CITATION: Corporation of the Canadian Civil Liberties Association et al. v. Ontario, 2026 ONSC 4980
COURT FILE NO.: CV-26-00016332-0000
DATE: 20260831

ONTARIO

SUPERIOR COURT OF JUSTICE

CORPORATIONS OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION AND THE CRIMINAL LAWYERS ASSOCIATION	)	*M. Gourlay, S. DiGiuseppe, B. Chung and J. Roth,* Counsel or the Applicants
-and –	)	
HIS MAJESTY IN RIGHT OF ONTARIO	)	*S. Z. Green, S. D. Pierce and T. Moffat* Counsel for the for the Respondent
	)	**HEARD: August 27, 2026**

CHALMERS J.

ENDORSEMENT

OVERVIEW

[1] The Corporations of the Canadian Civil Liberties Association (CCLA) and the Criminal Lawyers Association (CLA) bring this application seeking a declaration that s. 8.0.1 of the *Bail Act,* R.S.O. 1990, c. B.1 (the *Bail Act*) and its accompanying regulation is of no force and effect to the extent that they encroach on the federal government's jurisdiction over criminal law. In the alternative, the Applicants seek a declaration that the provisions are inoperative to the extent they conflict with federal law and in the further alternative that the provisions violate section 11(d) and (e) of the *Charter of Rights and Freedoms.*

[2] The Provincial Crown states that the amendments to the *Bail Act* were enacted within Ontario's legislative jurisdiction over the administration of justice under s. 92(14) of the *Constitution Act, 1867.* The province submits that the amendments do not conflict with the *Criminal Code* because they have no impact on the bail justice's determination of whether to grant interim release to an accused and under what terms. The amendments apply only after the justice has made the interim release order. The province states that the legislation is aimed at ensuring that Ontario may effectively and efficiently administer promises to pay in release orders.

[3] On August 19, 2026, the parties attended before me on a case conference to schedule the application to determine the constitutionality of the legislation. At the case conference, Ontario stated that it did not oppose an order granting public interest standing to the Applicants. The Application was scheduled for August 27, 2026.

[4] After hearing argument, I reserved my decision. The Applicants brought a motion for an interlocutory injunction to suspend the operation of s. 8.0.1 of the *Bail Act* and s. 2(1) of O. Reg. 278/26: *Security Deposits and Information from Sureties,* until the release of my decision. For the reasons set out below I grant the injunction.

<u>LAW AND ANLYSIS</u>

General Principles

[5] The test for an interlocutory injunction is well known and not seriously in dispute.

[6] Section 101 of the *Courts of Justice Act*, R.S.O. c. C.43, provides that an interlocutory injunction may be granted where it appears to the judge to be just or convenient to do so. The test for granting an injunction consists of three parts:

(a) there is a serious issue to be tried;
(b) the moving party will suffer irreparable harm if the relief is not granted; and
(c) the balance of convenience favours granting the injunction: *RJR MacDonald Inc. v. Canada (Attorney General)* [1994] 1 SCR 311 at p. 335-337.

[7] The test is not to be rigidly applied. It is to be considered as a whole, and strength in one part of the test can make up for a weakness in another. The court is to consider, in light of the three parts of the test, whether injunctive relief is appropriate: *Brown v. First Contact Software Consultants Incorporated,* 2009 CanLII 48504 (ONSC), at paras. 21-22.

Position of the Applicants

[8] The Applicants argue that the amendments ot the *Bail Act,* encroach on the federal government's exclusive jurisdiction to make laws governing criminal law, law and procedure: Constitution *Act, 1867*, section 91(27). The *Criminal Code*, R.S.C. 1985, c. C.46 (the *Code*) provides that the justice considering an interim release order is to move through increasingly onerous forms of release. The most onerous release is a release with a cash deposit. Cash bail is the exception not the rule for interim release. Section 515 (2.01) of the *Code* provides that a justice may not impose a more onerous form of release unless the Crown shows why every less onerous form of release would be inadequate. Section 515 (2.02) provides that the justice is to favour a promise to pay over cash deposit, if the accused or the surety, has reasonable assets.

[9] The Applicants submit that Ontario has decided to change the federal policy that cash bail is a measure of last resort. Ontario enacted Bill 75, *the Keeping Criminals Behind Bars Act, 2026* which provides that cash security deposits are required from anyone released on a promise to pay. The details were left to be prescribed by regulation. On August 13, 2026 (seventy-six days after Bill 75 was passed), the provincial government published the regulation. The regulation provides that anyone released on a promise to pay or their surety must deposit cash in the amount of the

promise to pay within 2 business days of the release. Failure to deposit the cash amount is a provincial offence.

[10] The Applicants state that the cash deposit provisions encroach on exclusive federal jurisdiction over criminal law. The Applicants further submit that even if the province could legislate in this area, the cash bail provisions conflict with the *Code* which expressly requires courts to favour promises to pay over cash deposits. In the alternative, the Applicants argue that the provincial cash bail provisions violate s. 11(e) of the *Charter* to not be denied reasonable bail without just cause. The Applicants state that cash bail will result in more accused persons remaining in jail because they cannot afford to pay the cash bail or find a surety willing to deposit cash within 2 business days of the release.

[11] The Applicants seek an order that the operation of section 8.0.1 of the *Bail Act*, and s. 2 (1) of the *Security Deposits and Information from Sureties* are suspended until the final determination of the Application. The Applicants state that the tripartite *RJR-MacDonald* test is satisfied. The Applicants' constitutional challenge is a serious issue to be tried. The Applicants submit that the stated purpose of the legislation is to keep more presumptively innocent persons behind bars. If the legislation results in persons remaining in jail who would otherwise be released, there is a loss of liberty that cannot be regained or fully compensated for: *R. v. Hall*, 2002 SCC 64, at para. 47. Finally, the Applicants state that the balance of convenience favours maintaining the system of bail that has been in place since 1972.

Position of Ontario

[12] Ontario states that *Bail Act* governs the administration of an accused's financial obligations under a promise to pay interim release order. The amendments to the *Bail Act* create a regulatory requirement for an accused or a surety who has made a promise to pay to provide a security deposit that can be used to satisfy the promise should there be a breach of the bail conditions. Ontario argues that the security deposit is due 2 business days after the accused is released and is not a condition of their release.

[13] Ontario submits that the amendments to require a security deposit were enacted pursuant to Ontario's legislative jurisdiction over the administration of justice under s. 92(14) of the *Constitution Act, 1867*. Ontario further submits that the amendments do not conflict with the *Code* because they have no impact on the bail justice's determination whether to release the accused and whether to impose conditions on release. Failure to make the security deposit does not affect the accused's liberty; it is a provincial offence which is punishable with a fine of up to $5,000.

[14] Ontario also submits that the amendments do not infringe s. 11(e) of the *Charter* because they do not authorize the denial or revocation of bail or the accused's detention in any circumstances. Ontario states that the obligation to pay the security deposit come into effect only after the determination of release has been made by the justice, and that any failure to pay the security deposit would not affect the liberty of the accused.

[15] Ontario argues that there is no basis to grant an interim injunction suspending the application of the challenged provisions. With respect to irreparable harm, the province submits that an accused's release is not contingent on compliance with the *Bail Act*. An accused's liberty

could not be revoked if there is non-compliance with the requirement to pay the security deposit. If a person is charged with a provincial offence for failing to pay the security deposit, that person will have the right to make full answer and defence in the provincial office proceeding and may raise any constitutional arguments at that time. Finally, the province states that there is a strong presumption that the balance of convenience favours enforcing duly enacted legislation.

Serious Issue to be Tried

[16] The Applicants state that the serious issue to be tried is the constitutional challenge to the legislation. Ontario does not contest that the "serious issue to be tried" prong of the tripartite test is satisfied.

Irreparable Harm

[17] The moving party must establish that if the injunction is not granted, there will be harm that cannot be quantified in monetary terms or cannot be cured. The court must consider the nature of the harm rather than the magnitude: *RJR MacDonald Inc. v. Canada (Attorney General)*, at para. 64.

[18] The Applicants argue that the requirement to pay a security deposit within 48 hours of the accused's release will result in the delay or denial of the interim release of accused. They submit that the cash deposit requirements will discourage persons from being willing or able to act as sureties. There also may be delays in obtaining the cash necessary to make the security deposit.

[19] The Applicants filed the affidavit of Marianne Salih, an experienced Ontario criminal lawyer. She deposes that she has represented hundreds of clients at bail hearings. Many of her clients are legally aided and have limited means. Their proposed sureties likewise have modest means. She states that in her experience the process of identifying and securing a surety is often challenging. When a surety is identified, Ms. Salih must explain the nature of the surety's obligation and assess whether they are suitable and willing to act in that capacity. She states that in virtually all bail orders with a surety also include a financial component in the form of a promise to pay.

[20] Ms. Salih states that the deposit mandated by the provincial legislation could place the accused, the sureties and their families, "in a precarious financial situation, impacting their ability to meet basic needs such as food and shelter." She states that many potential sureties express concern at the prospect of having to deposit funds. She states that explaining that only a promise to pay is required, "is essential to convincing potential sureties to come forward and agree to supervise the accused." She further states that based on her experience requiring cash deposits will make it "significantly more difficult to identify willing and suitable sureties". Ms. Salih was not cross-examined on her affidavit.

[21] The province submits that Ms. Salih's affidavit is inadmissible. She was not tendered as an expert witness. The province also submits that if she had been tendered as an expert, her evidence would be inadmissible because a lawyer cannot purport to give opinion evidence about domestic law or offer predictions as to how she thinks a statute may operate in the future: *Cycle Toronto v. Ontario (Attorney General),* 2026 ONCA 582, at paras. 61-65.

[22] It is my view that Ms. Salih provides fact evidence about her experience in bail courts in Ontario. She does not provide opinion evidence about the interpretation of Ontario law. In any event, some of her comments are not controversial and are consistent with common sense. In *R. v. Antic,* Justice Wagner commented that requiring cash as a condition of release has the potential to result in increased incarceration of accused persons. He stated that "requiring a cash deposit will often prevent an accused persons from being released": at para. 59.

[23] The province argues that the comments of Justice Wagner have no application because the amendments to the *Bail Act* do not have an impact on the detention of an accused. The security deposit is required only after the interim release order has been made, and the payment of the security deposit is not a condition of release. The province further states that if the security deposit is not made within 48 hours of the accused's release, the consequence is a provincial offence that would not affect the detention of the accused.

[24] The province also states that Ms. Salih's inference that it may be more difficult to find an appropriate surety is no substitute for evidence. The province states that there is no evidence that any accused was not released or the release was delayed because of the impugned legislation. I note that it is not surprising that there is no evidence. The legislation came into effect less than two weeks ago. I am also of the view that it is not necessary or appropriate to wait for irreparable harm to occur before an injunction may issue.

[25] I accept the evidence of Ms. Salih that the requirement that sureties pay a cash security deposit within 48 hours of the accused's release may make it more difficult to identify willing and suitable sureties. If persons are not prepared to come forward as sureties because of the security deposit requirement, or if there is a delay in release because the accused or surety has to raise the cash security deposit, persons who would otherwise be released will remain in custody, or their release will be delayed. An impact on the liberty of presumed innocent individuals is irreparable harm. As noted by F. Iacobucci J. (as he then was) in *R. v. Hall,* "liberty lost is never regained and can never be fully compensated for".

[26] I am satisfied that the Applicants have established that irreparable harm may result if the injunction is not granted.

Balance of Convenience

[27] In considering the balance of convenience, I must determine the greater risk of harm from either granting or refusing to grant the injunction pending a determination on the merits: *RJR MacDonald Inc. v. Canada (Attorney General,* at paras. 62-63.

[28] The province is not required to prove the benefit of the impugned legislation. Legislation is generally presumed to serve the public interest. As stated in *Harper v. Canada (Attorney General)*, 2000 SCC 57, when considering an injunction that would suspend the operation of challenged legislation there is a strong presumption that there is a public interest in enforcing the impugned statute. The assumption of the public interest in enforcing the law "weighs heavily in the balance": at para. 9.

[29] The Applicants argue that there is also a presumption that there is a public interest in not compromising the system of bail that Parliament deemed appropriate. The bail provisions in the

Code specifically state that cash bail is the most onerous form of release and the justice is to favour a promise to pay over the deposit of an amount of money if the accused or the surety, has reasonable assets. The Applicants submit that the amendments to the *Bail Act* have the potential to undermine the federal bail provisions.

[30] The Applicants also argue that the conduct of the province undermines the province's argument that there is an urgent need for the amendments. The province did not enact the regulations until 76 days after s. 8.0.1 came into force. The Applicants state that the *status quo* that has been in place since 1972 ought to be maintained pending my ruling on constitutionality.

[31] The province argues that there is no harm if the injunction is not granted because no person will be denied bail. The security deposit comes into effect only after the justice has decided whether an interim release is appropriate and on what terms. The province also argues that if an accused or surety is charged with a provincial offence for failing to pay the security deposit, that person will have the opportunity to defend the prosecution. It is unlikely that a provincial offences prosecution will be completed before the ruling on constitutionality is released.

[32] I find that the balance of convenience favours granting the injunction. Although I acknowledge the strong presumption that the impugned legislation is for the public good, I also acknowledge that the existing bail provisions in the *Code* were enacted by Parliament for the public good.

[33] I am satisfied that there is a greater risk of harm if the injunction is not granted. The effect of the impugned legislation may result in persons who would have otherwise been released, having their release denied or delayed because of the difficulty described by Ms. Salih in securing an able and willing surety. Justice Wagner in *R. v. Antic* set out the effects of pre-trial custody. He noted that the bail provisions must be "applied consistently and fairly. The stakes are too high for anything less." He stated that pre-trial custody, "affects the mental, social and physical life of the accused and his family" and may have a "substantial impact on the result of the trial itself": at para 66.

[34] I am also satisfied that there is no harm to the province if the injunction is granted. The bail procedure set out in the *Code* will continue to apply. The *status quo* that has been in place for over 50 years will be maintained for the limited period before my ruling on the constitutionality of the legislation is released.

DISPOSITION

[35] I have considered the tripartite test set out in *RJR-MacDonald*. I am satisfied that all three factors support an interim injunction pending my ruling with respect to the constitutionality of the amendments to the *Bail Act*. I find that it is just and convenient to grant the injunction.

[36] I order that the operation of s. 8.0.1 of the *Bail Act*, and s. 2(1) of O. Reg. 278/26: *Security Deposits and Information From Sureties* are suspended until the final determination of the application. I make no order as to costs.

[37] I signed the draft order.

Chalmers J.

DATE: August 31, 2026