

**LawyeredEp84**

**[00:03] HUSEIN:** This is Episode 84 of Lawyered. I'm Husein Panju. And on this week's episode, we're speaking about current issues involving Bail law, featuring a leading Toronto criminal lawyer, Trevin David. First up, we'll discuss a new and high-profile federal bill called Bill C48. If passed, this legislation would flip the onus for certain offenses from the prosecution to the accused. And we'll find out how this might work and how it might exacerbate some inequalities in the judicial system.

**[00:34]** Next, we'll speak about a new line of cases involving excessive delays for bail hearings. The Ontario courts have taken a recent firm stance about how much of a delay is reasonable between an arrest and a bail hearing, and we'll find out what this might mean for cases going forward. We will also speak about the case law following the similar case of RV. Antic, which helped to emphasize the Ladder Principle and the use of proportionality in arriving at bail conditions.

**[01:02]** And finally, in our Ask-Me-Anything segment, we'll cover a bunch of questions submitted by members of our Lawyered Patron community about topics ranging from collegiality in the criminal bar, the role of Legal Aid funding, and potential solutions to fix Canada's criminal bail system. All that and a lot more is coming up in just a bit. This is Lawyered.

**[01:31] HUSEIN:** Hey, everybody, welcome to Lawyered. Thanks for joining us for another installment of the podcast. This episode is coming out at the very, very end of the summer, August 2023. If you're listening to this in real time, I hope you that you had a great summer, whether that means vacation or family or friends or what have you, and are looking forward to taking on the rest of the year, fall and onwards.

**[01:57]** Not too much to report on in terms of housekeeping for the podcast. On our last episode, it was a real banger, to be honest. We had May Cheng on our podcast, who, as you may know, is one of the foremost IP legal practitioners in Canada. And we spoke about the specific area of Brand Protection law. So, we spoke about Bill 96, which is getting a lot of attention out of Quebec. We spoke about this theme or trend of bad faith registration, people who are trying to scoop up trademarks to undermine other parties.

**[02:34]** And then we had a really thoughtful discussion about the role of AI in the artistic space and how the use of this technology can create derivative works and presents a whole bunch of legal issues. A really fascinating look at these particular areas. And as May, spoke about at the end, part of what makes this area so interesting and

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compelling, is that we all deal with brands hundreds of times a day. From the moment we wake up to when we go to bed, numerous times during the day, we're interacting with brands so much, oftentimes without even appreciating it.

**[03:10]** And so the issue we spoke about are pretty high profile already, but help to kind of bring to bear the role that brands play and what lawyers do to help individual brands protect themselves, which is really interesting space. So, if that's of interest to you, check that out, that's Episode 83 in our archive.

**[03:30]** And on today's episode, we're going to speak about the area of Bail law. And this particular area came about because, again, at the time of this recording, this issue has been all over the news during the last several months. And as we'll speak about in the episode, this concept of bail and bail reform is often politicized by governments and is frequently subject of legislation and policy. And although a lot of people speak about bail reform, there isn't an especially clear understanding – at least in the mainstream – about how this works in practice.

**[04:06]** So, on today's episode, we're going to get a crash course into how the bail system actually works and talk about some of the current issues in this field. And we are very lucky to have a guest for today who is amply qualified to speak about these issues and more, and also happens to be a good friend of mine as well. And so without further ado, here is our interview about Bail law featuring Trevin David.

[Music]

**[04:30]** Trevin is a criminal defense lawyer and partner with Daniel Brown Law in Toronto, and he runs a trial-focused criminal defense practice in the Ontario Court of Justice and Superior Court of Justice throughout Ontario. The majority of his practice is focused on representing people charged with sexual offences and other serious indictable offences. Trevin has guest lectured at Queen's University Law School and Toronto Metropolitan University, and has always presented at various legal conferences hosted by the Law Society of Ontario, the Criminal Lawyers Association, and the Ontario Crown Ternous Association.

**[05:03]** And Trevin is also frequently asked by journalists to provide commentary on various issues in the justice system, and has appeared on CBB Your Morning, CBC Metro Morning, CP24, and The Toronto Star. So, Trevin, thanks for joining us on the show today.

**[05:17] TREVIN:** Thanks so much for having me, Husein.

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**[05:20] HUSEIN:** And I'm going to add Lawyered to your list of impressive media appearances as well. So, for those of you who don't know on the show, Trevin is actually a good friend of mine for over a decade or so. And since you've been called, you've been practicing exclusively in this area of Criminal Law. And for people of our vintage, I should say that that's more the exception than the rule, having the benefit of practicing in this one area and developing such a depth of practice. So, I'm curious if you can tell us a bit about what's kind of kept you in this area? What kept you engaged and why you enjoy it?

**[05:54] TREVIN:** So, when I was in Law School, I was always interested in an area that was more social justice oriented. And then I remember speaking to my evidence professor and he said, "You should consider criminal defense," and that wasn't an area I was really looking at the time. And his thought was, you're interested in social justice, there's nothing more social justice-oriented than criminal defense law and you get to be in court more. So, that's how I started. I articulated in that area. And I've never looked back and I don't see myself doing any other area of law.

**[06:26] HUSEIN:** Tell us more about how you feel that criminal law impacts your social justice leanings.

**[06:33] TREVIN:** Well, I think it's you're the ultimate underdog. You're a person that is representing an individual, sometimes groups of individuals, who are often the most disadvantaged in society against the oppressive power of the state. So, in terms of underdog stories, there's really nothing better. And so I think that's the main thing that makes it more social justice-oriented and also just the type of people who you're helping. Often people who are in the worst situation of their lives, you're doing what you can to help them with their situation.

**[07:06] HUSEIN:** Yeah, that's a great outlook. So, we got a bunch of issues to speak about, the specific area of Bail Law. So, I know that you practice Criminal Law generally, but there has been a lot of recent developments specifically relating to bail issues. And we've got numerous issues to speak about. The first one is about an active bill that's in parliament. And for those listening, we're recording this episode in the summer of 2023.

**[07:29]** And one of the most controversial Criminal Law legislative reforms of this year is Bill C48. Because amongst other changes, this bill would flip the onus for certain offenses from the prosecution to the accused, by requiring the accused person to instead bear the burden of proof to show why they should be granted bail before trial. And although this bill will not be passed during the current session, it does raise important issues about the practical effect of bail reform and how to fix the core issues in our bail system.

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**[08:00]** I know that a big part of this bill relates to the reverse onus principle that would change the bail frame. But before we go into that, can you just explain some basic principles about how a Judge or a Justice of the Peace, would typically determine whether or not an accused person should be detained before their trial.

**[08:19] TREVIN:** Yeah, of course. So, first I want to mention is just how important bail is. It's one of the decisions that's made at the earliest stage and determines whether a person can be released and remain in the community or remain in custody until their case is dealt with either by trial or by them pleading guilty. And that sometimes is an important consideration, because whether or not a person does get bail can impact whether they choose to plead guilty or whether they choose to have a trial.

**[08:48]** But bail at its core is just about assessing risk. So, it kind of occurs in this legal framework that assesses risk and public safety, but in a way that it also is meant to respect the presumption of innocence, because everybody that is charged is legally innocent of the crimes they're charged with, and the Charter right to reasonable bail.

**[09:08]** You mentioned the sort of the basic principles, the sort of three broad areas of frameworks that courts or a judge or Justice of Peace should consider. So, first is whether detention is necessary? Will the person show up to court? We call it the primary ground. The second one is a public safety ground. Is detention necessary for the safety of the public or the public's protection? Is there a substantial likelihood that if released, the person would commit a criminal offense or interfere with the administration of justice in some way?

**[09:40]** And then finally, there's the public interest ground. What would a member of the public think, knowing this individual, whether they get bail or they don't get bail? Is that detention or release necessary to maintain confidence in the administration of justice?

**[09:55] HUSEIN:** Okay, so just before going forward, so does the Crown need to establish that all three of these elements are passed in order to have them detained before trial?

**[10:04] TREVIN:** No, not necessarily. The answer is, it depends. So, usually you look at a variety of factors. You look at the person. The nature of the offenses charged. The individual, whether they have a prior criminal record, are they currently on release? And depending on those circumstances, some of those factors may be real considerations or real concerns, or some of them may not be.

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[10:28] And I think the other thing you have to look at is you look at whether there's these legitimate concerns relating to any of these grounds. And then also, can they be met by appropriate conditions? So, I'll use primary ground, for example. If the person is not ordinarily resident in Canada, you may consider, well, is there a condition that would allow this person to, just as long as they deposit their passport, can they still stay in the country? Can they remain in the community? So, those are sort of the things that you'd look at to see, are any of these factors relevant? And then also, what conditions can be put in place?

[11:04] **HUSEIN:** Typically, for this test, the burden of proof lies on the prosecution to make out these elements. Is that right?

[11:10] **TREVIN:** That's exactly correct.

[11:12] **HUSEIN:** Okay. So, as I mentioned in the introduction, one of the aspects of this new bill that's gained a lot of attention is this reverse onus. So, tell us more about how that would work if this bill is introduced.

[11:23] **TREVIN:** So, right now, as you mentioned, the vast majority of offenses, the burden is on the prosecution to justify any conditions up to and including detention. But in some offenses, and right now, those are generally for the most serious offenses, there's a reverse onus. So, for the most serious offenses, offenses where a person's alleged to have violated a prior court order, they're on bail, or domestic offenses where there's a prior history of domestic violence, those are some broad categories where the burden shifts onto an accused person and they have to explain or they have to justify why they should be released on bail.

[12:02] Usually the most serious offenses are things like murder, attempted murder, terrorism, but now we're expanding the list, especially involving firearm offenses that would again trigger this reverse onus. So, things like breaking and entering, robbery with a firearm are examples of now more offenses where the burden would shift onto an accused person, making it harder for them to get bail or making it more likely that they'll get stricter conditions.

[12:29] Also, there's some things that they're just clarifying. So, before they had said people who are previously convicted of domestic violence, and they're now charged with domestic violence crimes again, the onus shifts on them. Some things are clarified. They've said this means any prior conviction or any prior finding of guilt. If they have any type of prior history, they will get a reverse onus. And so there's certain elements of

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things that they've expanded the list of offenses, then also things they've made very clear of why a reverse onus would apply.

**[13:04] HUSEIN:** Although typically the prosecution may bear the onus, there typically are arguments that are made by the Crown and the defense, about whether they should be detained or not. So, I'm just curious, like what impact does this reverse onus practically play? Because I imagine that still, both sides would make their arguments about why the individual should or should not be detained. But I'm curious to see what meaningful impact it changes when the burden of proof shifts from one to the other.

**[13:31] TREVIN:** Of course. And I think one thing I'll mention is there are instances where there is a contested bail hearing, or sometimes even when there's a reverse onus, both sides may agree that a person can be released and agree as to the level of conditions.

Practically what it means is that if the burden shifts on to an accused person, it means it's more likely that they will need to have a contested bail hearing. It may take a period of time. But also it means that it may be more likely that they'll get detained, but also it's more likely that if they were to be released that the conditions of release would be much stricter.

**[14:07]** So, when the burden shifts on to an accused person, the burden shifts on to them. When it is a reverse onus and the burden shifts on to an accused person, you still have to recognize that they're presumed innocent. And detention is still the exception, but the burden shifts on to them. You're not starting off with, let's start with the least restrictive bail conditions. You may start off with, why should you get bail again? So, things like house arrest or a very strong surety where you have to live with your surety, those things are going to be more likely than they would when the burden is on the prosecution.

**[14:47] HUSEIN:** And what do you think as someone who works in this area day-to-day, how do you feel about, bail reform being introduced as a response to these sorts of issues?

**[14:57] TREVIN:** I think to me, it's a bit of a step backward. So, a few years ago, in 2019, in response to some recent Supreme Court of Canada decisions that mentioned this crisis of over incarceration of people who are again legally innocent, too many conditions being put on individuals, it's overly strict, and a disproportionate impact on accused people from marginalized groups. The liberal government had responded with

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codifying a principle of restraint that we should have bail be... that meant to expand the amount of people who should be getting bail and reducing the level of conditions.

**[15:38]** Now, about four years later, arguably, we're going to make it harder for people to get bail, more likely that we're going to wait longer for those people to get bail hearings, and more likely that legally innocent people are going to be detained, and may wait half the years, months, until they have their trial. So, I think there are some real concerns that I have that this is going to increase some of the problems that were in place, that a bill four years ago was meant to address.

**[16:06]** Statistically speaking, that accused people from marginalized groups are racially diverse, Black and the Indigenous accused people specifically have harder time getting bail. They're often more over-policed. So, I think when you see this new change, it just means that it's going to... we know that this is going to disproportionately impact people from these marginalized groups again.

**[16:30] HUSEIN:** Got it. So, it amplifies some of the injustice that are currently in this system. Is that right?

**[16:36] TREVIN:** That's right. So, it seems to be a little bit of mixed messaging. You have this bill four years ago that's addressing a problem, and then this bill that arguably may well, in addressing a different problem, is only going to make the previous problem worse.

**[16:55] HUSEIN:** I know this bill is not formally a law. For all we know me, not ultimately passed. But assuming it does pass and there is this reverse onus that's introduced for these new offenses. How do you think this would change the strategy for a defense lawyer like yourself, who would now be in a position for having to argue for the release or conditions for someone who is there on a contested bail hearing?

**[17:17] TREVIN:** Well, I think whenever there's increased reverse onuses, it means more likely that the prosecution is going to insist on stricter bail conditions that may or may not be possible for the accused person in court. So, where a person may otherwise have been able to be released on their own with a promise to come to court and to follow certain conditions, now you may insist on having a surety.

**[17:42]** That is a person who is responsible for monitoring an accused person who comes to court and says, they will help monitor an accused person and will call the police if the person is breaking the rules. Or you may say, I want the person to live with that surety or to follow a condition of house arrest. So, it means that you may need to prepare a stronger release plan before you can approach the prosecution.

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**[18:11]** It also makes it more likely that you have to prepare for a longer bail hearing. And with the way the bail courts are, it means that you may have to wait days, if not weeks, before you can have a bail hearing, especially if you know that that bail hearing is going to take longer. So, bail hearings are now going to be likely more complicated, which means that a person will likely remain in jail for a longer period of time.

[Music]

**[18:41] HUSEIN:** Now, in a typical scenario, an accused person is entitled to a bail hearing shortly after their arrest. However, in the last couple of years, there's been notable high-profile incidents of criminal charges getting thrown out because of extensive delays for persons to even get a bail hearing. And the most recent case took place very recently in June of 2023 and is prompting new questions of judicial fairness and resources alike.

**[19:07]** So, as I mentioned in the induction, I understand that there's this standard timeframe in which a person is expected to get a bail hearing after they're arrested. So, can you give us a sense of how this works in a 'normal case'?

**[19:20] TREVIN:** So, an individual, when they're arrested, if they need to be held for a bail hearing, they should be taken before a bail court or a Judge within 24 hours. And then they should be allowed to have a bail hearing within three days. Meaning there should be no adjournment of over three days unless they agree they're not in a position to address bail, for example, or unless a judge is satisfied that there is a special investigative purpose, which is, again, rare and doesn't happen in the vast majority of cases.

**[19:52] HUSEIN:** And these timeframes, are these in the criminal code?

**[19:54] TREVIN:** That's exactly right. They're put in the criminal code. So, what happens in some of these cases is whenever there are bail hearing, because the bail courts are really overburdened and under-resourced. What that means is that anything that is more complex, they will be scheduled separately than in the normal bail court, which is already so busy. That means that people will have to wait days and weeks, which is a real problem, but especially when the code says, you should be able to have a bail hearing within three days.

**[20:28] HUSEIN:** Got it. Okay. And so, I know that there's been two particularly notable incidents about extensive delays for bail hearings, kind of in the vein that you're speaking about. The first is a 2019 case called Simonelli, and then there is a more recent case called Ahad Salam. And again, these are not necessarily the only cases, but at least



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two of the more high-profile cases that is happening. So, can you tell us about the facts of how these cases came about?

**[20:53] TREVIN:** These bail hearings took place in different courthouses. Simonelli took place in Brampton, and was part of a larger project relating to a criminal organization. And I think Mr. Simonelli was charged with some illegal gambling offenses. And Mr. Ahad Salam was charged with robbery offenses. And in both situations, the individuals were ready to have their bail hearings and had proposed sureties and a proposed release plan ready for consideration.

**[21:24]** But because of delays and the need to have a special bail hearing, because those bail hearings were meant to be more complex and couldn't be dealt with in an already busy bail system, both individuals had to wait extremely long before they could even have a chance to go for bail. So, Mr. Simonelli, I think, waited about 12 days before they could have his bail hearing. Mr. Ahad Salem had to wait 17 days before he could have his bail hearing.

**[21:50]** And this isn't because they needed that time. They were ready to have their bail hearing the next day or the day after. It was because the court could not accommodate the type of bail hearing that they thought necessary to deal with these individuals.

**[22:04] HUSEIN:** So, this was at the court's request, but not necessarily the Crown. Is that right?

**[22:08] TREVIN:** I think it was to balance both. The Crown attorney said, "This needs a special bail hearing. This can't just be done in a busy bail court. So, we need a special court to deal with this and these cases alone." The defense was ready, and the court wasn't able to accommodate that for 12 days or 17 days.

**[22:27] HUSEIN:** Okay. So, for both the cases, we're well over the three-day prescribed amount that's in the criminal code. So, then what happened when these cases got exploited? Did these bail hearings end up happening at all?

**[22:43] TREVIN:** They did. So, eventually, these individuals were released on bail. I think the Crown consented to Mr. Ahad Salem's release after they had heard from some of the sureties. And then with Mr. Simonelli, they were able to have a bail hearing before a judge and were ordered released.

**[23:02] HUSEIN:** So, these bail hearings took place. They got the release that they had sought. And then afterwards, they understand that they filed a Charter application based on this bail issue. Tell us more about that.

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**[23:12] TREVIN:** So, after they get their bail hearing, they argued that these problems that meant that they waited in custody before they had a chance at bail were an abuse of process and a violation of their Charter rights. And they were arguing that the only remedy because of the misconduct here was that the Crown could not proceed with the prosecution anymore.

**[23:40]** So, what was significant about both of these cases was that these cases weren't isolated. In both cases, they brought a lot of evidence of people waiting days or weeks, other people in similar situations or charged with offenses, who had to wait days or weeks before they could have a bail hearing, which showed the court that these were systemic problems. And so they weren't just about Mr. Ahad -Salaam or Mr. Simonelli. They were indicative of this larger problem.

**[24:15] HUSEIN:** And how did the courts find on those?

**[24:17] TREVIN:** In both of those situations, and again, that's why usually something like this is pretty rare. And so that's why in both cases, they showed that this was not just about Mr. Simonelli or Mr. Ahad -Salaam, but that this was this larger issue. And when the court looked at that, they considered that any other possibilities, any other remedies, reducing sentences, or a stern rebuke of the Crown attorneys wasn't sufficient to address the problem. And that the only remedy to bring home how serious the misconduct was, was staying the charges or dropping the case against both of these people.

**[24:58] HUSEIN:** I see. So, it sounds like the facts and the outcomes are substantially the same for both of these cases. But I find it quite telling that one case happened in 2019, and there's another one happening four years later. So, I wonder if you have any thoughts about what this tells us about the bail system in our courts and whether there's any room for improvement.

**[25:20] TREVIN:** It's certainly not cause for hope. It tells you that if anything it shows... and again, I appreciate there are different places, different jurisdictions, one is in Brampton, one is in New Market. But it tells you that the problem hasn't gone away. If anything, it tells you that the problem is still the same and that other courts didn't take what happened in Simonelli, seriously, which led to a similar situation happening again four years later.

**[25:48] HUSEIN:** Right. So, what is...? And I know that it's not going to be a quick fix, but is it really, 'just a resourcing issue' or just having not enough Judges and courtrooms? What do you see as part of the solution for this?

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**[26:04] TREVIN:** I'd say that's the largest problem, because otherwise this amount of delay isn't acceptable. But I think the other thing also is to some degree should be looking at the prosecutions themselves. Sometimes they need to take the person's right to bail hearing more seriously. If that means that does the person have to have surety? Can we agree to a release? Can we agree to streamline the process or the person doesn't have to wait as long in custody?

**[26:34]** Things like that need to be more of a priority, which seems to be what the courts are telling us. Otherwise, we can expect more cases or more serious charges getting thrown out for the same reason.

**[26:48] HUSEIN:** Now that we've had two of these cases with a seemingly a stronger rebuke of the system. Do you think this may be cause for change?

**[26:59] TREVIN:** You would certainly hope so, but it all depends on what is a priority in each particular Crown's office, how do they respond to this, but also how do the governments that are in place responding to this? And I think what you may see is that there's a real problem with governments appointing Judges or appointing Justice of the Peace. So, that's a real problem that's contributing to this.

**[27:28]** But also in some ways, I think what we end up seeing is with some of this, if Bill C-48 comes into law, you may see more of these problems happening because the bail courts are just going to get busier and busier. If the resources don't follow up with that, again, people are going to be waiting days or weeks before they can have their bail hearing.

**[27:50] HUSEIN:** Are there other things that you think that lawyers can be doing to address this bail delay issue, whether it's on the Crown or the defense?

**[27:57] TREVIN:** For a defense lawyer, you need to prepare and be ready to go at the earliest possible opportunity. Because if the cause of the delay is that you're not available or that you don't have your sureties available or you don't have your release plan properly put together, well, then that's not the court's problem or the prosecution's problem. They're not going to be held to blame when you weren't ready to move forward.

**[28:25]** So, it makes it really important, especially with serious charges, that if you say you're ready to proceed, that you are ready to proceed. I think that's the most important thing. And also, I think it's important that when you have a situation like this, you ask people around you to see whether this is part of a larger problem. Again, that's what both of the lawyers in these cases did, was able to show, I think in one case, they

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were able to show 60 decisions and another case about 40 decisions that were showing this delay in getting bail hearings together.

[Music]

**[29:05] HUSEIN:** One of the most significant bail-related cases in the Supreme Court of Canada goes back to 2017 in the case of R v. Antic. That decision paved the way for a more efficient bail system and emphasized that Judges should base their decisions on release using a Ladder Principle. And in the years since, the courts and the legislatures have grappled with how to best implement these directions at a practical and procedural level. So, Trevin, I know that this Antic decision is not quite new, but it's had an important impact. So, can tell us more about the relevant facts and the relevance.

**[29:37] TREVIN:** So, Mr. Antic was arrested in Windsor. He was charged with several drug and firearm offenses. But at the time, he was an Ontario resident, but really spent most of his time in Michigan. So, he didn't really have many assets in Ontario and Canada. And so what happened in that case was rather than looking at plans with sureties, which is the primary way in which individuals get bail, a person may make a promise to the court and say, "I will pledge a sum of money, and that's going to bind my promise. And I know I could lose that if I don't monitor this person."

**[30:15]** The courts in Antic's case said, no, you need to deposit a sum of money, which was not possible for Mr. Antic. So, the courts use that case as an opportunity to talk about the bail system as a whole. And they spoke about the importance of the Ladder Principle and essentially said that the lower courts should not have jumped right to requiring that he make a cash deposit. And they should have considered other types of release that were much less restrictive and wouldn't have had the effect of keeping Mr. Antic in jail while he was trying to put together the amount of money that the courts had said he needed to be released.

**[30:56] HUSEIN:** Okay. So, you mentioned this in Ladder Principles. Can you tell us a bit more about how this Ladder Principle works like in the abstract? I mean, it makes sense for this particular case, but tell us more about how a judge in a regular case might go about reviewing this.

**[31:12] TREVIN:** The courts had mentioned that we are focusing too much on putting too strict bail conditions on people and overusing things like the use of sureties. And what the court had said in Antic was, something like a bail that involves sureties is one of the most significant forms of release. The default should be the person should be allowed to be released with no conditions attached. And that only most strict forms of

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conditions shouldn't be even be considered. And they should only be imposed if a Judge is satisfied that anything lower or less restrictive is inappropriate under the circumstances.

**[31:50]** So, the idea being that courts are making bail way too hard and too difficult to achieve. And we shouldn't be doing that right now for people recognizing that they're presumed innocent and they have a Charter right to bail.

**[32:02] HUSEIN:** Is there like a list of escalating conditions that you start and go up to?

**[32:09] TREVIN:** I think in that case and in other conditions, they've sort of mentioned... they say the default is release on an undertaking. "I promise to attend court with no other conditions." Then beyond that, you may see, well, are there any conditions that are necessary? Maybe no contact with a certain individual, stay within a certain geographic area. Again, it's only if that's appropriate under the circumstances. And then, as I said, it may rise to including sureties.

**[32:42]** There's no fixed list that the courts have said, but the whole point is that any bail conditions, whatever they are, should be clearly mentioned, minimal in number necessary and the least strict under the circumstances. And they have to be tied to that three grounds I mentioned earlier: Will they ensure a person attend court? Are they necessary to ensure the public safety or the public's confidence in the justice system?

**[33:09] HUSEIN:** Okay, it makes sense. Now, we talked about this in passing during the first segment. But I know that in 2019, the federal government introduced a new law in response to this Antic decision, which related to the sentences of indigenous and other vulnerable accused. So, can you tell us a bit more about that new law and how that engage with this Antic decision?

**[33:33] TREVIN:** So, it was in response to Antic and then a few other Supreme Court of Canada decisions that happened afterwards that sort of reinforced that same point in the years afterwards. What the government did is they imposed, they made some of these into law. So, they made it very clear, they codified it in the Criminal Code that said, you should consider the least strict form of release first and should only go to more strict forms of conditions, only once you've determined that other conditions, anything lesser is inappropriate.

**[34:08]** So, I think that was one of the changes that they had and they clarified that in the Criminal Code itself. And also they included another condition which was to consider the particular circumstances of an accused person from marginalized groups like indigenous communities. So, for example, again, is relying on a surety necessary? Or for

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example, you may want to consider that if you keep them in jail, that the jail may end up removing them from their community where they have a historical tie to and their Aboriginal community. So, you have to consider that, which may change whether or not you determine whether detention is necessary or it's not under the circumstances.

**[34:53] HUSEIN:** And we talked about this new Bill C-48 that may change the bail in generally. But putting that bill aside temporarily, I was wondering if you can kind of comment on the relevance of Antic and this corresponding legislation in the years since. Do you think that it's had a meaningful impact?

**[35:12] TREVIN:** I think it has and it should. But I also wonder whether the lessons that were said in Antic and some of the more recent cases from the Supreme Court of Canada, there's a case called Zora, there's a case called Myers in the years afterwards, whether that has sort of fallen on deaf ears. Because I think what you're seeing is courts emphasizing that we shouldn't be risk averse because a person is presumed innocent, but then when there are public safety concerns, we are kind of going in the opposite direction.

**[35:48]** So, I think the one thing that I wonder is, are we really taking seriously the lessons that the Supreme Court of Canada was telling us in Antic and some of those other cases? So, in some ways I say it is more relevant because there's still too many people in jail without bail, but also in some ways we're kind of moving back a little bit and some of these considerations show that we're cutting against what the courts told us.

**[36:24] HUSEIN:** Do you think there's an opportunity for us to correct, to get us closer to what the court was talking about in Antic and these other decisions?

**[36:30] TREVIN:** I think it's about what's the public priority and also what is the priority for the government in the day? If the government starts off with the presumption that public safety is the most important consideration. Obviously, the bail courts are meant to emphasize public safety. But if their focus is on trying to keep more people detained, then that's going to lead to some of the same problems that the courts were talking about in Antic and afterwards. So, it's about what is a priority for the government in power.

**[37:02] HUSEIN:** And politically speaking... I think we're talking about this bit earlier, is that it's very politically palatable to argue for greater public safety and more restrictive bail conditions. Do you see any governments in the future kind of clawing this back?

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**[37:24] TREVIN:** I think you're absolutely correct. It's easy and politically powerful to emphasize public safety. And anytime you get a situation where a person on bail has gone out and committed a serious offense, the first thing that I think that you hear from people in the public and the government is, this never should have happened, what can we do to change that? The idea that the vast majority of people on bail do not commit any type of offenses or if do, they're much, much more minor in seriousness is not something that plays well. And it's not something I think that the public... I hope the public cares about, but it may be that they don't care about as much. So, it makes it even more important, that it's a priority for the governments, but I'm not so optimistic.

[Music]

**[38:23] HUSEIN:** And we're going to wrap up this episode as always with our, Ask-Me-Anything segment with Trevin to speak about issues related to bail law. As listeners of our show will know, one of the bonus rewards we have for our members is the opportunity to submit questions they want to hear answered on the show, which can be about anything at all, so long as they're not asking for legal advice.

**[39:44]** And we do call for these questions about a week or so before the recording, so if you want to learn about how you can become a patron as well and help keep the lights on for the podcast and also submit your own question to our upcoming guest, you can check out our crowd funding website at [www.lawyeredpodcast.com/patreon](http://www.lawyeredpodcast.com/patreon), for more info. So, I've got a bunch of questions and given the subject matter, some questions are related to bail, some are about the criminal justice system generally, but I'm sure you'll be well suited to answer all of them.

**[39:16]** The first question is about comparative law issue. And the question is how does the bail system in America compare to that in Canada?

**[39:26] TREVIN:** So, in America, the bail system usually works on a cash deposit or a bail bonds model. Which is that a court may set bail at a certain financial amount. Bail is set at \$10,000 or \$400,000. And a person or a group of people have to put the funds together. Either they may have to put 10% of it down or the full amount down, and they may do that on their own or with a bail bondsman to help. And so, and once they do that, that's when they get the release. And if the person violates that bail, the amount of money that's already deposited, they may have to pay that amount.

**[40:05]** In Canada, it usually works on a promise, more of a promise or a pledge. I may promise an amount of money maybe as a surety, to monitor an individual, make sure they don't contact someone they're not supposed to or be somewhere they're not

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supposed to be. And I promise that knowing that if I don't hold up my end of the bargain, I could lose that money. But I don't have to deposit that anywhere. And only if the person breaks the rules, I could end up losing the amount of money. So, the idea is that the money is promised rather than deposited somewhere.

**[40:42]** And usually in Canada, bail isn't set at a particular amount. It's about what is meaningful to the particular individual, the particular surety. So, a bail, someone promising their full financial value, that is \$1,000, may be more powerful to a judge than a millionaire that promises \$10,000.

**[41:05] HUSEIN:** Great. So, you mentioned that in the US, they have the bail bonds. Can you tell us more about what that is?

**[41:10] TREVIN:** So, and again, I'll just sort of say that my experience with this is not someone that's called to practice law in the United States. Maybe more related to like Doug the Bounty Hunter.

**[41:22] HUSEIN:** This is why I'm asking to be quite honest.

**[41:25] TREVIN:** And so what you have is, it is allowed to have someone who may not know the accused person at all. In fact, that is the way it is often is. Who has a career where they help put up a sum of money for an accused person to help to make sure that they're released and that if the person violates that bail, they may then help to try to bring that person back into custody?

**[41:52]** In Canada, the whole point of a surety system is that is a person that is close to an accused person, a family member, a close friend, perhaps a loved one. The whole point is those people are often the most likely person that you can turn to to help monitor that individual. So, it's a complete disconnect in terms of who are the people that are in charge of monitoring an accused person, a person that's completely disconnected that may have a profit motive versus the people that are the most closest to them, the most likely to help the court monitor them and be the jailer in the community.

**[42:25] HUSEIN:** Yeah, makes sense. Also, there is the option of having someone hunt down someone else.

**[42:31] TREVIN:** Exactly.

**[42:32] HUSEIN:** Okay. Do you think that there's merits in the Canadian system of having a promise to do it, as opposed to having to collect all the money upfront?



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**[42:41] TREVIN:** I think it's significant because, again, what you see is with that case of Antic, that was more similar to what you would expect to see in the American context. And what happened was they put a bail on amount that was not financially possible for Mr. Antic. And so then there was a situation where he had to wait months in jail to get an amount of money that he couldn't reasonably afford.

**[43:07]** And so I think that was a real problem in that case. And I think that sort of gives you the problems in the American system. Bail shouldn't be for only the type of people who are rich. So, bail shouldn't be for the rich. And I think sometimes what happens in the American system is it leads to that critique within the justice system is that, oh, it's not about the people who get bail and the people who don't get bail. It's really about who has money and who has connections and who does not.

**[43:35] HUSEIN:** Next question we have is, many critics have maintained that Canada's bail system is broken. There's been themes of this that have come out throughout today's conversation. The question is, do you think that is an accurate statement of our bail system being broken? And if so, how might it be able to be fixed?

**[43:52] TREVIN:** I think you'd find that many people will agree or will say that the Canada's bail system is broken, but they may completely disagree as to how it is broken. I think it is broken in many ways because it means that often, even though we try not to, the most vulnerable people end up in jail too often or because of under-resourcing people way too long before they can have a bail hearing and bail hearings are much more complicated, which means that often the poorest and most disadvantaged stay in jail longer.

**[44:28]** So, I think the bail system is broken because it leads to too many people and often the most disadvantaged people in jail. I think many people will completely disagree with me. In fact, I think the many people in government might disagree and say the bail system is broken because it leads to a revolving door of people, it's way too easy for people who do get bail and then they get bail the same day and then they go out and commit these really heinous crimes.

**[44:57]** And the only thing I would say is, it's not whether the system is broken, it's how it's broken. But also I think for many of the people on the other side who might disagree with me, I think if they saw how bail worked on the ground for people charged with serious offenses, I think the way they believe the bail system is this revolving door where everyone just gets out with no conditions, I just don't think that is in line with what actually is happening in bail courts.

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**[45:27] HUSEIN:** Our previous segment, we talked about the bail delays, we talked about how resourcing is an issue. But you're saying that it's broken for other reasons. I was curious to about what solutions might be available?

**[45:40] TREVIN:** What I see, at least in Ontario and in the Greater Toronto area, is that resourcing isn't a problem in certain ways. So, for people that are charged with gun crimes, for example, possession of a firearm, there are special bail teams there, special teams that only deal with those type of offenses, who are available, skilled, and ready to deal with the bail hearing at the earliest possible opportunity.

**[46:06]** So, we're seeing a lot of funding for people like that. We're seeing a lot of funding for police officers to monitor and make sure that people on bail are following the rules. But what you're not seeing on the flip side are increases in funding for the legal aid system, for the vast majority of people who don't have money to fund a lawyer who need it, and not enough funding for resources to make sure that there are more Judges and Justice of the Peace who are dealing with these types of bails. So, what you're just seeing is there is funding, it's just not going into the correct places.

**[46:41] HUSEIN:** All right. So, that's a great Segue way into our next list for submitted question. The question is, how does the legal aid system— and that includes the funding issue—impact the fairness and efficiency of the criminal justice system. And so as I remember most people who are listening don't know anything about this system, maybe start by explaining how the LAO funding works.

**[47:03] TREVIN:** I'll talk about in Ontario, the legal aid system usually works with people who are in bail court often are assisted in the vast majority of cases by what's called duty counsel, a free lawyer who is able to help anybody who is charged with offenses and needs a bail hearing. So, that's happens for the vast majority of cases. But also for people who want to get a particular lawyer of their choice, they can apply to Legal Aid and assuming they qualify, they're financially eligible, they don't make too much money, and the offenses are serious, they may be eligible to get a lawyer to help them, and even a specific lawyer.

**[47:46]** The one thing that we are seeing is that there aren't enough duty counsels that are able to help. So, when you see that most people get assistance with duty counsel, they're really overworked and underpaid. So, which again means that the people that need that help, they're being spread too thin, because a duty counsel might have to help several people, all who want to get out and all who need attention.

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**[48:15]** But also if you want to have your own lawyer, what you then have to do is you may have to wait days for Legal Aid to issue a certificate, give it to your lawyer, and then see when your lawyer is available. So, what you often end up happening is that people who may agree to certain conditions, even stricter conditions that may otherwise not be necessary, they're just going to agree to that just to get out of jail.

**[48:40] HUSEIN:** Got it.

**[48:41] TREVIN:** So, they may say, "I'll agree to house arrest, because I just need to get out of jail, because otherwise I'm going to have to wait three days to get my own lawyer to help me with the bail hearing."

**[48:49] HUSEIN:** Tell us more about those Legal Aid certificates. So, you mentioned that if someone qualifies based on their income and other factors, they may get a certificate that makes them eligible for legal aid. But are there any limitations in terms of how much help they can get with a certificate like that?

**[49:04] TREVIN:** Yes, I think sometimes people may have this belief that once you get a Legal Aid certificate, the person can just bill as many as many hours as possible. Again, most people who take legal aid do so not to earn a living, but often to help people who otherwise can't pay for a lawyer. So, usually what you'll see is that Legal Aid limits the amount of hours that they'll pay for someone to do a bail hearing.

**[49:29]** So, let's say they will pay for a person to work four or five hours to do a bail hearing. Let's even say it's more, at a certain amount of time, once you've reached that cap, you may not be eligible to get any more. And that doesn't matter whether that may cover the amount of time you prepare for a case or even the amount of time you're spent in court. You may end up working 15 hours to prepare a person for bail and to prepare sureties for a bail hearing, knowing that there's a very good chance you may only end up getting paid for eight or 10 hours. So, that often also limits how many lawyers will end up accepting legal aid for something like a bail hearing.

**[50:08] HUSEIN:** Okay. I imagine not every criminal lawyer takes Legal Aid certificates, right?

**[50:13] TREVIN:** That's exactly right. Or even they may choose, we're not accepting any Legal Aid certificates, they may say, "I will accept Legal Aid certificates, but I will not accept it for a bail hearing." Again, recognizing that they may end up having to do a lot of work for free.

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**[50:27] HUSEIN:** In criminal law, there's plenty of movies and TV shows that offer a skewed version of how court systems actually work. And a lot of this involves this like, bickering back and forth between the Crown, the prosecution, or the defense. The question is, what role do you think collegiality plays within the criminal law bar?

**[50:44] TREVIN:** It's no surprise that I think that it's incredibly important. I mean, even though at the end of the day, the person on the other side is your adversary, it is often bad advocacy to view them and treat them only as your enemy. Again, especially within a bail context, getting a consent may be very important, especially it may mean that your client will get out at an earliest opportunity. So, collegiality is particularly important even across with opposing counsel, but also especially within the other people in the criminal defense bar, they may help you understand, whether you have a particularly good Judge or not, whether your Crown attorney that you're dealing with is reasonable or not, or may even tell you about some of the problems or resource problems within a particular system.

**[51:41]** I know with counsel for Mr. Ahad Salem, one of the ways that they were able to get that factual record was reaching out to other people in the Criminal Lawyers Association, the Association of Defense Lawyers, they're able to reach out to them to ask for people's inputs as to their own experiences with bail courts in the New Market courthouse. And we're able to get transcripts and get that information to show a Judge just exactly the type of problem they were dealing with.

**[52:11]** So, I think collegiality is particularly important because this can be a very stressful job. And so having people who are there to help you, will only make it easier. Having a level of collegiality, having a level of respect may be important, even in at least understanding what is to be expected with this bail hearing, not just even maybe it may help turn a contested bail hearing into a consent hearing and sometimes being reasonable can be useful there. But also it may be useful in just narrowing the issues.

**[52:45]** For example, are you taking the position that the nature of the charges are so serious that my client shouldn't get bail? So, maybe we don't need to cross examine all of the sureties. Can we agree on on certain concessions? Things that can help the bail hearing proceed as smoothly as possible. And also, for example, making sure that you can get the earliest bail hearing as necessary. So, sometimes I think that sometimes having those productive conversations can work to your client's benefit, but also can it can result in maybe having the earliest possible bail hearings as you can.

**[53:30]** And sometimes no amount of collegiality can change... let's say you have a client charged with firearms offenses, dealing with a member of the firearms bail team who

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instructions are to contest or who will often contest release in the vast majority of cases. It may mean that it may not result in tangible benefit to your client, but at least it can make sure you understand what the bail hearing will look like at the earliest, what's at issue and what isn't.

**[54:00] HUSEIN:** So, Trevin, I want to thank you for taking the time to chat with us about these issues. As you mentioned before, we've been pretty good friends for a number of years. I consider you as a mentor. I won't tell you to your face, but I'm telling you because we're on a recording right now. I always find you very helpful and practical legal advice. And so it was great to share with our broader audience. Well, I say this to all our guests that will stay in touch in the future, but I'm sure that will be the case for this episode as well. So, thanks very much for sharing your insights with the podcast today.

**[54:25] TREVIN:** No, I think this is it for us.

**[54:27] HUSEIN:** Okay, cool. Great. Well, it was a good run for what it was.

**[54:31] TREVIN:** We had a good run.

**[54:33] HUSEIN:** Okay, bye, Trevin.

**[54:35] TREVIN:** Thanks for having me on, Husein.

**[54:41] HUSEIN:** And that's going to be a wrap for this episode of Lawyered. Thanks for listening. On today's episode, our guest was Trevin David. You can learn more about him and his work at his law firm's website, which is [www.danielbrownlaw.ca](http://www.danielbrownlaw.ca). And Trevin also posts some very high-quality content on Twitter and his handle is @TrevinDavid. And for more about today's show and links to all the cases and legislation that we spoke about today, you can find those on our website at *LawyeredPodcast.com*.

**[55:14]** And on our next episode, we're going to be shifting gears entirely and covering the area of Pensions and Benefits law, featuring Ross Gashia, who is the practice leader at Baston. And we're going to speak about a number of topics in this area, including fiduciary duties of pension plan trustees, as well as new amendments to pension contribution errors and a controversial pension bill involving super priorities. So, stay tuned for that episode. So, we're going to hear from someone who's got a penchant for pensions.

**[55:45]** And if you want to help to improve our show and get some neat and affordable legal rewards, including early access to all of our episodes and the opportunity to send questions for our show as well, it'd be really great if you can check out our

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crowdfunding campaign, it's an ongoing campaign. And you can find out what that is and how you can help out at [www.lawyeredpodcast.com/patreon](http://www.lawyeredpodcast.com/patreon).

**[56:10]** I'm going to give a shout out to a number of our patrons, including Hasan Panju, Jeff Lang-Weir, Karen Gottfried and Lisa DeMarco. Thanks so much for helping out and keeping the show going. And as always, if you want to make sure you never miss another episode of the show, you can go ahead and subscribe to our podcast for free on iTunes or your favorite podcast platform. You can also find us on Facebook, LinkedIn or on Twitter. Our Twitter handle is @lawyeredpodcast.

**[56:36]** Our sound editing work is managed by Solomon Krause-Imlach, our theme was provided by Ben Swirsky and our website is maintained by Steve de Mello. And if you want to help out as well, if you got some value from the show, it'd be really great if you could share this episode with a friend, someone who might get some value out of the show as well. This is a pro bono exercise. We're trying to make the show as accessible to as many people as possible.

**[57:00]** And finally, please be advised that while this show is aimed to be helpful and informative, that it is not legal advice. However, if you do want some legal advice, please reach out to a lawyer directly to help you with your particular situation. And with that, we will see you back here in two weeks. Until then, keep it legal.