's really a more intense focus on like the law and whether it's appropriate to release this person. I've done one of those and it required written materials and a scheduling meeting with a judge in advance to determine how much time it would take.

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Things like firearms offenses, for example, are most often going to be designated as special bail hearings because Crowns really have an interest in ensuring that the people who are charged with these offenses are properly screened before being released into the community.

Cheryl:

So you mentioned about the right to bail and then we heard about that from Professors Rogin and Jones earlier in the episode about how it really is supposed to be the Crown's onus if they don't want to release somebody and they have to prove why they shouldn't.

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be released, but it does sound like the preparation that a defense lawyer has to do is really meeting that onus of why the accused should be released.

Teodora:

Yeah, I mean, it does take a lot of work and a lot of thinking, and it's tricky because although the onus is on the crown, it's also a persuasive exercise, right? Like, the court is not going to be satisfied that the person is releasable, especially if the allegations are serious.

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especially in sort of this difficult political climate where there's all these discussions about bail and people offending while on bail. I think it's really important to be properly prepared, even in cases where the Crown has to prove why the person shouldn't be released. It's important to be properly prepared for a fight and maybe an unsympathetic audience, especially if that person is maybe not so privileged or not so appealing to the typical court, like if they're a racialized person, if they don't have a lot of resources, if they have a criminal record.

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it's going to take more work, typically, to convince the court that they should be given this chance to spend time in the community before trial, which is, I think, really unfortunate, but it highlights the role of defense counsel in this process for sure.

Cheryl:

Yeah, so now just moving to the actual hearing, you've touched on this already. So can you explain a little bit more about the different aims of the Crown Attorney and defense counsel in the hearing itself?

Teodora:

For sure. So before I turn to that, I just want to clarify, we've been talking about offenses that...

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it's the Crown's onus to prove that the accused should be detained. There are also some offenses in the criminal code where it's actually the accused's onus to show why he should be released. So those are, for example, very serious offenses like murder. And they also include certain types of reoffending. For example, if you're released on bail, you breach your bail and you're charged with failing to comply with your bail. Suddenly you're back in court and you have to convince the judge why you need a second chance.

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But in either case, what the Crown is really trying to do is trying to convince the court that the accused should be detained for a bunch of different reasons. There are three grounds on which the accused can be detained. The primary ground, the secondary ground, and the tertiary ground. Primary ground is the person's going to run. They're not going to show up to court. They might be a flight risk. Secondary ground is there's a risk that they're going to commit an offense that threatens public safety. And then tertiary grounds...

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It's really about public confidence in the system, and it depends on a whole range of factors from the strength of the case against the person, the seriousness of the offense, the circumstances in which it was committed, and whether the accused is going to be liable to potentially long sentence of imprisonment if they are actually found guilty. And so with those grounds in mind, from my perspective as a defense counsel, if it's a reverse onus.

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I'm trying to convince the court why we've met all of those grounds as in why the person is not a threat to absconding, to public safety, or to the public confidence of the administration of justice. And then the Crown's trying to do the opposite, and whether it's reverse onus or whether the onus is on the Crown, it's really about trying to convince the decision maker that this person is either safe to release into the community without these potential consequences or should not be released, depending on the actor.

Cheryl:

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You mentioned bail conditions, and we talked about the ladder principle earlier with professors Rogin and Jones as well. But I want to delve a little deeper into bail conditions. Can you talk about what some of the typical bail conditions are?

Teodora:

For sure. So most bail orders have boilerplate conditions like keep the peace and be of good behavior, no weapons.

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That's kind of a no-brainer, especially for violent offenses. And then the other conditions tend to reflect whatever the plan is that's proposed and approved by the court. So, for example, you could be under conditions to reside with somebody. Like you have to have your address as your mom's house and you can't live anywhere else. You might have to abide by a curfew. You might be under house arrest. So, you're not allowed to leave the house except for specific exceptions. With or without

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electronic monitoring, for example. You might be under conditions not to contact certain people. There are even some conditions associated with certain types of offenses to not be in possession of certain electronic devices. For example, if you're charged with an offense that involves technology and the court is concerned that there's a risk that you might commit a related offense, your phone might be taken away from you or you might not be able to use a device with an internet connection except under supervision.

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So, all of these terms, they can be really restrictive on a person's liberty, and it's really important as a defense lawyer to make sure that you're not setting your client up for failure, to make sure that they can really comply with these conditions.

Cheryl:

How is compliance monitored? If the client has a surety, they have an obligation to report breaches or anticipated breaches to the police. So let's say my client is released with his mom as a surety, and his mom sees that.

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he doesn't come back on time and misses his curfew, she now has to do the very difficult thing of calling the cops to report him. And they can also apply to be removed as sureties if they've just kind of had enough of supervision, in which case the person goes directly back into custody. Police officers also often do routine checks, depending on the conditions. So, for example, if you're meant to be in the house between 11 p.m. and 6 a.m., an officer might show up at 1 a.m. just to make sure that you're there.

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and then if not, you know, you could be charged. If you're out on bail and you get apprehended by police, they are going to know based on the database what the nature of your conditions are typically and they're going to see that you might be in a position where you're breaching. And then finally, sometimes there's the option for the accused to sign up for electronic monitoring if they're not meant to

be within a certain area or if they're meant to be staying in the home. There are companies that set up accused with that system.

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It's often floated as a good option for monitoring, but it is quite restrictive, and often the accused has to pay for that out of pocket. So, you know, we try to avoid that wherever possible. Like if supervision can be done in other ways, it's best to avoid it.

Cheryl:

Now you mentioned that you don't want to set your client up for failure by having conditions that are impossible to meet. What are the consequences for breaching a bail condition?

Teodora:

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Well, failing to comply with your bail is a separate criminal offence. So in addition to whatever the person was initially charged with, they may or may not proceed with an additional trial or an additional charge added to the current trial of failing to comply with your bail. Depending on the nature of the breach, if it's really serious, it's quite likely I think that the Crown will also come after them for the breach. Breaching bail also makes it much more difficult to get bail later. So...

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Remembering what I said that failing to comply with your bail is a reverse onus offense. Some people are going to be released on the understanding that if they breach, it's straight back to jail. Especially on a very restrictive plan, if you breach that plan, it might be assigned to the court that there's really nothing more they can impose other than custody to control your behavior.

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But, the risk really is if the conditions are too restrictive or if they're worded in a very vague way or otherwise not properly formulated with like thought about what the person's life is going to look like before trial, you could be setting your client up for being in an impossible position. Like what if they get a new job? Like what if their relationship with their surety breaks down and they need to change residences? The system does allow you to vary bail conditions later on.

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But these are all things that you kind of have to think about in advance. Like, what is going to be realistic for the person to follow to ensure that they don't rack up additional charges or additional consequences for their case?

Cheryl:

Yeah, and we talked about how even if the ultimate charges that they got bail for are found not guilty or withdrawn, if they've got breaches of bail conditions, they'll still then end up having a criminal record.

Teodora:

So it has very serious consequences. Yeah, and that's...

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Frankly, I think that's really sad because sometimes breach of bail is a criminal offense, but the things that you have to do to be guilty of breach of bail in themselves are not necessarily criminal offenses, right? Like you could be breaching your bail by being outside of the house at the wrong time, which is not an offense for any person who hasn't been apprehended by the system before, but suddenly you're charged with something and you're subject to all of these conditions that become offenses.

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And they restrict your liberty in ways that ordinary people who aren't otherwise subject to supervision by the state would not be restricted.

Cheryl:

So what happens to an accused person if they're denied bail?

Teodora:

So if they're denied bail, they're stuck in custody for a while. There is an automatic review procedure. 30 days for summary conviction offenses and 90 days for indictable offenses is the waiting period.

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You can also apply for a bail review if there's been a significant change of circumstances or if the presiding justice made a legal error in denying bail. So there are ways to get the accused out later on, but it's typically easier, at least from my perspective, to get bail at first instance than to convince a higher court judge, because these are heard by the Superior Court, that the lower court judge made a mistake or there's some sort of reason why this should be revisited.

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I will also say that not getting bail at all has significant consequences for the accused's defense. It's really hard to prepare a case from custody. There are restrictions in jails on when lawyers can meet with their clients. There are lots of conditions that place pressures on the client such that they're stressed out and not in the best state to actually prepare a good defense.

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in ways that you know a client strolling into my office and being refreshed having had a good night's sleep and being in an environment where they're comfortable potentially being surrounded by family or friends who are supporting them. Like that person's going to be in a much better position to actually prepare their case with me as their lawyer than if I have to video call or show up to the institution and they only have a 20-minute window in which they can speak to me. It also I think looks worse.

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I mean, this is maybe a bit of speculation, but it would seem to me that it would look worse from a judge or jury's perspective when that person gets to trial if they see somebody coming straight from jail, you know, like handcuffed, being walked in by officers, potentially in a uniform if they aren't able to get different clothes, than somebody coming in from the community. Like a juror can relate to somebody strolling into the courtroom who looks like them and is dressed like them in a much easier way than somebody who...

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is kind of already labeled a criminal because they're coming out of an institution. And the psychological toll that pretrial detention takes on people is well documented. You know, you're isolated from your family. It can be very demoralizing. Sometimes trials or waiting periods for trials tend to drag on.

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This creates the conditions for somebody to start thinking about ways to get out of jail that are maybe not in their best interest, including potentially like pleading guilty to something that they shouldn't be pleading guilty to, or taking a bad deal that's offered just because they're in a desperate situation and they just really want to get out.

Cheryl:

So these are serious access to justice issues. We heard about how this can lead to wrongful conviction, where people plead guilty just to get out of jail.

Teodora:

Yeah.

Cheryl:

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Well, thank you for taking us through this. From your perspective, what are some of the most pressing challenges facing the bail system?

Teodora:

This area has a lot of challenges, and honestly, we could probably spend our entire time here talking about them. But I'll just kind of canvas a few examples. One issue that I think everyone has noticed in

this area is the politicization of bail and media representations of bail. I think that's a huge problem, like the way that bail is talked about.

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in the media and by some members of our political community, in my opinion, might give the public the impression that we have a system that sort of catches and releases people, that doesn't really care about community safety, or that criminals are sort of getting off without punishment. And that is not really a Charter compliant way to frame the issue, I don't think, because everybody has the right to be released if they should be released. And you have the presumption of innocence, like just because the police...

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takes you into custody and charges you with something doesn't mean that you did it and doesn't mean that you're not entitled to a fair trial. I mean the fact also I know that it's been sort of a hot topic the fact that somebody was on bail and then committed another offense but that doesn't mean from my perspective that the system is failing because there are so many people out on bail in the community who do not

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commit other offenses and that's very difficult to track and measure. So I think there's a bit of selection bias there because there's so many cases in which absolutely nothing is going wrong. You know, if the consequences of tightening rules on when somebody can get bail are being discussed a lot right now and that's going to impact a lot of people, all of whom are presumed innocent and many of whom don't pose any risk to the public.

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Another issue is the fact that, you know, even though you're entitled to have a bail hearing within a reasonable time, the reality is that our court system is extremely overburdened and often it can take quite a bit longer to get out of custody than what is technically Charter compliant. I think that is aggravated by the fact that the conditions in pretrial detention are not always that good.

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We saw this a lot when the pandemic hit, and people were being put into lockdown or there were quarantines or spread of COVID within facilities while people were in detention. And it's difficult sort of to hold correctional institutions accountable from the defense perspective. I've had a couple of instances in which a client was in custody and there was a judge's order to bring them to the courtroom and the jail just didn't do it.

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And there's not really a remedy for that. I guess you get another date, but then that means the client has to spend some extra time in jail, right? And then finally, I know that your other guests touched on this, but there are a lot of race and income disparities in the bail system. And typically, people who have more money and more privilege have the resources to hire a good lawyer, which will set them up for success.

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A lot of bail hearings are actually done not by privately retained counsel but by Duty counsel and cuts to legal aid have made their jobs over time much, much harder. Duty counsel doesn't have a lot of time like a privately retained lawyer would to sit down with a client and get to know their family and their history and really think about what would be the best possible thing for them in that moment. Duty counsel does the best they can, but they have so many clients and they're underwater that it really is...

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an immense feat to be able to represent all of those people on any given day. It could be like dozens of people that walk into your courtroom and suddenly you're on for them. I know that the federal government is contemplating passing Bill C-48 to make changes to the bail system. And...

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That might add additional complexity to the process and that might put even more strain on the duty counsel system and on the system in general that is already quite overburdened. All of these issues, you know, regardless of one's personal opinion on what should be done to fix them, all of these issues are realities. They work in tandem and they really show why it's so important to take Section 11E of the Charter seriously because otherwise the consequences on detained people will be dire.

Cheryl:

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Yeah, it's so clear from everything that we've heard in this episode that how important this right is in the Charter in terms of access to justice and in terms of the presumption of innocence and the march towards even wrongful convictions. That just puts so much pressure on the lawyer doing the bail hearing. And we hear in law school, for example, a lot of emphasis in criminal law, just on the crime side of it, the definitions of crimes and the trial part.

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not so much on bail. Can you give us a sense of what it was like as a junior lawyer, newly minted lawyer, doing your first bail hearing and just the weight that's on your shoulders and how it felt to do that?

Teodora:

My first bail hearing was really interesting. I was assisting senior counsel at the firm that I worked with last year with a special bail hearing, which is the type of bail hearing that I mentioned that requires quite a lot more.

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preparation and quite a lot more time than the typical hearing does. There were a lot of different things sort of complicating this case. Unfortunately, the Crown was not in a position where they were willing to consent or negotiate. And the bail that the client allegedly breached was an appeal bail. And so, this put

him in the position of essentially being in two jurisdictions instead of one because his breach charge was at the lower court level. And the appeal bail...

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was at the higher court level. So, we were kind of dealing with two different court streams in tandem. So it was really complicated for, especially for a first year lawyer to sort of deal with, but I'm really grateful that I had a lot of support from senior counsel guiding me through it. And I felt that it was really important in my job as defense counsel to focus the court's attention on what really mattered, not on the client's history or other things that may distract from the process, but really on the charge before the court,

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all of the grounds for release and turning this potentially very complicated matter into essentially a very simple question of whether this person should be on this charge detained before trial. And we were successful, which was wonderful, but it was a great learning experience and it was a lot of pressure because if you lose that initial bail hearing, it can kind of be an uphill battle from there.

Cheryl:

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It really speaks to how much preparation criminal defense lawyers have to do and how much attention they need to pay for this, what sounds like sort of an interim and perfunctory sort of process before the main show of a criminal trial, but still how critical it is for the accused person.

Teodora:

Yeah, for sure. It's a privilege to do that job, and I had a wonderful time

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where I practiced and I think that whether you're Crown counsel or defense counsel taking this area of the law very seriously and doing your job like above and beyond the limits of what the letter of the law says, I think is really important.

Cheryl:

Well, thank you so much for speaking with me about bail hearings. This legal proceeding is not something that many people are familiar with and as we've been saying, it's so important in the criminal justice system. Is there anything else that you want to add that you haven't shared with our listeners?

Teodora:

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I think for any students listening, just, you know, if you have the opportunity in your courses or in your practical work to get exposure to this area, I know that clinical work often doesn't actually include any consideration of bail, but if there's a way to get involved in this area, if you're interested in it, it's definitely one where we need a lot of bright people thinking about these issues. So I would encourage everyone to learn more and to try and get involved if they can.

Cheryl:

Well, thank you very much, Teodora. I really appreciate the time you've given us today.

Teodora:

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Thank you, Cheryl.

Cheryl:

I've been speaking with Teodora Pasca, criminal defense lawyer and current Supreme Court of Canada clerk and graduated of the University of Toronto Faculty of Law.

Thank you, listeners, for tuning into this episode of Charter, A Course, where we have been discussing the right under section 11E of the Charter not to be denied reasonable bail without just cause. I wish to thank our previous guests on this episode, Professor Jillian Rogin and Professor Danardo Jones who discussed the Supreme Court's approach.

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to bail in the R and Antic case, as well as the federal government's current bail reform efforts. Looking ahead, we will continue to explore various sections of the Charter, including in our next episode, Language Rights. You'll be able to find our episodes on Apple podcasts, Spotify, and other popular platforms, as well as on the Asper Center website. So check back in soon. Lastly, we'd like to thank law student Emily Chu, who helped produce this episode. Until next time.

Music:

01:31:52

Charter a course, I will Charter a course, if we can just get the country to trust us. Charter a course, southeast, west and north, and along the way we may find justice. Charter a course, I will charter a

course, if we can just get the country to trust us. Charter a course, south, east, west and north, and along the way we may find justice.

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