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Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention

CANADIAN CIVIL LIBERTIES ASSOCIATION AND EDUCATION TRUST
L'ASSOCIATION CANADIENNE DES LIBERTÉS CIVILES ET
LE FIDÉICOMMIS CANADIEN D'ÉDUCATION EN LIBERTÉS CIVILES

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Canadian Civil Liberties Association and Education Trust,

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About the Canadian Civil Liberties Association and Education Trust

The Canadian Civil Liberties Association is a national, non-profit, independent, non-governmental organization that was constituted to promote respect for and observance of fundamental human rights and civil liberties, and to defend and foster the recognition of those rights and liberties. The CCLA has been at the forefront of protecting fundamental freedoms and democratic life in Canada since 1964. A wide variety of people, occupations and interests are represented in its membership. The Canadian Civil Liberties Education Trust, CCLA's education arm, has been engaged in public education since its inception in 1968.

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Executive Summary

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On any given day in 2012/2013, approximately 25,000 people were detained in Canada's provincial jails.[1] Over half of them were in pre-trial custody – legally innocent and waiting for their trial or a determination of their bail.[2] Canada's jails have not always looked like this. The remand rate has nearly tripled in the past 30 years, and 2005 marked the first time in Canadian history that our provincial institutions were primarily being used to detain people prior to any finding of guilt, rather than after they had been convicted and sentenced.[3]

While questions remain about what is driving the rise in pre-trial detention, it is clear that it is not a response to increasing crime. Canada's overall crime rate has been declining for at least 20 years. The violent crime rate is at its lowest rate since 1987.[4] In 2012, property offences and other non-violent *Criminal Code* offences, such as breaching court orders or mischief, accounted for four-fifths (79%) of police-reported crime.[5]

The law governing bail aims to safeguard individual liberty, the presumption of innocence and the right to a fair trial by putting in place a strong presumption of release and only imposing restrictions on liberty or detaining a person where absolutely necessary. Not only does the *Canadian Charter of Rights and Freedoms* ("the *Charter*") guarantee our right to liberty, but it specifically enshrines a constitutional right to reasonable bail.[6]

In many courts across the country, however, the bail system is operating in a manner that is contrary to the spirit – and, at times, the letter – of the law. Legally innocent individuals are processed through a bail system that is chaotic and unnecessarily risk-averse and that disproportionately penalizes – and frequently criminalizes – poverty, addiction and mental illness. Canadian bail courts regularly impose abstinence requirements on those addicted to alcohol or drugs, residency conditions on the homeless, strict check-in requirements in difficult to access locations, no-contact conditions between family members, and rigid curfews that interfere with employment and daily life. Numerous and restrictive conditions, imposed for considerable periods of time, are setting people up to fail – and failing to comply with a bail condition is a criminal offence, even if the underlying behaviour is not otherwise a crime.

On any given day, the majority of people detained in Canada's provincial and territorial jails are legally innocent – waiting for a bail decision or their trial.

1 Statistics Canada, CANSIM Table 251–005.
2 *Ibid.*
3 *Ibid.*
4 *Ibid.*
5 Samuel Perreault, Statistics Canada, *Police-reported Crime Statistics in Canada, 2012* (Ottawa: StatCan, 25 July 2013), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2013001/article/11854-eng.htm#wb-tphp>.
6 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss 7, 11(*e*).

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Indeed, criminal charges for violating bail conditions are common. Across the country, an administration of justice charge was the *most serious charge* in over 20% of the criminal and federal cases completed; about half of these cases stemmed from violations of bail conditions.[7] Moreover, the number of administration of justice charges before our courts has risen in the past 10 years, and the increase is almost entirely due to allegations of broken bail conditions.[8] Our research found that some jurisdictions penalize bail breaches more strictly than others. In Manitoba, for example, policy requires bail supervisors to take a zero tolerance approach to bail violations: being a few minutes late to an appointment will frequently result in a breach report, criminal charges and a return to jail. Even when the original charge is withdrawn or dismissed, the Crown will frequently still pursue a conviction for charges of failure to comply with a bail order.

The cycle of detention, restrictive release and re-arrest could theoretically be justified if it were necessary for public safety or to ensure an accused person will return to court to face pending charges. Most of the people admitted to pre-trial detention, however, are there for non-violent offences, and one in five people are there simply because they failed to comply with a bail or probation condition.[9] Research also suggests that the release conditions being imposed are too numerous and restrictive, frequently unnecessary and, at times, directed towards behaviour modification and punishment.[10] It is unconstitutional to impose unnecessary restrictions on liberty, conditions the accused cannot realistically comply with or conditions that are unrelated to the purposes of bail. In some jurisdictions, violations of *Charter* rights in the bail context are routine.

We observed eight bail courts in five provinces/territories. Most of the bail courts observed showed signs of inefficiency, adjourning a large proportion of cases and spending only a fraction of open court time actively addressing bail matters. Ontario, however, is experiencing unique problems of systemic delay: during three weeks of observation, 20 people were returned to jail without having their cases heard simply because the courts ran out of time. Multiple court decisions over the past decade have criticized the "serious and flagrant" systemic delays in Ontario bail courts, which force accused to "languish in custody" waiting for their bail hearing.[11] The continued systemic violation of constitutional rights in Ontario bail courts is unacceptable.

Ontario and Yukon are also uniquely reliant on sureties: over half of observed accused in these jurisdictions who were released on bail were required to have a surety – a friend or family member that must agree to supervise the accused in the community and forfeit a specified sum of money if bail conditions are violated. A surety release is one of the most restrictive forms of release, and the costs of presumptively demanding an accused locate an acceptable surety – and

7 Public Safety Canada, *Corrections and Conditional Release Statistical Overview* (Ottawa: Public Works and Government Services Canada, Dec 2012), online: Public Safety Canada <http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2012-ccrs/index-eng.aspx#a5>.

8 Statistics Canada, CANSIM Table 252–0051.

9 Lindsay Porter & Donna Calverley, *Trends in the Use of Remand in Canada* (Ottawa: Juristat, 2011), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11440-eng.htm#a1>.

10 NM Myers & S Dhillon, "The Criminal Offence of Entering Any Shoppers Drug Mart in Ontario: Criminalizing Ordinary Behaviour with Youth Bail Conditions" (2013) 55:2 *Canadian Journal of Criminology and Criminal Justice*.

11 See, for example, *R v Zarinchang*, 2007 ONCJ 470 at para 49.

requiring sureties to testify in court prior to release – are significant. Accused spend more time in detention and ask for numerous adjournments as they try to put in place a release plan. Families and friends must take time off work, pledge their money and act as 'jailors' in the community. The practice especially impacts those with few resources or limited social support, and accused from remote communities. In Ontario even consent releases can be lengthy, contested affairs, as sureties are cross-examined in open court. British Columbia, in contrast, processes the vast majority of bail cases without requiring surety supervision, suggesting the significant personal, systemic and financial costs of insisting on so many surety releases in Ontario and Yukon are unnecessary.

Accused from remote communities are uniquely prejudiced by the bail system. Most remote community members, unless released directly by the police, are flown to the nearest provincial detention centre to have their bail processed. Arranging for transportation can take a significant amount of time, and some accused are spending over a week in detention waiting for their first appearance in bail court. Once removed from their communities, accused are often cut off from social support networks and do not even have access to phone numbers they need to try to secure their release. If a surety is required to appear in person, friends or family must spend hundreds of dollars on flights to appear in court to testify or simply sign the required papers. Counsel in northern Manitoba report that Aboriginal clients regularly spend more time in pre-trial detention than they would if they were just sentenced for the crime, and will frequently plead guilty just to be released from custody and return home.

Nearly every issue highlighted in this report – over-policing; routine adjournments; requiring large numbers of abstention, treatment and other conditions; difficulties with surety requirements; and the particular challenges faced by accused detained in remote communities – disproportionately impacts Aboriginal people. Canadian courts have affirmed that an individual's Aboriginal heritage and the systemic over-representation of Aboriginal people in our criminal justice system must be taken into account at the bail stage. Unfortunately, our research suggests that in areas with the highest concentrations of Aboriginal people, the relevant Supreme Court jurisprudence is rarely explicitly raised. Even when argued by counsel, the application of case law is inconsistent, and the practical impact on the bail process is uncertain.

The personal, societal, financial and democratic costs of maintaining this system are crippling. In Ontario, even a short stay in custodial detention awaiting bail determination costs the province over $1,000 – a figure that does not include the additional expense of court services, duty counsel, Crown counsel and judicial resources or costs to the accused person.[12] Accused who are innocent are pressured into pleading guilty just to escape the overcrowded "dead time"

It is unconstitutional to impose unnecessary restrictions on liberty, conditions the accused cannot realistically comply with or conditions that are unrelated to the purposes of bail. In some jurisdictions, violations of Charter rights in the bail context are routine.

12 Ontario spends an average of $183 per day to keep a person in provincial jail. Mia Dauvergne, *Adult Correctional Statistics in Canada, 2010–2011* (Ottawa: StatCan, 21 Dec 2012), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11715-eng.htm>. The median length of pre-trial detention ranges between four days (Quebec) to 24 days (Northwest Territories). In Ontario the median length of pre-trial detention is seven days. Statistics Canada, *Data Table for Chart 5: Median Number of Days Spent by Adults in Remand, by Province and Territory, 2009/2010 and 2010/2011* (Ottawa: StatCan, 11 Oct 2012), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11715/c-g/desc/desc05-eng.htm>.

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of provincial jails. Those released on bail pending trial are living under highly restrictive conditions, which criminalize a wide range of non-criminal behaviour. The most marginalized in our society are set up for a revolving door of charges, detention, release and further charges. Our courts are bogged down with administration of justice charges stemming from unnecessary or overly broad release conditions that should not have been imposed in the first place. This is a systemic violation of the *Charter* right to reasonable bail.

Bail and pre-trial detention are complex systems. Police, prosecutors, defence counsel, justices of the peace, judges, bail supervisors and the correctional system all play key roles. Reform must be approached with the involvement of all relevant stakeholders. The complexity of bail, however, must not be used as justification for inaction. The individual and societal costs of the *status quo* are unacceptable and unsustainable. In 1972, Canada passed comprehensive bail reform legislation in response to studies demonstrating vast numbers of people were being unnecessarily detained prior to trial.[13] We have again reached a point where concrete action is necessary to ensure that the bail system upholds – rather than undermines – fundamental rights, public safety and the administration of justice.

13 *Bail Reform Act*, SC 1970-71-72, c 37.

Introduction: Bail in Context

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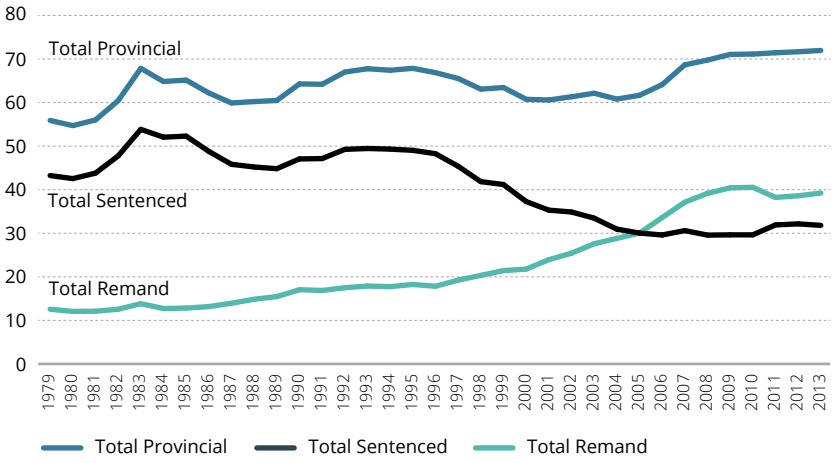
On any given day in 2012/13, 25,208 people were detained in Canada's provincial and territorial jails. Over half of those detained (54.5%) were in pre-trial custody, legally innocent and awaiting trial or determination of their bail.[14] Canada's jails have not always looked like this: the remand rate has nearly tripled in the past 30 years. Figure 1 below depicts the nature of provincial imprisonment by distinguishing between those who were in custody on remand from those who were in custody serving a custodial sentence.[15] As can be seen, over the past 25 years the sentenced population has been steadily declining while the rate of remand has been steadily climbing. Indeed, 2005 marked the first time in Canadian history that we had more people in pre-trial detention than we had in sentenced custody.

Figure 1: Provincial Imprisonment Rate per 100,000 Residents (Total, Sentenced and Remand) in Canada, 1978–2013



It is clear Canada as a whole has a pre-trial detention problem. Provincial statistics, however, show considerable variation in the use of remand across the country. Looking at the average remand counts (the average number of accused on remand on any given day) expressed as a rate per 100,000 residents, we see that while the country has an average remand rate of approximately 39.1 per 100,000 residents, in the jurisdictions that were examined in the studies reported here, rates of remand varied from 28.5 per 100,000 in British Columbia to 166.2 per 100,000 in Yukon.

14 Statistics Canada, CANSIM Table 251–005.

15 A third category of provincial prisoners, who are generally referred to in governmental statistical reports as "other provincial prisoners," has not been included. This very small group is largely comprised of people being held in custody for various other reasons (most commonly immigration issues).

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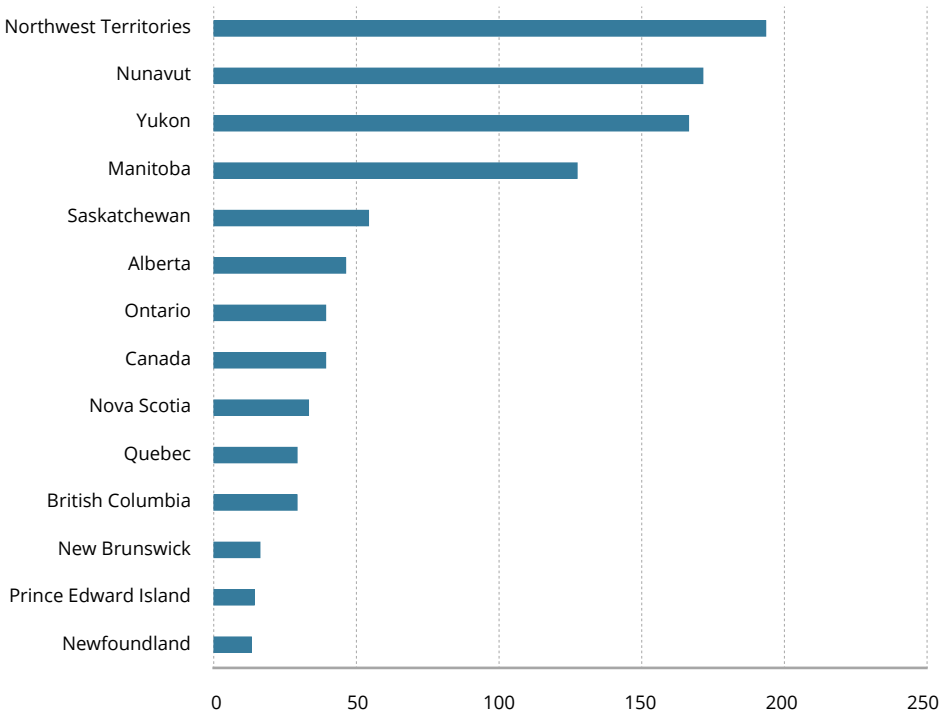
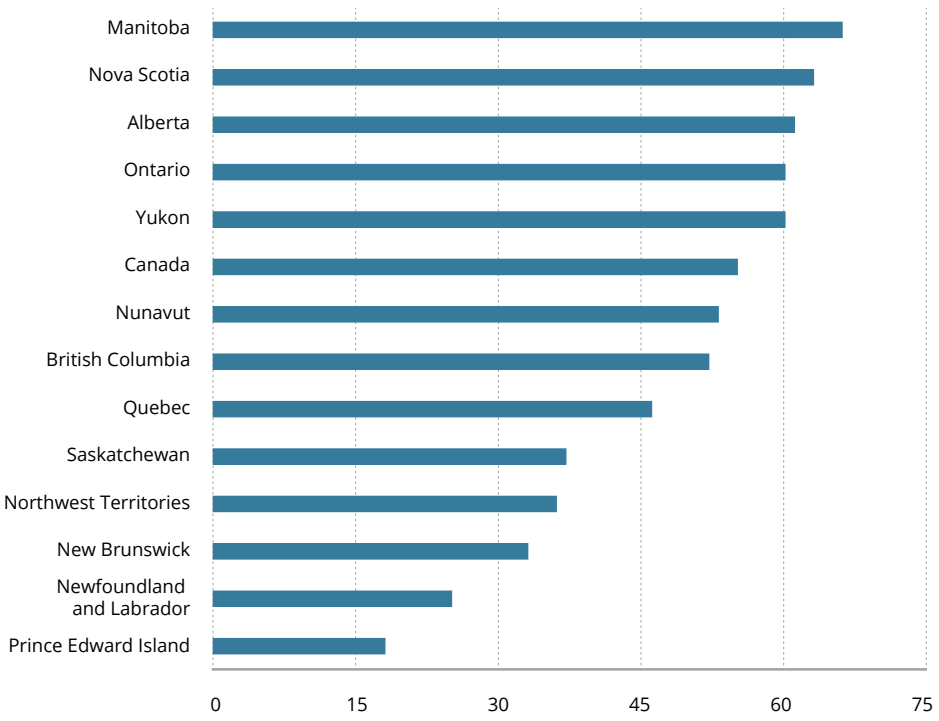
Figure 2: Remand Rate per 100,000 Residents, 2012/2013



The proportion of the provincial/territorial custodial population on remand also varies widely (see Figure 3 below). Across Canada 55% of people in provincial and territorial custody were on remand in 2012/2013. Looking at the five jurisdictions targeted for this study, 66% of Manitoba's, 63% of Nova Scotia's, 60% of Ontario's, 60% of Yukon's and 52% of British Columbia's provincial/territorial prison population was in pre-trial detention.

Figure 3: Percent of Provincial/Territorial Prisoners on Remand, 2012/2013



While questions remain about what is driving the increase in the remand population, it is clear that it is not a response to increasing crime. The crime rate in Canada continues to decline; indeed the 2012 crime rate in Canada was the lowest rate since 1972.[16] The violent crime rate has also consistently fallen and is at its lowest rate since 1987.[17] There are fewer crimes being committed, and those that are committed are less violent than they were in the past. In 2012, property offences and other non-violent *Criminal Code* offences, such as breaching court orders or mischief, accounted for about four-fifths (79%) of police-reported crime.[18]

The 2012 crime rate in Canada was the lowest rate since 1972. The violent crime rate has also consistently fallen and is at its lowest rate since 1987.

16 Samuel Perreault, Statistics Canada, *Police-reported Crime Statistics in Canada, 2012* (Ottawa: StatCan, 25 July 2013), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2013001/article/11854-eng.htm#wb-tphp>.

17 *Ibid*.

18 *Ibid*. ("In 2012, property and other *Criminal Code* offences accounted for about four-fifths (79%) of police-reported *Criminal Code* incidents (excluding traffic offences). Theft of $5,000 or under, mischief and offences related to the administration of justice, such as breach of probation or fail to comply with order, made up almost two-thirds (64%) of the non-violent crimes reported by police.")

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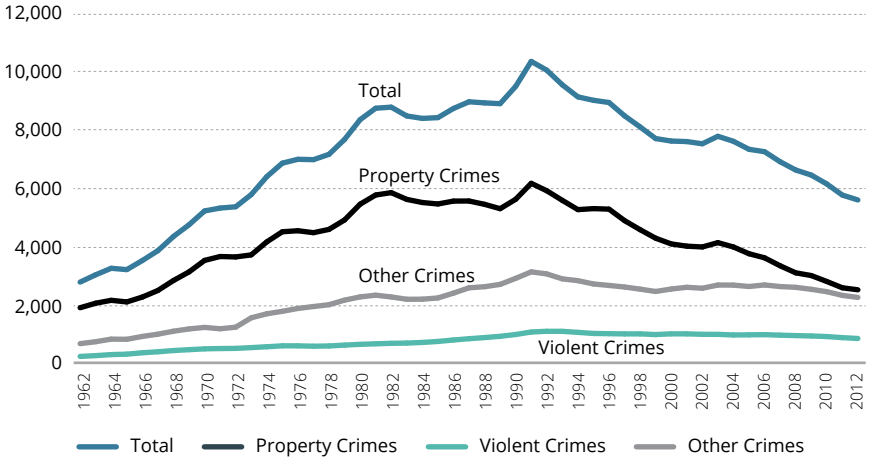
Figure 4: Total Police-Reported Crime Rate per 100,000 Residents for Canada, 1962–2012



Despite the fact that our communities as a whole are safer than ever and the vast majority of cases being processed are non-violent in nature, there are indications that more people are starting their interaction with the justice system in custody. In Ontario, the only province that has been studied in detail, more cases are starting criminal court processing in bail court, and individuals are making more court appearances as they wait for their bail to be decided.[19]

If a person is released on bail, restrictive conditions are often imposed. Common conditions include curfews; reporting to police or bail supervision workers; movement restrictions and geographical boundaries; no-contact orders; drug or alcohol abstention orders; medical or addictions treatment orders; bans on cell phones, computers or internet use; and house arrest. One has to keep in mind, when reading this list of restrictions, that those subject to them have not been found guilty of *any* crime. Once released, however, violating any condition of bail is a criminal offence; Canada's courts are overloaded with people accused of committing these crimes, which are generally called administration of justice offences. Across the country, in 2011/2012 an administration of justice charge was the *most serious charge* in 22% of completed criminal and federal cases; 44% of these administration of justice charges stemmed from violations of bail conditions.[20] The total number of failure to comply charges, including those that may be part of a case with more serious offences, is even higher.[21] A failure to comply charge will often result in the person's arrest and return to pre-trial detention – in fact, failure to comply with a bail condition is the most common reason for a person to be admitted to pre-trial detention.[22] Appearing in bail court with an administration of justice charge also establishes a legal presumption *against* release on bail, making it more difficult for individuals to secure their release.[23]

19 See CM Webster, AN Doob & NM Myers, "The Parable of Ms. Baker: Understanding Pretrial Detention in Canada" (2009) 21:1 *Current Issues in Criminal Justice* 79. In Ontario, the number of cases starting their case processing history in bail court has increased from an average of six per 1,000 in 2001 to 8.3 per 1,000 residents in 2007 – an increase of 38%. The mean number of appearances made in the entire criminal court process by those who were held for a bail hearing has also increased from an average of 7.7 appearances in 2001 to 9.4 appearances in 2007 – a 22% increase. Indeed, as noted by Webster, Doob and Myers, the proportion of cases that began their case processing history in bail court rose from 39.2% in 2001 to 50.2% in 2007 in Ontario (92). This means the majority of cases in Ontario now start in bail court. That said, the proportion of bail cases that were formally detained following a bail hearing stayed much the same (13% and 12.3%, respectively) (Webster et al [2009] at 92). This suggests that the growth in the remand population is not so much a function of more people being denied bail; rather, it is the result of more people being held for a bail hearing and the bail decision taking longer to be made. This means that not only are more people being detained after being charged, but they are spending a longer period of time in remand custody.

20 Jillian Boyce, *Cases Completed in Adult Criminal Court, by Type of Offence, Canada, 2010/2011 and 2011/2012* (Ottawa: Juristat), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2013001/article/11804-eng.htm?fpv=2693>.

21 *Ibid*.

22 Lindsay Porter & Donna Calverley, *Trends in the Use of Remand in Canada* (Ottawa: Juristat, 2011), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11440-eng.htm#a1>.

For a person who has been charged with an offence, the difference between being released from police custody and being detained for a bail hearing can be significant. Even a few days in detention can mean emergency child care arrangements, lost income, a lost job or skipped medication. In jurisdictions that regularly require a surety, the bail process is frequently delayed as the accused must find an acceptable family member or friend who will agree to supervise him or her in the community and promise a defined sum of money should the accused fail to comply with their bail or commit a new criminal offence. Often, release will be delayed until the surety can personally attend the courthouse. Accused in custody frequently agree to abide by numerous strict bail conditions to secure immediate release by consent of the Crown. These restrictions on pre-trial liberty can be quite onerous. If accused persons could expect to have their trial and be sentenced within a few weeks of initial arrest, the presence of numerous restrictive conditions may not present such a problem. However, the median time to case completion is 117 days (four months) in Canada,[24] and if accused were to insist on their right to a trial rather than simply pleading guilty, the wait time tends to be much longer. This means that accused are subject to numerous conditions for extended periods of time. Moreover, failing to comply with any of these conditions is a criminal offence. Even if the original charge cannot be sustained in court, an accused who violates a condition of release (e.g., is not at home 10 minutes after the beginning of a curfew period) can be found guilty of the criminal offence of failure to comply with a court order.

Those who are denied release on bail may spend months, or even years, awaiting trial in overcrowded provincial detention facilities. As explained in a federal report on justice efficiencies, "[t]ime on remand is often referred to as 'dead time' because the accused is housed in facilities designed for short-term detention and may have no access to recreation, work or rehabilitative programs."[25] The Supreme Court of Canada has stated that "an accused placed in remand is often subjected to the worst aspects of our correctional system by being detained in dilapidated, overcrowded cells without access to recreational or educational programs."[26] Countless lower court rulings have also recognized the overcrowded, harsh conditions of pre-trial detention facilities across the country.[27] As described by one Ontario court:

> generally, detention centres do not provide educational, retraining or rehabilitation programming for those in custody awaiting trial; and due to overcrowding, inmate turnover, labour disputes and other factors, the custodial conditions for remand prisoners can be unusually onerous.
>
> . . .

23 In these cases, the onus is reversed – the accused must demonstrate why they ought to be released, rather than the Crown having to demonstrate why the accused ought to be detained.

24 Statistics Canada, *Adult Criminal Court Statistics 2011/2012* (2013), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2013001/article/11804-eng.htm?fpv=2693#a11>.

25 Department of Justice, *The Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System* (Ottawa: DOJ, 2013), online: Department of Justice <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/ecc-epd/p1.html>.

26 *R v Hall*, 2002 SCC 64 at para 118.

27 For some recent examples from across Canada, see *R v Rose*, 2013 NSPC 99 at paras 20–21 ("Mr. Rose testified that he is on remand awaiting the final outcome of his case. He has been moved four or five times between 'Burnside' and Cape Breton. When in 'Burnside' he has had to sleep on the floor because of overcrowding. He cannot remain in Cape Breton if all beds are taken. He has missed several dental appointments because he has been moved due to overcrowding. . . . On one occasion when there was no room he was put in the lockdown range where there is no fresh air and no programs. There are no programs in Burnside for remand prisoners. In Cape Breton he has been able to attend Alcoholics Anonymous meetings and take an upgrading class."); *R v Utye*, 2013 NUCJ 14 at para 16 ("Mr. Utye has been in pre-trial detention for a period of approximately 50 weeks. He consented to his detention without seeking bail. Given the difficult conditions caused by overcrowding at the Baffin Correctional Center, the accused is entitled to enhanced credit for this pre-trial detention. Overcrowding continues to affect the availability of programming within the institution as well as the quality of a prisoner's confinement."); *R v Clayton*, 2012 ABQB 333 at para 34 ("I was advised that for 39 of the 48 days he had spent in custody awaiting

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> Living in very overcrowded conditions, with the threat of violence among the inmates, being regularly triple bunked in a windowless cell that is 6' by 9' including a toilet and not even being able to go outside for much of the time, let alone exercise is harsh for anyone. . . . The conditions in these institutions are disturbing.[28]

Under these circumstances, the pressure to plead guilty to get out of custody and back to normal life is enormous. Previous research shows there is a relationship between being held in pre-trial detention and pleading guilty.[29] The desire to be released from custody and have matters resolved exerts considerable pressure on the accused to forfeit their right to a trial. Even if a person decides to exercise their constitutional right to a trial, their detention makes it more likely that they will be found guilty and receive a longer custodial sentence.[30]

The financial costs of maintaining a high remand population are staggering. In 2010/11 the Ontario government spent $750 million on adult correctional services; 78% of these costs are directed towards keeping people in jail.[31] All the provinces and territories jointly spend $1.9 billion each year on adult corrections.[32] Even a short stay in custodial detention while awaiting bail is expensive. Ontario spends an average of $183 per day to keep a person in provincial jail.[33] This means the median of seven days[34] in remand costs taxpayers over $1,000 per accused – a figure that does not include the additional costs of court services, duty counsel, Crown counsel and judicial resources, and transporting the accused person between the remand facility and court (often multiple times). In comparison, it costs $5 to supervise an accused in the community.[35] Indeed, the size of the remand population represents such a significant cost liability to the Ontario government that, in 2012, the Commission on the Reform of Ontario's Public Services stated, "Ontario must address the trend of increasing custody remand and the additional costs associated with this trend if the province is to balance its budget by 2017–18."[36]

This public expenditure is not buying an increase in public safety. To the contrary, unnecessarily detaining people prior to trial will, if anything, make our society less safe. Individuals who are detained even for a short period of time can lose income, housing, employment and social connections. These stabilizing factors are all elements that contribute to individual success and community safety.[37] Over-supervising low-risk defendants and placing unnecessary conditions on their release also has a negative impact, as it tends to increase the likelihood of individual failure.[38] The majority of people who are admitted to pre-trial detention are facing non-violent charges.[39] There is no trade-off between a sensible, defensible, rights-respecting bail system and public safety: these are mutually reinforcing goals.

his sentencing hearing he was forced to sleep on the floor because of overcrowding in the Centre. This is unacceptable practice in my view."); *R v Johnson*, 2013 ONSC 4217 at para 36 ("The awful conditions of confinement at the Don Jail are well-known to judges in Ontario. The overcrowding, triple-bunking and lack of access to fresh air and exercise are part of the regular menu at this institution"); *R v Crockatt*, 2013 ONSC 6797 at para 55 ("Evidence was obtained from the Ministry of Community Safety and Correctional Services relative to the circumstances that obtained at the Toronto E. Detention Ctr. During [*sic*] the period from January 27, 2012 to August 28, 2013 relative to the incarceration of Justin Battle. This document evidences the overcrowded conditions at that facility which frequently required the offender to be housed with three inmates to a cell, which resulted in him being offered access to the exercise yard only 312 times, or about 56% of the time that he was in custody there, and the number of times during that earlier period of pretrial and presentence custody during which lockdowns took place."); *R v Dicker*, 2013 CanLII 13200 (NLPC).

28 *R v Morant*, 2013 ONSC 1969 at paras 52, 55.

29 Martin L Friedland, *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (Toronto: University of Toronto Press, 1965).

30 *Ibid*; P Koza & A Doob, "The Relationship of Pre-trial Custody to the Outcome of a Trial" (1975) 17:4 *Criminal Law Quarterly* 391; M Dhami, "Conditional Bail Decision Making in the Magistrates' Court" (2004) 43:1 *The Howard Journal* 27.

31 Statistics Canada, *Table 5 Expenditures on Adult Correctional Services, by Jurisdiction, 2010/2011* (Ottawa: StatCan,

The *Canadian Charter of Rights and Freedoms* ("the *Charter*") constitutionally guarantees individuals' right to be presumed innocent, right to reasonable bail, right to equality, right to be free from arbitrary detention and right to not be deprived of our liberty except in accordance with the principles of fundamental justice.[40] The *Criminal Code* sets out a presumption that accused should be released without conditions while awaiting trial.[41] Yet, for the past 30 years, the remand population has grown at an alarming rate. Today there are more legally innocent people in Canada's provincial and territorial jails than there are people in custody serving a sentence post-conviction. The bail system routinely prejudices accused persons, violates fundamental rights and freedoms of Canadians and undermines the integrity of the criminal justice system. The personal, societal, democratic and financial costs of needlessly imprisoning the innocent make this a trend that we cannot afford to continue.

11 Oct 2012), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11715/tbl/tbl05-eng.htm>.

32 *Ibid*.

33 Mia Dauvergne, *Adult Correctional Statistics in Canada, 2010–2011* (Ottawa: StatCan, 21 Dec 2012), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11715-eng.htm>.

34 The median length of pre-trial detention ranges between four days (Quebec) to 24 days (Northwest Territories). Statistics Canada, *Data Table for Chart 5: Median Number of Days Spent by Adults in Remand, by Province and Territory, 2009/2010 and 2010/2011* (Ottawa: StatCan, 11 Oct 2012), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11715/c-g/desc/desc05-eng.htm>.

35 Commission on the Reform of Ontario's Public Services, *Public Services for Ontarians: A Path to Sustainability and Excellence* (Toronto: Ontario Ministry of Finance, 2012), online: Ontario Ministry of Finance <http://www.fin.gov.on.ca/en/reformcommission/chapters/ch14.html>.

36 *Ibid*.

37 M Berg & B Huebner, "Reentry and the Ties that Bind: An Examination of Social Ties, Employment and Recidivism" (2010) 28:2 *Justice Quarterly* 383; Daniel S Nagin, Francis T Cullen & Cheryl Lero Jonson (2009), "Imprisonment and Reoffending" in Michael Tonry, ed, *Crime and Justice: A Review of Research* (38) (Chicago: University of Chicago Press, 2009).

38 J Sprott & N Myers, "Set Up to Fail: The Unintended Consequences of Multiple Bail Conditions" (2011) 53:4 *Canadian Journal of Criminology and Criminal Justice* 404.

39 Lindsay Porter & Donna Calverley, *Trends in the Use of Remand in Canada* (Ottawa: Juristat, 2011), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11440-eng.htm#a1>.

40 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

41 *Criminal Code*, RSC 1985, c C-46, s 515.

02

The Human Impact of Pre-trial Detention

There are repercussions of the bail system that people don't understand. Being detained has a cataclysmic effect on a person's ability to defend themselves. . . . Access to your counsel is considerably harder. . . . For me to go visit someone in pre-trial, [it] is an hour each way. . . . You're sitting in a locked room that's hot and smelly and [in] most cases you require your client to be more proactive. . . . It makes a huge difference.

– Defence counsel, British Columbia

[The pressure of being in jail] forces people to plead guilty. The ride to and from Vanier [Detention Centre] and the West [Detention Centre] in the wagon – that in itself forces people to plead guilty regularly. Somebody will be arrested, and they want to plead guilty to avoid having to come back the next day . . . . I guess at Vanier they have to get up [between] 4:00 a.m. to 5:00 a.m. As long as you're coming to court, you can't access the phone. A woman told me recently that she was coming back and forth for a few days, and had not been given access to clean clothing or underwear, and she had been menstruating . . . actually the guards, she told me that the guards with the inmates had lobbied for clean clothes. Surprisingly the guards supported the women, and they were able to achieve that. That's the same with the men; they're not given access to showers or the phone as long as they're coming to and from court. So they have to rely 100% on us [duty counsel] to make calls, talk to their family.

– Duty counsel, Ontario

We had a client – no record, charged with straight summary offence, prowl by night, and later charged with criminal harassment – [who] was arrested in [city A]. . . . The conditions of his release were a curfew every night, [and] he had to reside with his surety in [city B]. . . . He had to move . . . he lost his job. . . . It was a significant disruption for a first offender charged with minor offences. . . . At that point, a few weeks later, when you get a chance to speak with the Crown, the damage has been done – he's lost his job, had to move out of his apartment.

– Defence counsel, Ontario

[People plead guilty to get out of remand] all the time. . . . People will just plead; sooner in, sooner out. . . . The wait for trials, even in custody, is so long. . . . You could have somebody who is waiting six to eight months for a trial, and the Crown's only looking at three to four months on a guilty plea.

– Defence counsel, rural Manitoba

[There are] huge problems [with people getting released and not having their property with them]. People getting arrested in one city, taken to another city and then they have to make their own way back. They don't have any money. Their wallet is at the police station. The level of inhumanity is staggering; and [if] I were to focus on it, it would overwhelm me – it shocks me. But it happens all too easy because one individual is making a bureaucratic decision and they don't have any sensitivity to the repercussions of it because they actually don't understand the system.

– Defence counsel, British Columbia

Conditions in Provincial Jails

They are abysmal. I have a client convicted. . . . He ended up in a max[imum security] prison outside of Vancouver. . . . He ended up being successful on his appeal; a new trial was ordered, so he's now been returned to the remand centre. He's so horrified at the prospect of being in the remand facility. He was in the remand facility for three years prior to being convicted. He's so horrified by the prospect of remand that he attempted suicide within a week of being [back] there. [In] most of the remand facilities, you have no personal contact with anybody. . . . Twenty-two–hour lockdowns for many people, double bunking, no work, no education, no programs – you really are better off serving time in a federal institution. The conditions are appalling, and of course you can't get in to look at them, but I can tell you that I would not be surprised if the standards breached any number of international conventions.

– Defence counsel, British Columbia

It's overcrowded. . . . I find that I'm often dealing with older people who . . . might have dementia or other problems, and it seems like they're forced to sleep on the hard concrete floor [because] there's not enough bunks. . . . I'm wondering why the people who look like they need the bed the most aren't being given the bed. . . . It seems like it's being left to the inmates to determine who gets to sleep where.

– Defence counsel, Ontario

The local jail went to double bunking possibly five years ago or so and sort of a fuss died down so what was new then is now old. . . . The most common complaint is access to prescribed medications – anything, like pain medication or mood altering [medication] which has been prescribed, seems to be a hard sell at the jail. . . . The jail has doctors who patrol regularly and it seems that they are influenced by the jail authority and are persuaded. . . . They don't prescribe as doctors do on the street.

– Duty counsel, Nova Scotia

They're overcrowded from what I'm told. . . . The remand centre downtown doesn't have a yard. So there's really no real outdoor time that they get. . . . Downtown, you're in downtown Winnipeg . . . and if you're in segregation, you're locked up 23 hours a day . . . and there's not a whole lot of programming.

– Defence counsel, Manitoba

03

The Law and Practice of Bail

The legal framework governing bail and pre-trial detention draws from the presumption of innocence and the general principle that the government must justify any restriction on an individual's liberty. The right to pre-trial release is secured in both the *Criminal Code of Canada* and the *Canadian Charter of Rights and Freedoms*; everyone charged with a criminal offence has "a basic entitlement to be granted reasonable bail unless there is just cause to do otherwise."[42] Both the legal provisions governing pre-trial detention, as well as the practical decisions regarding how bail courts operate, must be interpreted and analyzed in light of the right to liberty and the presumption of innocence.

3.1 Police Powers to Release or Detain Accused[43]

In the vast majority of cases[44] the *Criminal Code* directs police to release individuals from custody with the least restrictions possible placed on their liberty. Police officers can only arrest a person without a warrant if there are reasonable grounds to believe that the person will not attend court or the public interest will not be satisfied by issuing the person an appearance notice.[45] Officers considering whether an appearance notice will be sufficient are specifically directed to consider whether arrest is necessary to establish the identity of the person, secure or preserve evidence, prevent the commission of more offences, protect victims or witnesses, or ensure a person's attendance at court. If the police decide a warrantless arrest is necessary, other sections of the *Criminal Code* direct officers to release the accused as soon as practicable unless their detention is necessary to achieve the specifically listed purposes of bail. Where there is a warrant for an individual's arrest, the *Criminal Code* gives police officers the discretionary power to release an individual with a promise to appear or a recognizance.[46]

The *Criminal Code* permits the police to impose release conditions in certain circumstances. Where there is an arrest warrant, the police may release a person on an undertaking and may impose the following optional conditions where justifiable:

- remain within a territorial jurisdiction specified in the undertaking;
- notify a peace officer or another person of any change in address, employment or occupation;
- abstain from communicating, directly or indirectly, with any victim, witness or other person;
- deposit the person's passport;

42 *R v Pearson*, [1992] 3 SCR 665 (1992), 17 CR (4th) 1, 77 CCC (3d) at 691; *R v Hall*, 2002 SCC 62, 217 DLR (4th) 536 at para 13.

43 *Criminal Code*, RSC 1985, c C-46, ss 497(1.1), 498(1). There are a variety of forms of police release, including a summons, appearance notice, promise to appear and recognizance. An appearance notice is usually issued directly by the police. A summons, which can be received via mail, requires an individual to appear in court at a specific time and place. Both of these can be issued without arresting the accused. A promise to appear is a written document signed by the accused where he or she promises to appear in court on a specific time and date, and abide by any additional conditions imposed by the officer and included in the document. A recognizance is similar to a promise to appear, but will require the accused to pay a sum of money if they fail to appear in court. Individuals who live more than 200 km from where they will have to appear in court may be required to provide a cash deposit.

44 Only a Supreme Court judge may release people charged with treason (s 47), alarming Her Majesty (s 49), intimidating parliament (s 51), inciting mutiny (s 53), sedition (s 61), piracy (s 74), piratical acts (s 75) and murder (s 235). Individuals who are arrested without a warrant for an indictable offence committed in another jurisdiction must also be brought before a justice (s 503(3)). All sections in this footnote refer to *Criminal Code*, RSC 1985, c C-46.

45 *Criminal Code*, RSC 1985, c C-46, s 495(2).

46 *Criminal Code*, RSC 1985, c C-46, s 499(1).

- abstain from possessing a firearm;
- report at specified times to a peace officer or other person;
- abstain from consuming alcohol, other intoxicating substances, or drugs other than prescribed medication; and
- any other condition specified in the undertaking that the officer in charge considers necessary to ensure the safety and security of any victim of or witness to the offence.[47]

These conditions may also be imposed on a person arrested without a warrant if they are not released through the mandatory release provisions described above.[48]

3.2 Judicial Interim Release

Canada's bail provisions were reformed in 1972 when the *Bail Reform Act* was introduced. Before 1972 bail was highly discretionary. There was a presumption that an accused person would be detained unless he or she applied for bail, and the law gave judges no criteria or guidance for the decision. Studies of the bail system in the 1960s found that bail was operating in "an ineffective, inequitable, and inconsistent manner" and the system was "often subverted into a form of punishment before trial."[49] In light of the significant impacts on liberty, the presumption of innocence and an accused's practical ability to mount his or her defence, it was recommended that pre-trial detention be carefully controlled by clear criteria[50] and limited to those situations where it was necessary for the protection of society.[51]

The legal reforms in the 1970s firmly established the presumption that an accused should be released without conditions pending trial. This presumption was constitutionally entrenched in s 11(*e*) of the *Charter*, which guarantees the right "not to be denied reasonable bail without just cause."[52] As described by the Supreme Court:

> Most of the current bail provisions in the Criminal Code were enacted in the Bail Reform Act, S.C. 1970-71-72, c. 37. The Bail Reform Act established a basic entitlement to bail. Bail must be granted unless pre-trial detention is justified by the *prosecution*. . . . *Section 11(e)* creates a basic entitlement to be granted reasonable bail unless there is just cause to do otherwise.
>
> . . . In general, a person charged with an offence and produced before a justice, unless he or she pleads guilty, is to be released on an undertaking without conditions. However, the Crown is to be given a reasonable opportunity to show cause why either detention or some other order should be made. . . .[53]

The legal reforms in the 1970s firmly established the presumption that an accused should be released without conditions pending trial.

47 It should be noted that police officers do not have unlimited discretion to impose conditions of release. Police may impose the specific enumerated conditions, or any other condition that is necessary to ensure the safety and security of any victim of or witness to the offence. *R v Skordas*, 2001 ABPC 118, 290 AR 191; *R v Barnett*, [2010] OJ No 5822, 2010 ONSC 3720.

48 *Criminal Code*, RSC 1985, c C-46, s 498.

49 Martin L Friedland, *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (Toronto: University of Toronto Press, 1965) at 172, 175; cited in *R v Hall*, 2002 SCC 62, 217 DLR (4th) 536 at paras 57–58.

50 Friedland, *ibid* at 186.

51 Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (Ottawa: CCC, 1969) at 108–9.

52 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

53 *R v Pearson*, [1992] 3 SCR 665 (1992), 17 CR (4th) 1, 77 CCC (3d) at 691.

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In order to withstand constitutional scrutiny, the amount of money required and any restrictions on an accused's liberty when released on bail must be "reasonable" and there must be "just cause" if a person is denied bail altogether.[54]

While there are some situations in which the burden of proof is reversed and an accused is required to show that he or she should not be detained,[55] in general the onus is on the prosecution to show why a person cannot be released.[56] An accused shall "be released on his giving an undertaking without conditions"[57] unless a prosecutor can show why further restrictions on liberty are justified. If unconditional release is not appropriate in a specific case, the Court has a series of increasingly restrictive release orders that can be imposed:

> (2) Where the justice does not make an order under subsection (1), he shall, unless the prosecutor shows cause why the detention of the accused is justified, order that the accused be released
>
> (a) on his giving an undertaking with such conditions as the justice directs;
>
> (b) on his entering into a recognizance before the justice, without sureties, in such amount and with such conditions, if any, as the justice directs but without deposit of money or other valuable security;
>
> (c) on his entering into a recognizance before the justice with sureties in such amount and with such conditions, if any, as the justice directs but without deposit of money or other valuable security;
>
> (d) with the consent of the prosecutor, on his entering into a recognizance before the justice, without sureties, in such amount and with such conditions, if any, as the justice directs and on his depositing with the justice such sum of money or other valuable security as the justice directs; or
>
> (e) if the accused is not ordinarily resident in the province in which the accused is in custody or does not ordinarily reside within two hundred kilometres of the place in which he is in custody, on his entering into a recognizance before the justice with or without sureties in such amount and with such conditions, if any, as the justice directs, and on his depositing with the justice such sum of money or other valuable security as the justice directs.

Section 515(3) of the *Criminal Code* requires the prosecution demonstrate why the less onerous form of release is inappropriate before the justice can impose the subsequent, more restrictive form of release. This process has been referred to as the "ladder approach":

54 *Ibid* at para 57.

55 Generally the Crown must prove why an individual should be detained. Since the introduction of the *Bail Reform Act*, however, several amendments have been passed that reverse the onus, requiring certain accused to demonstrate why they ought to be released. Currently, an accused bears the onus if he or she is charged with:
- an indictable offence that was allegedly committed while the accused was on bail for another indictable charge (s 515(6)(*a*)(i));
- murder, treason and a few other serious offences (s 522(2));
- certain offences related to or involving criminal organizations, terrorism, security of information, firearms, or the trafficking, importing or production of prohibited drugs (s 515(6)(*a*));
- an indictable offence when the accused is not ordinarily resident in Canada (s 515(6)(*b*)); or
- an offence of violating an existing bail condition or failing to attend court when required for a pending charge (s 515(6)(*c*)).

In these cases, a person will be presumptively detained unless he or she can prove that release is appropriate.

56 *Criminal Code*, RSC 1985, c C-46, s 515(1).

57 *Ibid*.

> The structure for interim release adopted in Part XVI has been called the "ladder" principle. At its core this means . . . that release is favoured at the earliest reasonable opportunity and, having regard to the risk of flight and public protection, on the least onerous grounds. The first option to consider is release upon an undertaking without conditions (s. 515(1)). Second, if the prosecution considers that this will not secure the aims of Part XVI it may seek to show cause for other, non-monetary conditions (s. 515(2)(a)). Only in the last resort should those conditions include a requirement for cash by deposit or recognizance by the accused or a third party (s. 515(3)). These are the steps on the ladder. Even then, however, there is a progression in the types of cash conditions that may be sought and imposed . . . and, again, the policy favours less onerous conditions unless cause is shown for more onerous grounds.[58]

The basic principle is restrictions on pre-trial liberty should be imposed only "to the extent that they are necessary to give effect to the criteria for release."[59]

The *Criminal Code* sets out three justifications (commonly referred to as the primary, secondary and tertiary grounds) for detaining a person or requiring conditional release prior to trial. The primary ground requires that detention be necessary to ensure an accused's future attendance in court to face the pending charges.[60] The secondary ground authorizes detention where it is necessary for the protection or safety of the public due to a "substantial likelihood" an accused will commit an offence or interfere with the administration of justice and thereby endanger "the protection or safety of the public."[61] Finally, bail may be denied or conditions imposed where necessary to "maintain confidence in the administration of justice, having regard to all the circumstances."[62] This analysis includes consideration of the apparent strength of the Crown's case; the gravity of the offence; the circumstances surrounding the commission of the offence, including whether a firearm was used; and the potential sentence if the accused is found guilty.[63]

Section 515(4) of the *Criminal Code* states that a justice may impose one or more of the following requirements on an accused who is released with conditions under s 515(2):

- report at specified times to a police officer or other person;
- remain within a specified territorial jurisdiction;
- notify a police officer or other person of any change in address or employment;
- abstain from communicating, directly or indirectly, with any victim, witness, or other specified person;
- refrain from going to any specified place;
- deposit a passport;

"Restrictions on pre-trial liberty should only be imposed to the extent that they are necessary to ensure attendance at trial, address a substantially likely risk to public safety, or to maintain confidence in the administration of justice."

58 *R v Anoussis*, 2008 QCCQ 8100, 242 CCC (3d) at para 23; see also *R v Horvat* (1972), 9 CCC (2d) 1, [1972] BCJ No 540 at paras 5–6.
59 Hon Justice Gary T Trotter, *The Law of Bail in Canada*, 3d ed, (Toronto: Carswell, 2010) at 241.
60 *Criminal Code*, RSC 1985, c C-46, s 515(10)(*a*).
61 *Criminal Code*, RSC 1985, c C-46, s 515(10)(*b*); *R v Morales*, [1992] 3 SCR 711 at 737, 77 CCC (3d) 91 ("I am satisfied that the scope of the public safety component of s 515(10)(*b*) is sufficiently narrow to satisfy the first requirement under s 11(*e*). Bail is not denied for all individuals who pose a risk of committing an offence or interfering with the administration of justice while on bail. Bail is denied only for those who pose a 'substantial likelihood' of committing an offence or interfering with the administration of justice, and only where this 'substantial likelihood' endangers 'the protection or safety of the public.' Moreover, detention is justified only when it is 'necessary' for public safety. It is not justified where detention would merely be convenient or advantageous").
62 *Criminal Code*, RSC 1985, c C-46, s 515(10)(*c*).
63 *Ibid*.

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- "comply with any other condition specified in the order that the justice considers necessary to ensure the safety and security of any victim of or witness to the offence";[64] and
- "comply with such other reasonable conditions specified in the order as the justice considers desirable."[65]

Although the court's discretion appears to be quite broad, case law makes it clear there are important limits to the conditions that may be imposed. Courts must take the presumption of innocence into account before imposing any condition, and only conditions that are connected to the purpose of bail are permissible.[66] The *Charter* also requires that any conditions imposed be "reasonable." A court may not impose conditions an accused has no reasonable prospect of complying with – for example, if the condition is impossibly restrictive[67] or requires the accused to deposit an excessive sum of money given their personal circumstances.[68] Conditions that unjustifiably restrict the liberty of the accused may also infringe on other rights protected under the *Charter*, including security of the person, the right to equality, freedom of expression[69] and freedom of association.[70]

The *Criminal Code* contains specific provisions establishing timelines for bail appearances. A person who is detained by the police must be brought before a justice without unreasonable delay, and in any event within 24 hours if a justice is available or as soon as is practicable if one is not.[71] On account of the primacy of liberty and in recognition that freedom is not to be restrained except in accordance with constitutionally valid law, this requirement has been described as one of the most important procedural provisions of the *Criminal Code*.[72] Given the paramountcy of the liberty of the accused in this context, it is clear the appearance before a justice must be a meaningful appearance and not merely a procedural formality. The *Criminal Code* also specifies that a bail hearing may not be adjourned for more than three clear days without the consent of the accused.[73]

Beyond these statutory requirements, unjustified delays in securing bail violate *Charter* rights, specifically the right to reasonable bail, the right to be free from arbitrary detention and the right to liberty as protected by s 7. Several cases examining the impact of systemic delays in the bail system conclude the resulting *Charter* violations may justify a stay of proceedings against the accused.[74] Finally, purposive delays by the prosecution in order to secure advantages unrelated to the bail process (for example, to allow for further police investigation of circumstances irrelevant to the bail decision) infringe the constitutional right to reasonable bail.[75]

64 *Criminal Code*, RSC 1985, c C-46, s 515(4)(*e.1*).
65 *Criminal Code*, RSC 1985, c C-46, s 515(4)(*f*).
66 *R v Keenan*, (1979) JQ No 195, 57 CCC (2n) 267.
67 *R v Sexton*, (1976) NJ No 89, 33 CRNS 307 (Nfld Dist Ct).
68 *R v Saunter*, 2006 ABQB 808 (Alta QB).
69 *Collins v R* (1982), 31 CR (3d) 283 (Ont Co Ct).
70 *R v Farago* (2002), 333 AR 158 (QB).
71 *Criminal Code*, RSC 1985, c C-46, s 503(1); *R v Obed*, 2011 CanLII 50704.
72 Originally noted in *R v Simpson* (1994), 117 Nfld & PEIR 110 (Nfld CA), appeal allowed by the Supreme Court on grounds not affecting this point, [1994] SCCA No 180 and affirmed in *R v W(E)* (2002), 168 CCC (3d) 38 (Nfld CA).
73 *Criminal Code*, RSC 1985, c C-46, s 520(4).
74 *R v V(J)* (2002), OJ No 1027, 163 CCC (3d) 507 (ONSC); see also *R v Pati* (2002), 2002 CarswellOnt 6271 (ONSC) where practice directive stating that the court could hear a maximum of 10 bail hearings per day were seen to be at the root of the delay. Such a delay was held to be in violation of s 11(*e*) of the *Charter*; *R v Jevons* (2008), OJ No 4397, 2008 ONCJ 559 (Ont CJ); *R v Brown* (2009), OJ No 3592, 247 CCC (3d) 11 (ONCA); *R v Zarinchang* (2010), OJ No 1548, 254 CCC (3d) 133 (ONCA).
75 *R v M(N)* (2005), 1 CRR (2d), 2005 ONCJ 348 (Ont CJ).

Canadian courts have affirmed an accused's Aboriginal status must be taken into consideration during the bail process.[76] In 2008/2009, although Aboriginal people represented approximately 3% of the Canadian adult population, Aboriginal people comprised 18% of admissions to federal custody, 27% of admissions to provincial and territorial sentenced custody and 21% of admissions to remand.[77] In *R v Gladue*[78] and *R v Ipeelee*[79] the Supreme Court of Canada recognized the gross overrepresentation of Aboriginal people in Canada's prisons and criminal justice system constituted a "crisis."[80] The Court found that systemic bias and discrimination throughout the criminal justice system had combined with "[y]ears of dislocation and economic development and have translated, for many Aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation"[81] to propel over-incarceration.[82] Subsequent appellate decisions affirm consideration of an accused's Aboriginal heritage and systemic discrimination in the justice system extend beyond the confines of sentencing and are applicable[83] whenever an Aboriginal person's liberty is at stake, including in the exercise of prosecutorial discretion.[84] These principles must also be taken into account in judicial interim release proceedings.[85]

The application of *Gladue* to bail proceedings involves a contextual analysis of the systemic factors at play in the arrest, charging and detention of Aboriginal accused. "Reasonable bail," as envisioned in s 11(*e*) of the *Charter*, must include an assessment of what is reasonable for the Aboriginal accused, having regard to the systemic issues the person may face in terms of the requirement of a surety, the accused's ability to comply with conditions and the quantum of bail. As noted in *R v Daniels*, in any bail application involving an Aboriginal accused, "the Court is required to take judicial notice of the unique systemic factors which have affected aboriginal people in Canadian society in order to place in the proper context the individual accused applying for bail. Part of this context is the fact that aboriginal people are disproportionately denied bail."[86]

3.3 The Practice of Bail

The legal framework established by the *Criminal Code* and *Charter* provides a uniform starting point for the adjudication of bail. In practice, however, differences in local context, policy, procedure, practice and culture can impact how the law is applied and interpreted. In order to have a full understanding of bail in Canada, a formal review of the law must be supplemented by an overview of the practice of bail in different jurisdictions. A short survey of bail practices in the five jurisdictions studied – British Columbia, Yukon, Manitoba, Ontario and Nova Scotia – is provided in Appendix C. There are, however, a few key differences worth highlighting to contextualize the findings.

76 See for example *R v Robinson*, 2009 ONCA 205; *Rich v Her Majesty the Queen*, 2009 NLTD 69; *R v Wesley*, [2002] BCJ No 3401; *R v TJJ*, 2011 BCPC 155; *R v Pitawanakwat*, [2003] OJ No 5029, *R v P(DD)*, 2012 ABQB 229; *R v Daniels*, [2012] SJ No 810 (CJ).

77 Lindsay Porter & Donna Calverley, "Trends in the Use of Remand in Canada" (Ottawa: Juristat, 2011), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11440-eng.htm#a1>.

78 *R v Gladue* (1999), 133 CCC (3d) 385 (SCC).

79 *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433.

80 *R v Gladue* (1999), 133 CCC (3d) 385 (SCC) at para 64.

81 *Ibid* at para 67.

82 *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group Publishing, 1996) at xii, 315; M Jackson, "Locking Up Natives in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release" (1989) 23 UBCL Rev 220.

83 Other contexts include jury selection: *R v Kokopenace*, 2013 ONCA 273, leave to appeal to the Supreme Court allowed, [2013] SCCA No 308; review board hearings: *R v Sim*, 2005 CanLII 37586 (Ont CA); parks (s 161) orders: *R v Sutherland*, 2009 BCCA 534; civil contempt proceedings: *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534, leave to appeal refused, 2008 CanLII 63483; parole ineligibility: *R v Jenson*, 2005 CanLII 7649 (Ont CA); and extradition: *United States v Leonard*, 2012 ONCA 622.

84 *United States v Leonard*, 2012 ONCA 622.

85 See for example *R v Robinson*, 2009 ONCA 205; *Rich v Her Majesty the Queen,* 2009 NLTD 69; *R v Wesley*, [2002] BCJ No 3401; *R v TJJ*, 2011 BCPC 155; *R v Pitawanakwat*, [2003] OJ No 5029; *R v P(DD)*, 2012 ABQB 229; *R v Daniels*, [2012] SJ No 810 (CJ).

86 *R v Daniels*, [2012] SJ No 810 (CJ) at para 19.

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There are significant differences in the way bail is adjudicated across the country. Ontario is the only jurisdiction to primarily use justices of the peace to preside over bail hearings.[87] Yukon uses a combination of justices of the peace and judges, whereas Manitoba, Nova Scotia and British Columbia only use judges in bail court. The Winnipeg court has a unique administrative triage system to streamline the bail process.[88] As a result of this system, the majority of consent bail releases in Winnipeg are addressed relatively informally before a justice of the peace without oral submissions in open court or the attendance of the accused or a surety.

The availability and structure of bail supervision programs also differs drastically across the provinces. Nova Scotia currently has no bail supervision programs. Ontario contracts all bail supervision to community organizations across the province whereas British Columbia and Yukon use government bail supervision programs, with probation officers supervising accused. Manitoba also uses government-run bail supervision, which is supplemented in Winnipeg by two community bail supervision programs.

87 Section 522 of the *Criminal Code* requires judicial interim release (bail) decisions for certain charges (e.g., murder, treason, terrorism, etc.) be adjudicated by a Superior Court justice. In Ontario, it is routine for all other matters to be heard by justices of the peace. Other provinces primarily use judges for all bail matters.

88 Provincial Court of Manitoba, *Pre-trial Coordination Protocol: Adult Charges* (Winnipeg: Provincial Court, 4 January 2013), online: Provincial Court of Manitoba <http://www.manitobacourts.mb.ca/pdf/pretrial_jan2013.pdf>.

Findings

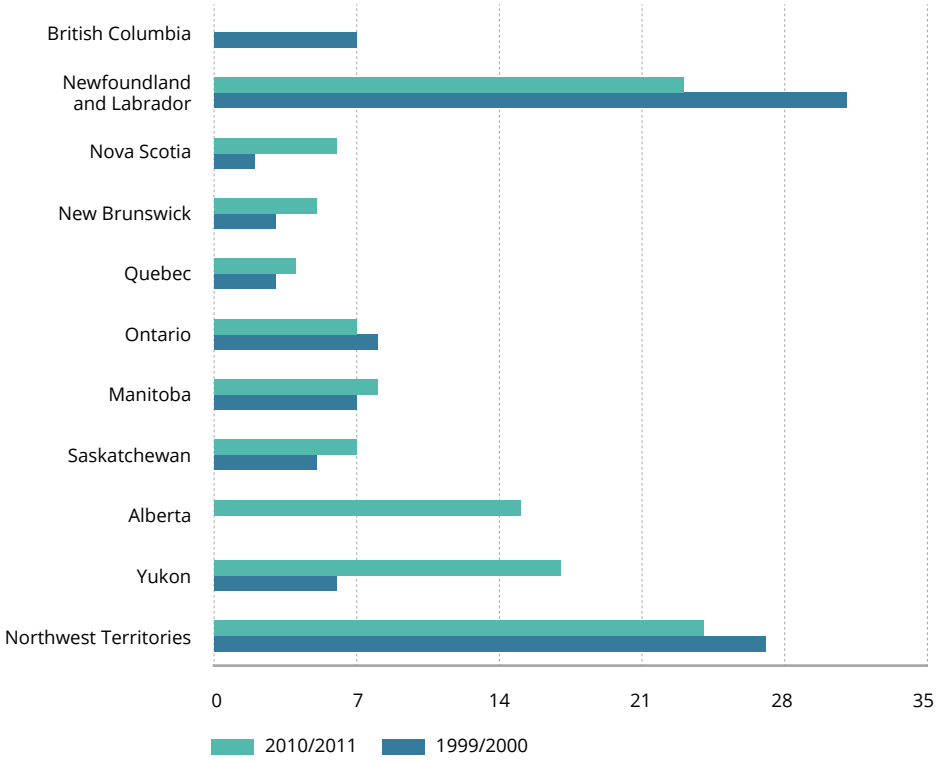
04

4.1 The First 24 Hours in Detention: Police Powers to Release and the First Judicial Appearance

Decreasing use of police powers to release

The police have the ability to release accused pending their first court appearance or to hold them in detention for a bail hearing before a justice. The police decision whether to detain or release an individual is important. As depicted in Figure 5 below, accused, depending on where they are arrested, will spend a median of four to a median of 24 days in pre-trial custody before a decision is made with respect to bail.

Figure 5: Median Number of Days Spent in Remand by Adults, by Selected Provinces and Territories, 1999/2000 and 2010/2011[89] [90]



89 Mia Dauvergne, *Adult Correctional Statistics in Canada, 2010/2011* (Ottawa: StatCan, 21 Dec 2012), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11715-eng.htm>; Lindsay Porter & Donna Calverley, *Trends in the Use of Remand in Canada* (Ottawa: Juristat, 2011), online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11440-eng.htm>.

90 Note: 1999/2000 data missing for Alberta and 2010/2011 data missing for British Columbia.

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For accused from remote communities, time in custody may be longer as it may take up to a week to be transported to the nearest provincial detention centre. The logistical difficulties of contacting friends and family from hundreds of kilometres away slows the bail process and results in more time spent in pre-trial detention.[91] The difference between being released directly from police custody and being held for processing by the bail courts can be the difference between sleeping at home and spending many nights in jail awaiting a bail decision.

> **Recommendation 1.1:** The RCMP and other police services operating in rural detachments should review the conditions of confinement in police holding cells, recognizing that individuals may be detained there for multiple days while they await transportation to provincial correctional centres.

As noted in the introduction, at least in Ontario, police releases are becoming less frequent – more people are starting their contact with the court system in bail court, after having been detained by the police. Unfortunately, there is no academic research into this part of the pre-trial process. Police release decisions are made behind closed doors, generally without the participation of defence counsel. There is no public reporting or centralized database listing the number and types of conditions imposed by police when an individual is released without appearing in bail court.

Observations of individual cases illustrate how police discretion can be used to detain people who ought to have been released. An Ontario interview participant, for example, described a number of scenarios where, in her opinion, accused who could have been released by the police were held in custody for a bail appearance:

> In one case, there was a woman with no criminal record, no outstanding charges, who was arrested for a domestic assault. The charge was assault with a weapon; it was alleged that she hit her husband with a tea towel. She was arrested over a long weekend and not released in WASH [Weekend and Statutory Holiday] court, meaning that she was in custody for days before being released from bail court.
>
> In another instance, a young Aboriginal man was charged with mischief – graffiti – and released on a promise to appear. Although he went to court as required and was working towards diversion on the mischief charge, he didn't go to the police station for [finger]prints and was charged with failure to appear. Upon arrest for this charge he was held for bail, and because the Crown requested some form of supervision, he was in custody for two days waiting to be seen by the bail program before being released on his own recognizance. One of the conditions the Crown requested was that he be bound by a boundary condition, not to be within a certain area of the

91 Rural Manitoba interviews.

> downtown core of Toronto. This condition had not been imposed on the original police release. It seems like the police operate under the mistaken assumption that if anyone is charged with any kind of 'fail to,' that they have to bring them in for bail. This kid had appeared for court as required, had not committed any further substantive offences and did not pose any threat to the public. Why did he have to spend two days in jail? What basis could the Crown possibly have had to impose a boundary condition? Why would he need to be supervised by [the] bail program?
>
> In yet another case, an elderly gentleman with significant health issues was charged with committing some kind of minor fraud. The alleged offences were dated – the allegations arose six to seven years earlier against an employer the accused no longer worked for. He had a minor criminal record that was very dated, although it contained findings of guilt for some related offences. The Crown insisted on a surety and the gentleman spent two days in custody waiting for one of his friends to be able to get to the courthouse to bail him out.[92]

Instances of very minor charges resulting in detention for a bail determination are not unusual. In their 2009 study, Webster, Doob and Myers reproduce a newspaper article to tell the "parable of Ms. Baker," a 40-year-old woman who was held for a bail hearing after being arrested for stealing a high school laptop:

> Stolen Laptop Recovered
>
> A Dell laptop computer stolen in December has been located. The Huntsville [detachment of the Ontario Provincial Police] report that in December, police were advised that the computer had been turned in to a local computer shop for reformatting. While store employees were conducting a reformatting process, they found that the laptop was property of Trillium Lakelands District School Board and it had been taken from Huntsville High School. After an investigation, police arrested 40-year-old Rosanne Baker of Huntsville for the theft. Baker was charged with possession of stolen property obtained by crime and breach of probation. She remained in custody and was held for a bail hearing in Bracebridge today.[93]

In these and similar cases, it is unclear why the police did not release the individual from custody. The increase in the number of accused held by the police for a bail hearing, in a time of declining overall and violent crime rates, suggests police are not exercising their powers of release to the fullest extent available. Indeed, considering the legally mandated grounds for detention, holding an accused in detention is to be used with restraint and only for more serious offences or accused. The frequent presence of minor cases in bail court suggests individuals are being needlessly detained by police.

It is not unusual for a person who is accused of committing a very minor offence to be detained for a bail determination.

92 Duty counsel, Ontario.
93 "Stolen Laptop Recovered", *The Forester* (4 March 2009) A4.

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Reports from across the country urge the police to release more people directly from police custody. In 2006 a federal report found that "in some jurisdictions the police make limited use of their release powers," recommended "police make better use of the available statutory forms of release," and suggested supplemental education and training to attain this goal.[94] This recommendation was adopted again in 2013 by the Ontario Ministry of the Attorney General's expert round table on bail, which recognized "the significant impact that police practices, relating to the exercising of their discretion, have on the efficiency and effectiveness of bail courts."[95] Similarly, a 2012 report into the bail system identified a "misunderstanding on the part of some police officers concerning the scope of their authority to release" and the underuse of these powers as a contributing cause to the growing remand population.[96]

When police decide to release an individual, there may be inappropriate or unconstitutional conditions imposed. Indeed, interviewees report concerns with this aspect of the police release process. Accused who are offered release from police custody may feel they have little choice but to accept the police-imposed conditions:

> The problem is, a guy's sitting in jail. . . . He has no idea what's going on. Someone comes in and says, "you're going to get released," and they get basically told what the conditions are. They don't really have a lot of say in the process. If you were about to be released, would you start arguing about what sorts of conditions you're going to be released on? No, you just be damn glad that you're going to be getting out in a few hours.[97]

Defence counsel in Halifax note that while the police appear to be appropriately exercising their powers to detain an accused for a bail hearing, they also impose strict conditions that are often unrelated to the underlying offence when they release the accused.[98]

Previous reports recommend police increase the use of their powers of release under the *Criminal Code*. We adopt the recommendations of these reports, and echo their call to increase the use of this release power while simultaneously educating police officers on the legal limits of their power to impose conditions.

> **Recommendation 1.2:** Police should make increased use of their power to release, and ensure that any conditions imposed are constitutional and legally permissible under the *Criminal Code*.

94 Canadian Department of Justice, *The Final Report in Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System*, online: <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/ecc-epd/p6.html#a2>.

95 Justice on Target, Ministry of the Attorney General, *Bail Experts Table Recommendations* (2013) at 18.

96 *Re-inventing Criminal Justice: Final Report*, The Fourth National Criminal Justice Symposium (January 13/14, 2012) at 2. See also John Howard Society of Ontario, *Reasonable Bail?* (2013) at 8 (Recommendation 1.1: "That police draw on their powers of release, outlined in the *Criminal Code*, to release more charged persons onto their own recognizance, instead of detaining for a bail hearing").

97 Defence counsel, British Columbia.

98 Defence counsel, Halifax.

Recommendation 1.3: Individuals released from police custody should be proactively informed of the procedures that can be used to vary police-imposed conditions under ss 499(3) and 503(2) of the *Criminal Code*.

Appearance before a justice without unreasonable delay: A missed opportunity?

The *Criminal Code* requires individuals detained by the police to be brought before a justice without unreasonable delay, or in any event before a justice within 24 hours where one is available.[99] All jurisdictions studied have established procedures to fulfill this obligation outside of regular court hours, usually by providing a telephone appearance with a justice.

This first bail appearance, while a crucial guard against arbitrary detention and police abuse of authority, is not necessarily functioning as a meaningful review of whether or not a person should be released from custody. The impact this first appearance has on individuals from remote communities may be particularly profound. In Manitoba, rural defence counsel report that a person who is adjourned and returned to police cells after their first appearance by telephone could wait up to a week before transportation is available to fly them to the provincial court for a continuation of their bail hearing. Since the RCMP holding cells were not designed for long-term detention, researchers were told that the conditions can be quite bad: "I guess the cells are not very comfortable – they're not prison cells, [and] some of them don't have mattresses I'm told. The toilet is right out in the open there . . . "[100]

Ontario appears to be grappling with similar issues. A 2013 Ontario report on justice in fly-in communities sought ways to keep accused in their local community pending a final bail decision, but ultimately concluded this was not legally possible in most cases: the *Criminal Code* requires that any remand before or during a bail hearing be "to custody *in prison* [emphasis added]."[101] Unfortunately, the report did not provide an in-depth examination of this provision or reflect on the fact that this interpretation may lead to an accused having their case adjourned for more than three days as transport is arranged, in clear violation of s 516(1) of the *Criminal Code*.

Failure to effectively adjudicate release at the first appearance has drastic consequences for individuals from remote communities. For remote communities where courts or provincial jails are significant distances away, keeping accused in police custody, increasing Crown and defence involvement in the first appearance and making use of video technology are areas that should be explored.

99 In practical terms, barring highly exceptional circumstances all jurisdictions in Canada have justices available. *R v Simpson*, 1994 CanLII 4528 (NLCA), online: CanLII <http://canlii.ca/t/1nplw>.

100 Defence counsel, rural Manitoba.

101 Ontario Court of Justice and Ministry of the Attorney General, *Report on Fly-In Court Operations*, (Toronto: 2013), online: Ontario Court of Justice <http://www.ontariocourts.ca/ocj/files/reports/fly-in.pdf>; *Criminal Code*, RSC 1985, c C-46, s 516(1).

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Recommendation 2.1: Provincial and territorial governments should implement the recommendation of the Ontario Court of Justice and Ministry of the Attorney General Joint Fly-In Court Working Group that "[w]here appropriate, northern police should exercise their discretion to release the accused person into the fly-in community. Police should consult with the Crown whenever detention is contemplated, northern police services and Crown Offices should review, and adopt if appropriate, a bail consultation process as a best practice to ensure that accused persons are not taken out of the community where the Crown will consent to release."[102]

Recommendation 2.2: In line with the recommendation of the Ontario Court of Justice and Ministry of the Attorney General Joint Fly-In Court Working Group,[103] s 516(1) of the *Criminal Code* should be studied further, particularly in light of the requirement that no adjournment be for more than three clear days except with the consent of the accused. If s 516(1) does clearly prevent an accused from staying in police custody after the first bail appearance, the federal government should study amending the provision to "permit an accused person, with his or her consent, to be remanded to somewhere other than 'custody in prison' (i.e., police custody) before or during a bail hearing. Such an amendment could potentially allow an accused person to remain in the community for his or her bail hearing."[104]

4.2 Nights, Weeks or Months behind Bars: Getting through Bail Court

A person who is remanded after their first appearance is transferred to a provincial jail to await determination of their bail. Both in-court observations and interviews for this study focused on how the bail courts are operating. Existing academic research on bail in Canada has focused on the situation in Ontario. These studies found the bail court makes remarkably few bail decisions each day; rather, most accused are adjourned to another day for their bail to be determined. In one study of eight courts, between 57% and 81% of accused in bail court did not have their bail decided on an average day.[105] It has been suggested that a "culture of adjournment" has developed, whereby an adjournment is the most expected and accepted outcome.[106] Intertwined with this culture of adjournment is an aversion to being the one to make the release decision. Despite the presumption of innocence, presumption of release on bail, and instructions to approach the use of detention and conditions of release with restraint, most accused in Ontario are required to produce a suitable surety and agree to comply with an average of nine conditions[107] in order to secure release on bail. Indeed, actual practice would lead one to believe that the onus was almost always on the accused to demonstrate why a release was appropriate – the opposite of what is suggested by current law.

102 Ontario Court of Justice and Ministry of the Attorney General, *Report on Fly-In Court Operations*, (Toronto: 2013), online: Ontario Court of Justice <http://www.ontariocourts.ca/ocj/files/reports/fly-in.pdf>.
103 *Ibid*.
104 *Ibid*, recommendation 4(d).
105 NM Myers, "Shifting Risk: Bail and the Use of Sureties" (2009) 21:1 *Current Issues in Criminal Justice* 127.
106 Nicole Myers, *Creating Criminality: The Intensification of Institutional Risk Aversion Strategies and the Decline of the Bail Process* (University of Toronto: Doctoral dissertation, 2013).
107 *Ibid*.

Many conditions that are routinely imposed have little or no relationship to the grounds for detention and facts of the alleged offence. In a study of bail conditions imposed in Ontario youth courts, approximately 41% of conditions imposed had no apparent connection to the allegations or grounds for detention, and a further 22% were only ambiguously connected.[108] Examples of unrelated conditions include broad general requirements to "be amenable to the rules and discipline of the home," "attend school each and every day, each and every class" or "attend counseling." A number of conditions the court routinely imposes may be difficult to comply with for the duration of time it takes for a case to be completed. Some conditions are overly vague or far-reaching, in that they can encompass a wide range of different behaviours. Bail conditions, when imposed in large numbers for long periods of time, are often violated, leading to additional criminal charges.[109]

Many conditions that are routinely imposed have little or no relationship to the grounds for detention and facts of the alleged offence.

The rise in the use of sureties and conditions of release is consistent with the notion that criminal justice professionals are reluctant to be the one to make the bail release decision out of fear they will be held accountable if the accused commits an offence while on bail. Previous research suggests this risk aversion and off-loading of responsibility has manifested in more people being detained by the police for a bail hearing, more releases being contested by the Crown and more stringent conditions being placed on those who are released, despite falling crime rates.[110]

We were interested in confirming these trends in Ontario and obtaining preliminary assessments of issues experienced in other provinces. Although some of the concerns raised are shared across multiple jurisdictions, there are significant differences that influence how accused are treated in the bail process. Three areas of concern are canvassed below: court administration and efficiency, conditions of release and the requirement of surety supervision.

Court administration and efficiency: Systemic administrative delay

Bail court observations tracked the use of court time and how each accused was processed. Across the country the observed bail courts opened for operation between 9:30 a.m. and 10:00 a.m. and closed for the day between 3:00 p.m. and 4:00 p.m. On average the courts were open for operation for five hours and 22 minutes; the remaining two hours and nine minutes were spent on recesses. There was, however, significant variability across the provinces: the courts observed in Yukon and Manitoba, for example, spent much less time on recesses than other jurisdictions.[111]

108 NM Myers & S Dhillon, "The Criminal Offence of Entering Any Shoppers Drug Mart in Ontario: Criminalizing Ordinary Behaviour with Youth Bail Conditions" (2013) 55:2 *Canadian Journal of Criminology and Criminal Justice* 187.

109 J Sprott & N Myers, "Set Up to Fail: The Unintended Consequences of Multiple Bail Conditions" (2011) 53:4 *Canadian Journal of Criminology and Criminal Justice* 404.

110 NM Myers, "Shifting Risk: Bail and the Use of Sureties" (2009) 21:1 *Current Issues in Criminal Justice* 127.

111 See Appendix B, Table 2.

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Across the country, only about half of the time the courts were officially open was used to actively address bail matters. The rest of the time was typically spent waiting for various things – for example, accused must be brought before the court, paperwork must be located. Again, there was significant variation across the jurisdictions: Nova Scotia actively used only 39.7% of its operational court time while Manitoba spent 73.4% of operational time actively addressing cases.

Assessments of court efficiency must also take into account whether cases are resolved or adjourned to another day. All courts observed adjourned a relatively high percentage of their cases, ranging from a low of 30.7% of cases in Manitoba to a high of 68.8% of cases in Yukon.[112] Consistent with previous research, most (70.4%) requests for an adjournment came from defence counsel or the accused. Some of these delays may be justifiable: lawyers may have no advanced notice of an appearance in bail court, and accused persons may want some time to prepare their case. Some interviewees, however, did relate instances of duty counsel refusing to hold show cause hearings as an apparent policy matter. Financial restraints, including significant cuts to legal aid systems, may also be pushing private defence counsel to adjourn clients until several legal aid matters are ready to proceed in the same courthouse on one day. There are also likely systemic factors at play, even in defence adjournments. Accused have difficulty consulting with counsel before court and are frequently required to put in place a plan of release that, in some jurisdictions, presumptively includes the in-court attendance of sureties. These and other systemic factors can significantly contribute to defence-requested adjournments.

In a further 9.5% of adjournment requests, the Crown asked for the adjournment and 6.7% came from the presiding justice. Crown and court-initiated adjournments suggest that the justice system is not ready to proceed with the bail hearing.

Adjournments, whether requested by defence counsel or the Crown, directly contribute to an increased pre-trial detention population. There is no automatic right of the Crown to delay bail proceedings. Rather, as Justice Trotter has noted,

> It must be stressed that "three clear days" is the outside limit on an adjournment without consent. Adjournments under s. 516 need not be contemplated in three day blocks of time. An adjournment should only be as long as is necessary in the circumstances. Just as the prosecutor must justify the need for an adjournment per se, the length of the adjournment (within the parameters of three clear days) must also be substantiated.[113]

112 The statistic for Manitoba may be artificially low due to the unique procedures in Winnipeg bail court. For details please see Appendices.

113 Gary T Trotter, *The Law of Bail in Canada*, 3d ed, loose-leaf (Toronto: Carswell, 2010) at 5–21.

With the exception of Yukon, close to a third of all adjournments were granted without any justification being provided to the court. Unjustifiable adjournments and those that are caused by systemic delays in the court system are unconstitutional. Crown, defence counsel and the judiciary all have an obligation to ensure adjournments are not being requested or granted simply out of habit, and that each request for an adjournment is necessary and fully justifiable in each individual case. It is within the discretion of the presiding justice to not grant an adjournment. Indeed, where it is found that an adjournment would violate s 516, or the accused's *Charter* rights, the justice should release the accused on an undertaking with no conditions.[114]

Recommendation 3.1: All justice participants should ensure only meaningful adjournments are requested.[115] Where it is found that an adjournment would violate s 516(1), or the accused's *Charter* rights, the justice should release the accused on an undertaking with no conditions.

Recommendation 3.2: All justice participants should state on the record who is requesting the adjournment and the reason for the request. Adjudicators should, where appropriate, question the necessity of the adjournment prior to granting or denying the request.

Recommendation 3.3: Governments should establish mechanisms to track the reasons for adjournments. Where adjournments are frequently requested in order to facilitate administrative needs (for example, to get access to a phone to contact potential sureties or gather court paperwork), initiatives should be explored to address the underlying causes of delay. This may help identify the specific resources and procedures that need to be put in place in a particular location to enable earlier bail decisions.[116]

Recommendation 3.4: All steps of the pre-trial process should facilitate the individual's release from custody as soon as possible. Procedures should be explored to allow defence counsel, including duty counsel, to speak to accused individuals before the first bail appearance (e.g., *Brydges* counsel)[117] to assist the accused in preparing for bail release. Phone access should be provided both in police custody and in court so accused may prepare for release by contacting potential sureties and retaining private counsel.

When reasons for the adjournment request were given, there were important and significant variations between the jurisdictions. Based on court observations and interviews with counsel, there are particular concerns with systemic delays in Ontario and Yukon. In Ontario, 20 accused – 12.7% of observed cases – were returned to custody because the court ran out of time to hold their bail hearing. In Yukon, a high percentage of cases were adjourned for court services and

Close to a third of all adjournments were granted without any justification being provided to the court.

114 For an example of this happening, see *R v Obed*, 2011 CanLII 50704 (NLPC).

115 See also the recommendation in *Re-inventing Criminal Justice: Final Report*, The Fourth National Criminal Justice Symposium (January 13/14, 2012).

116 *Ibid* (recommending "early access to the resources needed to implement release decisions [e.g., telephone access]").

117 *Brydges* counsel is the term used to refer to the 24-hour duty counsel telephone lines available to provide individuals with legal advice upon arrest or detention. According to a 2004 report surveying these services across Canada, "accused persons receive basic information concerning their legal rights, the structure and operation of the court process, the nature of the criminal investigation, and the important elements of their own cases. Most significantly, accused persons gain some rudimentary knowledge about the legal implications of the alleged offences and the desirability of giving statements to the police." Simon Verdun-Jones & Adamira Tijerino, *A Review of Brydges Duty Counsel Services in Canada* (Department of Justice Canada Research and Statistics Division, 2004) at 63.

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administrative processes. In both jurisdictions approximately 20% of adjournments were related to surety requirements. The situation in these two provinces is addressed in more detail below.

Ontario

Observations of systemic delay

During observational data collection, 20 accused – 12.7% of observed Ontario bail cases – had their bail hearing adjourned because the court ran out of time to hear any more matters. This is consistent with Myers' finding that 6.6% (n=132) of observed cases in Ontario were adjourned because the court ran out of time to adjudicate the accused's bail hearing.[118] Interviews with counsel in Ontario confirm these were not isolated or infrequent situations. Multiple defence counsel related instances where an accused was ready to proceed with a contested bail hearing, and sureties were present in the courtroom, but the justice of the peace refused to hear the matter because the court was out of time. As one defence counsel related,

> Often, contested bail hearings aren't reached and then go over 'til the next day. . . . That's with the surety coming every single day. . . . Justices of the peace have said in court that they will not run contested bail hearings after a certain time of the day.[119]

Another defence counsel spoke of significant delays scheduling contested bail hearings, stating if you can schedule a bail hearing for within a week, you are "doing pretty well"[120]:

> If you have a complex bail hearing, where you have more than one surety [or] where charges are fairly serious, you are not going to get a bail hearing within a day, three days, or even a week. . . . You quite often can wait several weeks to get a bail hearing. . . . Even if that client is released, there's not necessarily a remedy.[121]

Accused are faced with a difficult choice: agree to the conditions being offered by the Crown to secure a consent release today – even though the conditions may be inappropriate, overly restrictive or impossible to comply with – or wait in custody in an overcrowded jail to gamble on a contested bail hearing. If an accused does not agree to follow all of the conditions proposed by the Crown as part of a consent release, the accused faces the uncertainty of a bail hearing, where the justice may detain the accused or impose the same or more onerous conditions of release than was offered by the Crown. Immediate release is the primary goal, and accused will agree to almost anything to avoid returning to detention. Lengthy waits in custody for bail hearings may exacerbate this pressure.

118 Nicole M Myers, "Shifting Risk: Bail and the Use of Sureties" (2009) 21:1 *Current Issues in Criminal Justice* 127.
119 Defence counsel, Ontario.
120 Defence counsel, Toronto.
121 Defence counsel, Toronto.

Defence counsel in different regions also report that certain justices of the peace refuse to set the case aside until later in the day when defence or duty counsel is ready to proceed (commonly referred to as "holding a matter down"). This occurs even when counsel report that sureties will be arriving later that day to secure the person's release: "They absolutely will not hold any matter down – ever, for anybody, no matter what. . . . The justice of the peace will not hold matters down."[122]

A similar situation is noted by counsel working out of a different courthouse:

> That's the situation, where duty counsel isn't even able to go and speak to the person ahead of time to find out if they have a surety. . . . The first time they see them is in the court. I ask the matter to be held down to see if we can get a surety there, and the result is quite often that, with certain justices of the peace, they'll just adjourn the matter. They feel like there's a pressure to bring people down one after the other. They don't want to wait to allow lawyers to speak to the accused upstairs, [so] they just adjourn them until the next day. . . . Sometimes on occasions when things are running smoothly and there's a surety coming, there's one justice of the peace who won't hold the matter down even for that.[123]

Individuals must be given a meaningful opportunity to consult with counsel and arrange for sureties where necessary. Our courts should be facilitating this process by holding cases down if there is a chance they will be ready to proceed later in the day. It is the definition of arbitrary to send a person back to jail simply because certain justices of the peace do not want to hold down cases until a person can consult with counsel or a surety can arrive.

The type of court-imposed adjournment observed in Ontario is in clear violation of the *Charter* – a holding affirmed by higher courts on several occasions over a number of years. It is important to highlight that Ontario is the *only* province where researchers observed cases being adjourned because the court ran out of time.[124]

At some courthouses, defence counsel report that significant barriers to communicating with accused in the court holding cells can contribute to systemic delay. As described by one duty counsel,

> At College Park we have much less access to the people in custody – so you can wait up to 45 minutes to see someone, whereas at Old City Hall that would never happen. There are three interview rooms upstairs – but that's for everybody, all the people in custody – and so you often wait in line. The lawyers are there for trials, bail, sentencing – so three [interview rooms] is

Certain justices of the peace refuse to set the case aside until later in the day when defence or duty counsel is ready to proceed.

122 Defence counsel, Greater Toronto Area.
123 Defence counsel, Ontario.
124 In Nova Scotia one duty counsel specifically stated he thought they were doing better compared to Ontario: "remanding routinely for domestics, holding [in custody] routinely for drinking and driving, remanding because of limited court time – I've seen all those issues in Ontario and none of them are in play here. . . . We have a small little system so that if there's a drug bust of say 20 or so people, it overloads us for a few days, but we're keeping up."

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> not enough. There are interview rooms downstairs, but once court starts, everyone is brought upstairs except those who are considered separates [accused held in custody separate from other accused].[125]

In some courts, in-custody consultation areas are frequently closed, forcing duty counsel to speak to clients for the first time in the body of the court:

> Quite often, in St. Catharines, we're not able to speak with the accused people before court starts. And [when] they're brought down and when we do speak with them . . . there's not very much confidentiality, so that's a problem as well. . . . The explanation I've been given is that there's not enough room upstairs and very often . . . the prisoners just aren't there on time to begin court.[126]

Lack of interview space also prevents mental health workers from accessing clients. Ultimately, defence counsel's inability to access and speak with accused "means that the person often has to stay in jail because there was not enough time to contact a surety."[127]

History of systemic delay in Ontario bail courts

The continuing situation in Ontario merits particular attention, as a number of cases have recognized and condemned the systemic delays in the bail system. In the 2002 case *R v Villota*, the Peel Criminal Lawyers' Association filed affidavit evidence of the systemic delays faced in Peel Region bail courts. The evidence alleged that, "on a regular basis, show cause bail hearings are not reached on the date scheduled because of congestion in the bail courts and protracted judicial interim release hearings. Prospective sureties attend day after day."[128] The court at that time commented that,

> The routine adjournment of bail hearings other than at the request of the prosecutor or the accused (Code s. 516(1)), as "not reached" cases, is an entirely unacceptable threat to constitutional rights, a denial of access to justice, and an unnecessary cost to the court system. . . . There appears to be a widespread indifference to the injustice done to accused persons by reason of unnecessary incarceration pending arraignment.[129]

125 Duty counsel, Toronto.
126 Defence counsel, Ontario.
127 Defence counsel, Ontario.
128 *R v Villota*, 2002 CanLII 49650 (ON SC) at para 57.
129 *Ibid* para 67.

Similar problems were evidenced in the 2008 case *R v Jevons*.[130] The court found that, "[n]otwithstanding several appearances over a period of eight days, the Defendant remained in custody because the Court was too overburdened to do anything other than repeatedly remand him":[131]

> In this case, a 59-year-old man, with no criminal record, and a productive member of the community was arrested because of serious allegations made by another person. He spent eight days in custody, partly under lock down, without access to his daily medication, at much inconvenience to family and sureties, and the expense of counsel, because the Court was unable to hear his case. What occurred to the Defendant was not an aberration but the result of long-standing systemic problems. The Defendant feared he might never be released before trial. That fear was reasonable. What is not reasonable are the resources allocated for bail hearings in Durham Region.[132]

The court found the accused's s 11(*e*) *Charter* rights had been violated in a manner that constituted "an affront to the administration of justice and shocks the conscience of the community."[133]

Very similar facts arose in the 2010 case *R v Zarinchang*, where an accused waited 24 days in custody before being able to proceed with a bail hearing.[134] The Court of Appeal stressed the accused's experience in the bail process was indicative of a general trend:

> [T]he systemic problem of delay was recognized in York Region for some time – at least a year and no doubt for some time before the regional Crown Attorney found it necessary to appoint a committee to study the matter. The circumstances in which the respondent was placed were entirely predictable. The record demonstrates that many others were similarly affected.[135]

Justice Chisvin, who heard the application at first instance, found the breach of constitutional rights

> can only be described as serious and flagrant, those responsible have effectively ignored the impending reality and disaster that was afoot. Individuals have been allowed to languish in custody awaiting show cause hearings.[136]

The interviews and court observations make it clear these problems remain entrenched. Although the Ontario government's Justice on Target initiative[137] has recently released a report with recommendations for addressing delays in the bail system, it is not clear how these recommendations will be implemented.[138] Justice on Target has also been criticized for focusing on administrative and procedural

130 R *v Jevons*, 2008 ONCJ 559.
131 *Ibid* at para 40.
132 *Ibid* at para 35.
133 *Ibid* at para 40.
134 *R v Zarinchang*, 2010 ONCA 286.
135 *Ibid* at para 71.
136 *R v Zarinchang*, 2007 ONCJ 470 at para 49.
137 As described on Ontario's Ministry of the Attorney General's website, "Justice on Target (JOT) is the province's strategy to address criminal court delay, using an evidence-based approach to increase the effectiveness of Ontario's criminal courts." Ministry of the Attorney General, "Justice on Target", online: Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/jot/>.
138 Justice on Target, Ministry of the Attorney General, *Bail Experts Table Recommendations* (2013).
139 See for example Megan O'Toole, "Courting Disaster? The Long Wait for Justice in Ontario", *National Post* (9 June 2012) ("A veteran judge, speaking on condition of anonymity, said Justice on Target has ignored the larger problem of why certain cases are entering the system at all. 'The real problem, which all criminal-justice professionals know, is that it targets only surface targets, such as the number of appearances,' he said. 'What is not targeted, for political reasons, is the harder question of why we expect our criminal justice system to accomplish something which it is simply not designed to do – to 'solve' our social nuisances.'").

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technicalities rather than tackling more entrenched and substantive problems.[139] Indeed, the report explicitly states the recommendations are "focused on streamlining processes and enabling effective and efficient decision-making" rather than seeking to "restrict the exercise of discretion by justice participants."[140] Although the report addresses the appropriate exercise of police discretion, the exercise of Crown discretion is not mentioned. Given the long-standing, systemic nature of the issues, more emphasis on concrete action is necessary.

> **Recommendation 3.5:** The Ontario government must take immediate and concrete steps to end ongoing unconstitutional adjournments in bail court. As a starting point, policies should ensure that the courts have the resources to remain open until individuals who are ready to have their bail hearing have been addressed.

> **Recommendation 3.6:** Regularly refusing to hold cases down so as to allow for consultations with lawyers, case preparation and the attendance of sureties violates the right to be free from arbitrary detention. Cases that are not ready to proceed in the morning should be held down until later in the day rather than immediately adjourned to another day. All hold down requests that are intended to facilitate the timely release of the accused should be granted by the presiding justice. It should be presumed that all cases will be dealt with to the fullest extent possible each day.

Yukon

Adjournments also constituted a particularly high percentage of case dispositions in Yukon. Despite a small daily caseload, on average 68.6% of observed cases were adjourned to another day;[141] most (83.3%) adjournments were requested by defence counsel.[142] One explanation for the high number of adjournment requests may be that, as reported by a wide range of interviewees, accused who are not immediately released are routinely remanded for three days to allow a probation officer to complete a bail supervision report. As described by one interviewee:

> We do bail supervision reports for anybody who is kept in custody; the court will order a bail supervision report. . . . They are very time consuming and a huge concern for us. It wasn't so much of a concern when the orders were straightforward, [but] now we have very complicated orders put on bail, and sometimes it doesn't fit with what the actual allegation is that's before the court.[143]

Defence counsel with experience in multiple jurisdictions singled out these reports as a unique practice:

140 Justice on Target, Ministry of the Attorney General, *Bail Experts Table Recommendations* (2013) at 2.
141 See Appendix B, Table 4.
142 See Appendix B, Table 5.
143 Interviewee, Yukon.

> One of the differences in Yukon is that, in every serious case, the Crown will obtain a report prior to the bail hearing from a bail supervisor about a person's suitability for bail . . . a 'bail suitability report.' I think that benefits the Crown more than the defence. It's another layer of bureaucracy that seems to be extremely risk averse. Anybody in the chain who has to make a decision is going to err on the side of caution. The problem with erring on the side of caution is it inevitably leads to decision-makers detaining, as we have very poor models for predicting risk. And I think people forget the presumption of innocence in all of it.[144]

The observational data support the interview evidence that adjournments are primarily for administrative reasons; during observation, 29.2% of accused were adjourned in order to get court paperwork organized and a further 29.2% for a court service or administration. This means that 58.4% of individuals appearing before bail court were remanded in custody for administrative reasons.

Recommendation 3.7: Yukon government should examine the frequent practice of remanding individuals in order to obtain a bail supervision report from probation. The practice is costly for both accused and probation services.

Recommendation 3.8: Yukon justice system participants should consider whether regular adjournments for a bail supervision report are warranted.

Overreliance on sureties: A costly obsession

Across all the courts, the most common form of release, when the Crown consents to the accused's release, is on the accused's own recognizance (38.1%): an acknowledged indebtedness to the Crown and a promise to return to court and comply with any condition the court imposes. A release with surety supervision – a friend or family member who must agree to supervise the accused in the community and forfeit a specified sum of money if bail conditions are violated – was the next most common form of release at 30.6%. These generalized statistics, however, mask some striking regional differences.

Despite the fact that Canada has a single *Criminal Code*, there appear to be dramatic differences in the way bail releases are approached across jurisdictions. In British Columbia, Manitoba and Nova Scotia, the majority of accused were released on their own recognizance. During our court observations, neither British Columbia nor Manitoba courts required a surety for any accused; in Nova Scotia sureties were attached to only 25% of releases.[145]

There appear to be dramatic differences in the way bail releases are approached across jurisdictions.

144 Defence counsel, British Columbia.
145 See Appendix B, Table 13.

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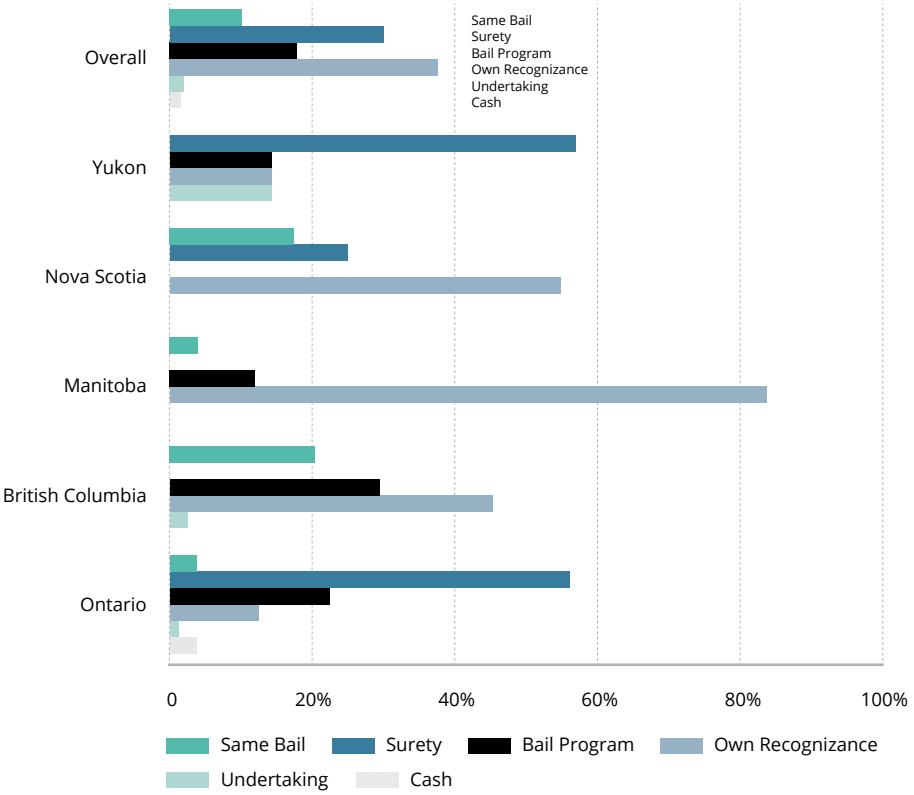
In contrast, in Ontario and Yukon the majority of individuals were released with a surety requirement. In Ontario, 53.1% of accused released with the consent of the Crown were required to have a surety supervise their bail.[146] An additional 21.9% of releases were with bail program supervision, a program that in Ontario is reserved for those who cannot find a surety and would otherwise be detained. Taken together, 75% of accused released by consent in Ontario were required to be under the supervision of a surety or a bail program. When an accused was released after a contested show cause hearing, 68.75% were required by the justice to have a surety. In total, over half of those released on bail were required to have a surety, and just under half of those were also required to reside with their surety.[147] Patterns in Yukon are similar: 57% of those released were required to have a surety, and 18% were released to bail program supervision.

Figure 6: Form of Bail Release Order[148]



146 See Appendix B, Table 10.

147 A residential surety is someone who agrees to supervise the accused (ensuring they return to court and do not commit any further offences) and have the accused reside with them until the resolution of the charges.

148 'Same bail' refers to accused being re-released on the same bail release order they were subject to at the time of arrest. In these circumstances the original form of release and any conditions attached to the bail order are not generally stated on the record.

The disproportionate reliance on sureties in Ontario aligns with previous research. Previous work found that of all the releases observed, both with the consent of the Crown and after a show cause hearing, 60.5% of accused were required to find an appropriate surety to supervise their release.[149] Indeed, the Ontario government's expert report on bail confirms "[i]t is common practice in Ontario to require an accused person who is being released on bail to provide a surety."[150] A recent report on bail in Ontario recommends the government "move away from reliance on sureties as a condition for consent release."[151] There is also judicial commentary disapproving of the overreliance on surety forms of release.[152] There is no evidence that this increased reliance on sureties results in greater compliance with bail conditions. Indeed, despite dramatic differences in the use of sureties in British Columbia and Ontario, the two provinces have almost identical charge and conviction rates for failing to comply with a bail order (see Figures 8 and 9).

There is no evidence that an increased reliance on sureties results in greater compliance with bail conditions.

Ontario interview participants raised serious concerns with Ontario's heavy reliance on sureties. Across the province counsel report, the Crown's default position is a surety is required for the accused to secure release:

> Very rarely do I ever see the Crown consenting to anything less than a surety bail. . . . A majority of the surety bails [set] are residential surety bails. . . . The "ladder" of bails as outlined in s. 515 is just completely non-existent.[153]

The situation at College Park courthouse in Toronto was described in similar terms:

> One main [concern] is the overreliance on sureties. Pretty much if you are arrested and brought into custody, the Crown is likely going to insist on a surety, regardless of the circumstances. We see people with no criminal records, no outstanding charges, 40 to 50 years old having to have a residential surety. And residential sureties are very common. That would most often happen in domestics. It seems that there is a lack of a conversation going on between the police and the Crown – so the police say, "we'll arrest them, bring them into custody and let the Crown sort it out." And then the Crown relies on the fact that the police brought the person into custody to say they should be in custody or [they] should have a surety. There's some issues in the Crown's office about risk aversion. And young Crowns – I don't blame them, they're not going to be supported, I don't think, by MAG [Ministry of the Attorney General] if something goes wrong, and their contracts won't be renewed and they're under a lot of pressure. But that said, it's become the absolute practice at College Park anyways. There are some people released on their own recognizance, or to bail program, but that seems few and far between, and many bail program hearings are contested.[154]

149 Nicole M Myers, "Shifting Risk: Bail and the Use of Sureties" (2009) 21:1 *Current Issues in Criminal Justice.*

150 Justice on Target, Ministry of the Attorney General, *Bail Experts Table Recommendations* (2013) at 22.

151 John Howard Society of Ontario, *Reasonable Bail?* (Toronto: John Howard Society of Ontario, 2013) at 9.

152 In *Canada v Horvath*, 2009 ONCA 732, the Court of Appeal cited Martin L Friedland, "Criminal Justice in Canada Revisited" (2004) 48 CLQ 419 expressing criticism of the overreliance on sureties in Ontario. See also *R v Cole*, [2002] OJ No 4662 (CJ) and *Shaw v Shaw*, 2008 ONCJ 130.

153 Defence counsel, Ontario.

154 Duty counsel, Toronto.

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Defence counsel across the province echoed these statements, with one confirming that "the vast majority of cases are requiring a surety"[155] and another stating, "I don't think I've ever had a case where the person was released on an appearance notice, never. . . . And I can only think of one case where someone was released on a summons."[156]

Requiring a surety for release has particular consequences for vulnerable or marginalized accused persons who might choose to be released to an abusive surety rather than remain in jail. One defence counsel indicated that she had particular concerns around young accused:

> I would argue [abusive or inappropriate sureties] are particularly an issue with children because they are often going back to homes where the parents are like, "now I have all these rules that I can play with," and it becomes almost abusive in that the parents repeatedly pull the bail.[157]

Another Ontario duty counsel commented that she had concerns that female accused "are putting themselves in potentially dangerous situations when the only surety available is one that is abusive, and then the surety has even more power in the already abusive relationship as they can threaten to pull the bail if the woman isn't compliant."[158]

Not only are sureties regularly presumed to be required for release in Ontario, but it has also "become a common practice to conduct an in-court examination of the proposed surety to determine suitability."[159] Previous research has found that in Ontario, over a quarter of sureties for consent releases were required to testify, a figure that rose to nearly 90% in show cause hearings.[160] These practices were confirmed by Ontario interviewees:

> So you often see in Toronto consent releases, or bails that turn into consents on minor matters, where a lot of court time is taken by having the surety testifying about the plan and is it really necessary. So 1) it takes a lot of court time and 2) it delays the process [because,] as a defence lawyer, you have to interview the surety . . . and it shouldn't be necessary. . . . That logistical step is time consuming. Certainly by making a surety sign a recognizance before the [justice of the peace], it's impressed upon them the seriousness of the consequences of a breach, and that should be sufficient [since] they're pledging significant amounts of money. . . . Why that has to be under oath is entirely unclear to me. . . . It's for the [justice of the peace] under the Criminal Code to determine surety suitability and they can ask the surety any que*stions in chambers*. . . . Doing that all in open court just ties up court time.[161]

155 Defence counsel, Ontario.
156 Defence counsel, Toronto.
157 Defence counsel, Ontario.
158 Duty counsel, Toronto.
159 Justice on Target, Ministry of the Attorney General, *Bail Experts Table Recommendations* (2013) at 22.
160 Nicole M Myers, "Shifting Risk: Bail and the Use of Sureties" (2009) 21:1 *Current Issues in Criminal Justice* 127.
161 Defence counsel, Toronto. Another Ontario defence counsel similarly stated that "in St. Catharines [the surety always has to testify]; rarely do they do it any other way."

Appellate decisions in Ontario clearly state there is no legal obligation for sureties to appear in court or formally testify, and a presumed insistence on in-person appearances can amount to a violation of the right to reasonable bail under the *Charter*.[162] Although it has been recognized that the Crown has the right to cross-examine a surety in some circumstances, this right is not absolute and must be assessed on a case-by-case basis.[163]

Research participants were consistent in their view that the near universal demand for a surety in Ontario is causing significant court delay. Appropriate sureties must be located with the help of the accused, who no longer has access to his or her cell phone to look up phone numbers, and in any case will frequently not be allowed to make calls until they are returned to the provincial jail. Defence counsel reported many accused only learn of the need to contact a surety once they arrive at court. It is up to duty counsel to make inquiries on the accused's behalf. Even if duty counsel can locate a willing surety, it is unlikely that he or she will be able attend court immediately. The consequence of this is the accused's bail hearing is adjourned and they are held in pre-trial custody until their surety can attend court to secure their release.

The court observation data support interviewees' perceptions that reliance on sureties increases adjournment requests. In Yukon and Ontario, a significant proportion of adjournment requests (where reasons were offered) were related to surety requirements – 19% and 20%, respectively. These types of requests were rare in other jurisdictions.

Several Ontario cases have also referenced the connection between restrictive Crown and court demands regarding sureties and chronic administrative delay. Justice Hill, for example, states in *R v Villota*:

> Restricting consideration of the sufficiency of sureties to the bail hearing stage inevitably lengthens bail hearings and compounds the congestion already existing in busy courts.[164]

Similarly, in R v Jevons the court was presented with evidence that

> [a] "major reason" for the delay [in regional bail courts] is the practice of the Crown, and the insistence of some Justices of the Peace, especially in cases of "domestic violence," to have potential sureties cross-examined even though the Crown consents to the release of the defendant.[165]

The court found "the practices of the Crown and some Justices of the Peace with respect to sureties" is contributing to the systemic delay in bail courts.[166]

Not only are sureties regularly presumed to be required for release in Ontario, but it has also "become a common practice to conduct an in-court examination of the proposed surety to determine suitability."

162 *R v Brooks*, (2001) 153 CCC (3d) 533 (ON SC) at para 35.
163 *R v Renaud*, 2010 ONSC 5300.
164 *R v Villota*, 2002 CanLII 49650 (ON SC) at para 81.
165 *R v Jevons*, 2008 ONCJ 559 at para 27.
166 *Ibid* at para 29.

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All court participants are implicated in the overuse of sureties. Defence counsel acknowledge they implicitly become "part of the problem by suggesting the [surety release] plan."[167] Indeed, in Ontario, where sureties are routinely presumed to be required for release, it appears defence counsel will come prepared with a surety to negotiate a consent release or to be examined during the bail hearing. Defence counsel consistently reported it is very hard to contest Crown requests for sureties. As explained by one defence counsel,

> it's very difficult to convince people to run a contested bail hearing when they know the Crown is consenting to a residential surety. . . . It implicitly allows the Crown to get away with asking for so much higher up the ladder than they should be asking for.[168]

The situation observed in Ontario departs markedly from the other provinces. Interviewees in other jurisdictions repeatedly stated sureties are reserved for more serious cases or when the accused has a record for failing to comply with a court order. When sureties are required the process is more informal, something interviewees indicate is preferable to the Ontario model. As one Manitoba counsel explained, "if people had to start calling evidence here and putting sureties on the stand, I think the system here would just crumble."[169] One British Columbia government representative with experience in both jurisdictions confirms sureties are used much less frequently compared to Ontario.[170] Even Manitoba and Nova Scotia defence counsel, who report sureties are used "a ton" or in "all sorts of cases" nonetheless reference more serious charges, multiple failures to comply and the ladder approach when asked under what circumstances sureties are required.[171]

> **Recommendation 4.1:** Ontario must develop and implement a concrete strategy for reducing delays in the bail system, including measures to address and reverse the province-wide overreliance on sureties.

> **Recommendation 4.2:** Ontario and Yukon's Crown Policy Manuals and training materials should be revised to emphasize the presumption of release and the ladder approach to the bail process. In Ontario, specific policy guidance and court procedures should be put in place to reverse the overreliance on sureties and the widespread practice of having sureties testify in court. As recommended by the Bail Experts Round Table, "witnesses should not be called in consent release matters, except in the rarest of circumstances. Relying on a 'read-in' of allegations and affidavit of surety (when a surety is necessary) should ordinarily be sufficient."[172]

167 Defence counsel, Toronto.
168 Defence counsel, Ontario.
169 Defence counsel, Manitoba.
170 Interview with British Columbia government representatives. A British Columbia defence counsel stated that "with serious offences [sureties are used] regularly [because] it's an effective way of getting a client released on a serious offence," but that they were usually not required for less serious cases.
171 Multiple defence counsel in Nova Scotia and Manitoba.
172 Justice on Target, Ministry of the Attorney General, *Bail Experts Table Recommendations* (2013) at 10.

Recommendation 4.3: Concrete measures should be taken to combat institutional risk aversion. We endorse the recommendation adopted by previous reports: "Senior levels of all relevant organizations (including the police, prosecution and the judiciary) should create an environment conducive to the appropriate exercise of discretion by providing greater public support, including in the media, for decision makers in the bail process."[173] Ontario's Crown Policy Manual and any associated training material should be edited to reflect the appropriate level of institutional support for individual decision-makers.

Recommendation 4.4: Experienced Crowns and duty counsel should be assigned to bail court. Rotating counsel should be avoided to promote workgroup consistency, encourage case ownership and preserve institutional knowledge.

Recommendation 4.5: Where appropriate, adjudicators should question the necessity and legality of requiring a surety in proposed consent releases. Given the systemic overuse of sureties in some jurisdictions, adjudicators should exercise their jurisdiction and decline to impose unnecessary surety requirements even in circumstances when Crown and defence counsel might agree to a surety requirement.

Sureties and Remote Communities

Surety requirements have a disproportional impact on accused from remote communities. Fly-in Aboriginal communities often experience widespread poverty, unemployment and substance abuse problems.[174] On Aboriginal reserves, few, if any, community members own property. This can be problematic as bail orders generally have a financial component. Indeed, across the observed courts, the amount of bail was set at a mean of $2,669 and a median of $1,000.[175] Finding a surety that is acceptable to the court under these circumstances is particularly difficult, as sureties are required to demonstrate sufficient assets to cover the amount of bail. Although Ontario has some bail programs that will supervise individuals who do not have an appropriate surety, the programs tend to operate out of larger centres where provincial courts are located. Furthermore, there are some suggestions that these programs, like sureties, can be required more often than is necessary.[176]

Interviews with counsel in northern Manitoba and Ontario also highlighted the significant prejudice caused by court procedures that require sureties from remote communities to fly in to appear in person before the court. In rural Manitoba, for example, individuals who are not released by the police or at their first bail appearance are flown to Thompson for processing. Even if a consent surety release is approved, sureties are required to complete the paperwork

173 *Re-inventing Criminal Justice: Final Report*, The Fourth National Criminal Justice Symposium (January 13/14, 2012); Justice on Target, Ministry of the Attorney General, *Bail Experts Table Recommendations* (2013) at 20.

174 The Supreme Court of Canada instructs courts to "take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples." *R v Ipeelee*, 2012 SCC 13 at para 60.

175 See Appendix B, Table 13.

176 A recent report on bail in Ontario, for example, found "many instances where clients under BVSP [Bail Verification and Supervision Program] supervision with minor criminal charges still lived with a parent . . . , were employed and/or in school or noted that they currently resided with other extended family." John Howard Society of Ontario, *Reasonable Bail?* (Toronto: John Howard Society of Ontario, 2013) at 8.

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in person before a court clerk. If the surety does not have the means to pay for a flight, they can wait until circuit court is in their community to complete the bail paperwork. The ability to fly in and out of these communities, however, depends on weather conditions. Indeed, it may be several months before the court is able to fly into the community. The difficulty is, until the bail paperwork is completed and signed by the surety, the accused remains in custody. This problem was recognized in the 2001 *Final Report* of the Manitoba Aboriginal Justice Inquiry:

> During the course of our Inquiry, we heard countless stories of the hardships that Aboriginal people encounter as they deal with a system which metes out justice on a monthly basis. Percy and Irene Okimow told of the frustrations they experienced following their daughter's arrest for discharging a firearm, break and enter, and mischief. Upon her arrest in God's River, their daughter was taken first to God's Lake Narrows for court, where she was denied bail, and then sent to Thompson. Her parents followed her to both communities, attempting to arrange for her release. In the space of a week, the family spent $1,200 on transportation and accommodation. Another youth who had been arrested at the same time, whose parents had not been able to travel to Thompson, was denied bail.[177]

Despite advances in technology and the ability to interview sureties remotely, there continue to be significant barriers to just and timely access to justice in remote communities.

Bail and Remote Communities

The facts of the case in *R v Tommie Atlookan* detail the delay in bail adjudication often experienced by accused from remote communities. Mr Atlookan was from Fort Hope, an isolated community 300 km north of Thunder Bay; in the summer his community could only be reached by airplane. He was arrested in Fort Hope on March 12, 2011 and flown to Thunder Bay to have his bail decided. He then spent over 90 days in custody, waiting for his bail decision:

- March 14: the accused appeared before a justice of the peace, the Crown objected to his release and the matter was put over one week for a bail hearing. An interpreter was requested to assist Mr Atlookan's mother, who was going to be proposed as a surety.
- March 21: the matter was adjourned as the mother "had been unable to raise the cash necessary for the flight to Thunder Bay."
- March 23: the matter was adjourned again – the mother still could not attend.
- April 1: the mother attended court, but the case could not proceed because there was no interpreter.

177 The Aboriginal Justice Implementation Commission, *Aboriginal Justice Implementation Commission: Final Report* (Winnipeg: June 2001), online: The Aboriginal Justice Implementation Commission <http://www.ajic.mb.ca/reports/final_ch06.html>.

- April 6: the mother could not be present because of financial limitations. The justice of the peace was asked to remand the accused to appear before a judge sitting in Fort Hope to set a "speedy trial date"; that request was denied as bail had not yet been settled.
- April 21: the accused was remanded for an August 24 trial in Fort Hope.

On August 17, 2011 there was a mandatory 90-day bail review. Since his trial was in a week, the judge refused to find systemic issues had contributed to his detention or release the accused.

One area of particular concern highlighted by Ontario bail program workers was the difficulties releasing youth from rural communities. Researchers were informed that even when a youth had been approved for release, this would not occur until a parent or guardian could travel to the base court. Although the youth's travel back to the home community would be paid for, parents had to buy their own plane tickets. It is unclear how frequently this occurs or how many youth could not be released because their parents could not afford to pick them up.

A similar situation appears in some rural communities in Ontario. Interviewees from one northern Ontario bail program report sureties from fly-in communities can complete the paperwork from their home communities by attending their local police detachment and conducting a remote interview with a justice of the peace.[178] A 2013 Ontario report on justice for fly-in communities, however, suggests this practice is not universal:

> The Working Group agreed that where an accused person must be flown out for his or her bail hearing, the added burden of having to get sureties to the base court for a bail hearing imposes a significant hardship. Technology could assist in this regard if arrangements could be made for the surety to appear in front of a justice of the peace presiding in a base court location by video or telephone from the surety's home community.[179]

Recommendation 4.6: The relevant recommendations of the Ontario Court of Justice and Ministry of the Attorney General Joint Fly-In Court Working Group should be adopted, including developing "a protocol for sureties to appear in front of a justice of the peace presiding in a base court location by video or telephone from their home community." The judiciary receive education "regarding ss. 515(2.2) and (2.3) of the *Criminal Code* and the various options to receive surety information, which include, but are not limited to, the standard bail surety affidavit form." Standard procedures should be adopted in courthouses that regularly serve remote communities to reinforce that requiring sureties to testify is the exception, rather than the default.

178 Bail program worker, Ontario.
179 Ontario Court of Justice and Ministry of the Attorney General, *Report on Fly-In Court Operations*, (Toronto: 2013), online: Ontario Court of Justice <http://www.ontariocourts.ca/ocj/files/reports/fly-in.pdf>.

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Perceptions regarding the quality of bail adjudication

The jurisdictions studied differed in the type of judicial officer who presided over bail matters. In British Columbia, Nova Scotia and Manitoba, provincial bail courts are presided over by provincial court judges. In Yukon bail matters are heard by a combination of judges and justices of the peace. In Ontario non-specialized provincial bail courts are presided over by justices of the peace.

Individuals who are appointed to serve as justices of the peace in Ontario generally do not have formal legal training.[180] Although both Ontario and Yukon highlight the importance of training and educating new justices of the peace, justices of the peace generally have less legal education than the lawyers appearing before them. In Ontario training consists of a nine-week intensive course covering a wide range of topics, including bail, mentoring and ongoing professional development;[181] in Yukon, there does not appear to be a formal education program.[182]

This study did not compare the quality of bail adjudication in different jurisdictions. It is therefore not possible, based on our research, to come to any firm conclusions regarding bail decisions made by justices of the peace relative to those issued by judges. Nevertheless, the interviews we conducted revealed a consistent concern about the quality of adjudication provided by justices of the peace. In our view, the existence of this perception, regardless of how closely it aligns with reality, threatens the proper administration of justice. For that reason, this is an issue that needs to be addressed if the bail courts are to operate, and be seen as operating, in a fair manner.

Counsel from both Yukon and Ontario repeatedly noted concern about the quality of bail decisions being made by some justices of the peace. Both lawyers and corrections personnel expressed frustration that the law of bail was not being applied appropriately:

> I often bring case law to bail hearings and go through it in a detailed way, lay out the grounds for detention. It [court] will adjourn for 15 minutes or an hour, and they [justices of the peace] come back, and there's some decision that's completely unrelated to the primary, secondary or tertiary grounds detaining your client. . . . The presumption of innocence isn't there; the decision isn't rationally connected to those grounds. . . . It's extremely frustrating that the decision that is perhaps the most important in the process is made by someone that very likely does not have any legal training.
>
> . . .

180 Ontario Courts, *Judicial Conduct: Justice of the Peace Education Plan* (April 2013), online: Ontario Court of Justice <http://www.ontariocourts.ca/ocj/jprc/education-plan/>.

181 *Ibid*.

182 The Judicial Council's web page states that the Council has "supported the supervising judge in his efforts to develop a formal training process for justices of the peace." Yukon Courts, *Judicial Council*, online: Yukon Courts <http://www.yukoncourts.ca/courts/territorial/judicialcouncil.html>.

> Bail hearings are conducted in front of justices of the peace who often don't have legal training . . . [and] who often don't apply the law. . . . [They] simply look at the allegations and make what often appears to be a fairly arbitrary decision about detention or release . . . and their decisions often do not reflect the presumption of innocence, so it'll be "you've done something terrible young man!" or something to that effect.[183]

Interview participants perceived significant differences in case outcomes between matters presided over by judges and justices of the peace. For one Ontario lawyer, the difference between a justice of the peace and a judge is illustrated in the outcomes of contested bail hearings in front of a justice of the peace, which he reported are "very, very rarely . . . successful," and bail reviews of the same cases in front of a judge just a few weeks later, which he rarely lost.[184]

Defence counsel believe the lack of legal training and confidence in decision-making leads some justices of the peace to defer to the Crown's interpretation of the law. As stated by one duty counsel:

> Many of the [justices of the peace] will just go with the Crown – there's a lot of deference to the Crown as opposed to the defence lawyers, and particularly duty counsel[, who] are not thought of as real lawyers by the JPs [justices of the peace]. . . . I find it shocking. Sometimes I'm saying this is what the [*Criminal*] *Code* says, it's right here, and there's a lot of deference to the Crown. And so in that sense, the Crown is guiding what is going on in the bail courts, because they have all of the control over all of the conditions of release. They have a lot of power that they're not really aware of. . . . [Unlike with plea bargaining,] with bail there's no negotiation; the Crown suggests conditions and the accused agrees to them and the JP [justice of the peace] says nothing and imposes them. That, to me, is responsible for the inanity of the bail system.[185]

Defence counsel report the Crowns' position on release changes depending on whether they are before a justice of the peace or a judge:

> I think sometimes – maybe just sub-consciously or not intentionally – I think the Crowns take advantage of the fact that it's justices of the peace as opposed to judges. What they ask for, if something were to get traversed to a judge, they all of a sudden don't ask for . . . or some of what they had originally been asking for gets dropped. On the face of it, it would appear that they know that what they're asking for is pretty unreasonable, and it would be more embarrassing to put that in front of a judge, . . . but they don't seem to have the same concerns in front of justices of the peace.[186]

Interview participants perceived significant differences in case outcomes between matters presided over by judges and justices of the peace.

183 Defence counsel, Toronto.
184 Defence counsel, Toronto.
185 Duty counsel, Toronto.
186 Duty counsel, Toronto.

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Similarly, another defence lawyer states:

> I think the Crowns have an expectation of what the judge's position will be and know that it's going to be difficult in many cases in the Superior Court of Justice to justify the individual's detention. . . . Whereas if you're at 2201 [the court at 2201 Finch Avenue in Toronto], or at some of the other courthouses, and you're before a [justice of the peace], the Crowns know that it [detention] is fairly likely. . . . I think the bench has a significant influence on the Crowns.[187]

Given pressures on defence counsel to accept the release conditions proposed by the Crown to secure a bail release on consent, it is important that judicial officers are firmly independent and knowledgeable about the law and its application.

> **Recommendation 5.1:** Given the fundamental importance of bail decisions, conditions of release and the high possibility for constitutional rights violations in the bail process, justices of the peace should be required to have further specialized training prior to adjudicating bail matters.

> **Recommendation 5.2:** Chief justices should establish programs to monitor and evaluate the quality of adjudication provided by justices of the peace. Where necessary, bail adjudication should be reallocated to judges.

Conditions of release: Setting people up to fail

The majority of conditions attached to release orders, even strict and onerous conditions, are imposed with the consent of the accused. Interviewees nevertheless brought up concerns about the imposition of inappropriate or overly restrictive conditions of release. Defence counsel explain individuals readily agree to very restrictive conditions in order to avoid more time in pre-trial detention:

> A person might agree to [certain conditions] rather than remain another day, or even another half a day, in custody. Unfortunately, it's kind of the nature of the beast; I think that's very commonplace. And so in order to get out, or to get out sooner, people agree to conditions with the intention of trying to do something about them later – whether they do or not.[188]

187 Defence counsel, Toronto.
188 Defence counsel, Nova Scotia.

Some also report difficulty challenging overly restrictive conditions in the first instance bail hearing:

> Your first objective is to get them out of jail as quickly as possible, particularly if it's someone who hasn't been through the system before. These are violent places – the Don Jail, the West [Detention Centre] in Toronto, [or] any of the remand centres – so your objective is to get them out of there as quickly as possible. So typically they're being held for a bail hearing, [and] the Crown will say, "well, what's your plan?" And if the Crown and you disagree about the conditions, then you need to have a contested bail hearing. It is extremely unlikely that you would be able to have a contested bail hearing on that first day . . . so if you wanted to have that fight, you'd have to put it over. The Crown's position might then be, "we're going to seek their detention." But even if the Crown said, "nope, we're prepared to release them, but it's going to be house arrest," your client's going to wait several days in that remand centre to have that bail hearing.[189]

The chance of having bail denied altogether pushes both defence lawyers and accused to accept the release plan the Crown consents to. Defence counsel report they very rarely insist on a contested bail hearing over a few conditions, preferring to secure their client's release and hope they can comply and, if necessary, bring a bail review or bail variation at a later date.[190] This, however, means the accused has to live with overly restrictive conditions until some indeterminate point in the future and bear the cost of bringing an additional legal application.

Several specific themes around conditions of release emerged from the interviews. First, there was a general view that too many conditions are being imposed, and the conditions are often unrelated to the underlying offence or the purposes of bail. Interview subjects are also concerned about accused with addictions being ordered to abstain absolutely – a condition many feel simply sets people up for failure, further criminal charges and increased detention. Conditions requiring individuals to seek or attend medical treatment or addictions counselling, while used regularly in a few jurisdictions, are viewed as inappropriate at the bail stage by other provincial governments. Moreover, while some feel that a court-imposed order is useful in helping people access needed services or to achieve temporary stability, many participants acknowledge that if a person does not voluntarily attend treatment, a court order will not help the situation. These themes are explored in more detail below.

The chance of having bail denied altogether pushes both defence lawyers and accused to accept the release plan proposed by the Crown.

189 Defence counsel, Toronto.
190 Duty counsel, Toronto; defence counsel, Manitoba.

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Overuse of bail conditions

> Conditions [are] a huge issue. . . . The terms are crazy. I remember when I first went there, I was dizzy in court. There might have been a client with FASD [Fetal Alcohol Spectrum Disorder] and they were, like, reading out the 20 terms and they're like, "do you understand, sir?" and I was like, "I couldn't follow that" – like actually it was too confusing. Their bails, if you've seen them, are huge and everyone is on an abstain. Everyone is on an abstain – it doesn't matter. I know sometimes for the secondary grounds, it's arguable, but everyone's on it. . . . People were, until very recently, all consenting to the 'blow on demand'. . . . There's house arrests when I wouldn't think that would be necessary.
>
> – Yukon interviewee

> The other thing that's very difficult to explain to a client – especially if the client has read the bail provisions of the *Criminal Code* – is that the way bail is supposed to work is that the Crown is supposed to justify any conditions beyond releasing an accused on their own recognizance. But when you're in a contested bail hearing, a good result is that your client [will] be released on very strict conditions (say, house arrest). So for whatever reason, even if the Crown's decision to oppose bail is completely arbitrary – and there's no way, of course, to review that – your client is looking at best at a very restrictive curfew [or] a surety bail with a significant recognizance for that individual. [They are] very restrictive extensive conditions – if not house arrest, a curfew – where the way the bail system is supposed to work is you're supposed to climb the ladder upwards, not downwards.
>
> – Toronto defence counsel

The majority of research participants identified the number and type of conditions imposed as a primary concern with the bail process. Court observations confirm that it is common for multiple conditions to be imposed. Across the courts a mean of 7.1 or a median of 6.5 conditions of release were imposed on accused. Yukon is an outlier, routinely imposing close to twice as many release conditions compared to the other jurisdictions (a mean of 12.71 and a median of 13). There was also significant variation between individual cases, as the courts imposed a low of 1 and a high of 34 conditions on the bail order. Of the 172 observed released in which the number of conditions imposed was known, no one person was released without any conditions.[191] This is consistent with other academic work on provincial bail courts in Quebec and British Columbia, where the authors concluded that individuals who are detained by police are almost never released unconditionally by bail courts, and that judicial actors simply assume

191 In total 196 releases were observed; the number of conditions imposed is unknown in 23 cases.

192 Marie-Eve Sylvestre et al, "Liberté d'expression et de réunion pacifique et tactiques judiciares de contrôle des espaces publics", *Conférence Enjeux émergents en droit public* (22 May 2014).

that if individuals are held for a bail appearance, it is because the police decided it was not reasonable to release them.[192]

Court observations confirm a wide variety of conditions are routinely imposed. Courts frequently imposed conditions prohibiting weapons possession (45.9%), not to attend at particular addresses (usually the address of the alleged offence) (30.2%), not to enter a boundary around an address or person (40.1%) and not to contact any victim or witness (51.2%). Looking across all jurisdictions, it is clear the courts are also concerned about where accused will live when they are released on bail. Most accused (69.2%) were required to either reside with their surety (26.2%) or at an address approved by their surety or the bail program (43%); 44.2% of accused were required to report their residential address to the police.

In nearly half of all observed cases (43%), the accused was required to keep the peace and be of good behaviour, and in a quarter of cases, accused were required to be amenable to the rules and discipline of the home (25.6%). Finally, close to a third of all accused released on bail were required to attend treatment or counselling (28.5%); abide by a curfew (23.8%); not purchase, possess or consume drugs (25%) or alcohol (27.3%); and/or report to a program (27.2%).

Research suggests that the more conditions accused are subject to and the longer they are required to comply with conditions, the more likely they are to accumulate charges of failing to comply with a court order.[193] Many interviewees expressed the opinion that individuals are subject to too many conditions:

> I think they're probably over-conditioned; I think people are put on too many conditions. I think there's some judges that would actually agree with that. [Are the conditions tied to the secondary or primary grounds?] No, not necessarily – as much as it shouldn't be punitive, I think they [the conditions] are.[194]

There was also a general perception that standard sets of conditions are being requested by the Crown, regardless of the circumstances of the accused:

> The conditions [imposed] are usually very standard. And frankly, in the last few years that I've been doing it, in bail court anyhow, I've been seeing the creeping in of more and more conditions that are usually [for] things that, before, I had the ability to maybe persuade the judge that we don't want – and now even the more liberal judges are imposing them as a matter of course.[195]

Despite the legal presumption of unconditional release, out of 196 bail releases observed, not a single person was released without restrictive conditions.

193 J Sprott & N Myers, "Set Up to Fail: The Unintended Consequences of Multiple Bail Conditions" (2011) 53:4 *Canadian Journal of Criminology and Criminal Justice* 404.
194 Defence counsel, Manitoba.
195 Defence counsel, Ontario.

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Questions were also raised as to whether the conditions being imposed are really warranted in light of the underlying charges:

> There's conditions like "don't ride the TTC [Toronto Transit Commission]," curfews, house arrest on simple charges that I don't think warrant house arrest, boundary conditions. We don't see a lot of [conditions ordering people] not to possess cell phones, but that happens in almost every single drug case.[196]

The perception that individuals are subject to too many conditions is supported by other research. Previous reports raise concerns that bail supervision programs, designed to reduce remand populations by providing supervision for individuals who would otherwise be detained, are being relied on for the supervision of low-risk clients who could reasonably be released on their own recognizance. A recent report on bail in Ontario, for example, found "many instances where clients under BVSP [Bail Verification and Supervision Program] supervision with minor criminal charges still lived with a parent[,] . . . were employed and/or in school or noted that they currently resided with other extended family."[197] Moreover, despite the prevalence of low-risk supervision, all clients are subject to conditions above and beyond the usual requirements to "keep the peace and be of good behaviour" (a problematic condition in itself, since good behaviour is in the eyes of the beholder) and "report to the bail verification and supervision program." Numerous examples were identified where conditions were unrelated to the purposes of bail and seemed to focus on "character modification or improvement."[198] The report recommends realigning Crown policy to ensure there is a true presumption of unsupervised release for low-risk individuals and reserving bail program supervision for cases that are facing probable detention.[199]

> **Recommendation 6.1:** Crown policy manuals should be revised to emphasize the presumption of unsupervised release for low-risk accused.

> **Recommendation 6.2:** Bail program supervision should be reserved for cases that are facing probable detention; referrals to bail supervision should not be routine. Regular reviews of bail program cases should be conducted to ensure the purpose of bail programs – to increase releases – is not being subverted by imposing unnecessarily strict conditions and supervision. Bail supervision manuals should be revised to explicitly state that bail supervision is not suitable for individuals who can be released on their own recognizance, and standard bail supervision forms should allow bail program workers to suggest that an individual is not suitable for bail program supervision for this reason. Bail supervision manuals should also be revised to clearly reflect the statutory presumption of unconditional release and minimal supervision

196 Duty counsel, Toronto.
197 John Howard Society of Ontario, *Reasonable Bail?* (Toronto: John Howard Society of Ontario, 2013) at 8.
198 *Ibid* at 11–12.
199 *Ibid* at 9.

> within the bail program. Standard checklists of conditions attached to bail supervision programs should be avoided, and conditions should only be recommended by bail programs where they are necessary to meet the statutory requirements for release. In order to ensure that bail supervision programs are reserved for those who would otherwise face probable detention, bail supervision manuals should specify that individuals with a history of failure to comply charges are, in general, appropriate supervision candidates. Although concerns about public safety may make an individual an inappropriate candidate for bail supervision, a history of failure to comply alone should not prevent an individual from participating in a bail supervision program.

Professionals in Yukon seemed particularly concerned about the issue of overly intrusive and restrictive conditions, reporting additional restrictions are being imposed based on previous individual knowledge of the accused and his or her background. Interviewees note the small size of the community plays a role in increasing the likelihood that conditions are imposed:

> One of the factors [leading to the overuse of bail conditions] is that this is a small community. The offenders in the territory are very well known. They tend to be repeat offenders, and I think that . . . because people know the offenders and know what some of their underlying problems are and what some of their past behaviours have been, they try and use or create bail conditions based on that knowledge rather than on the charges and the *Criminal Code*. . . . It's like Mr Smith has committed a new theft under or something, [and] because they know that he's an alcoholic – because they know that he does this, that and the other thing – they impose conditions based on that knowledge rather than on the risk that he actually presents with respect to the *Criminal Code* and the conditions for bail.[200]

Interview participants in Yukon also expressed concern about the practice of imposing a long list of very strict conditions and then giving discretion to the bail supervisor to allow for exceptions where warranted. It is understandable why the courts and prosecutors may view this as an attractive option, as it essentially downloads the responsibility for crafting conditions and assessing the risk posed by the accused to probation officers. The courts must impose reasonable conditions that are tailored to the accused's circumstances. Although it may be useful to provide mechanisms to allow exceptions to bail conditions outside a formal bail review process, this flexibility should not operate to increase the number or restrictiveness of conditions imposed by the courts.

Counsel across all jurisdictions report conditions are frequently imposed that have little or no connection to the underlying offence and are of questionable relation to bail concerns of ensuring the accused returns to court, does not

Conditions are frequently imposed that have little or no connection to the underlying offence and are of questionable relation to bail concerns.

200 Interviewee, Yukon.

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threaten public safety by committing further offences and does not interfere with the administration of justice. Curfews, for example, are regularly imposed regardless of the time or nature of the offence.[201] In one case, a justice of the peace required a youth bail order to include "a condition that at all music on personal music devices [has] to be vetted by the surety for inappropriate music. . . . The justice of the peace said in her decision that there is a clear link between violence and rap music."[202]

Ongoing research is also highlighting the way in which broad, overlapping or variable bail conditions can combine to result in highly restrictive, and at times unconstitutional, legal prohibitions.[203] Standard bail conditions can significantly impair basic constitutional and statutory rights, including mobility rights; the right to life, liberty and security of the person; the right to equality; the right to dignity; and certain social and economic rights protected by the Quebec *Charter*.[204] These conditions have particularly dramatic impacts on marginalized individuals, who may find themselves legally prohibited from accessing the basic welfare services they need in order to survive as a result of overlapping, stringent restrictions on location, contact and movement.[205]

Bail conditions may also have significant impacts on freedom of expression, association and democratic participation, in particular for individuals arrested during major Canadian demonstrations. Recent work identifies numerous problematic bail conditions, with interviewees reporting bail conditions fundamentally interfered with their personal and professional lives, impacting relationships with their families and friends and causing job loss and economic insecurity, marginalization and physical and mental health problems.[206] Conditions prohibiting demonstration, communication or association, and geographical exclusion orders, had a particularly devastating impact on individuals' participation in democratic life and political activism.

Any restriction on an accused's liberty while he or she is on bail must be reasonable.[207] The *Criminal Code* and the *Charter* require bail conditions be directed towards concerns on the primary or secondary grounds that may have otherwise provided a basis for the accused's detention.[208] Bail conditions are not remedial, they cannot be used to enhance the rehabilitation of the accused and they must be related to the circumstances of the offence. Restrictive bail conditions are likely experienced by accused as punishment. Imposing conditions unrelated to the purposes of bail is unconstitutional and takes the process further towards punishment and behaviour modification rather than the legally permissible purposes of conditions of release.

Indeed, imposing unconstitutional, arbitrary or unrelated bail conditions brings the administration of justice into disrepute. In *R v DA*[209] the Ontario Superior

201 Defence counsel, Ontario; defence counsel, Manitoba; defence counsel, Nova Scotia.
202 Defence counsel, Ontario.
203 Marie-Eve Sylvestre, Dominique Bernier & Céline Bellot, "Zone Restrictions Orders in Canadian Courts and the Reproduction of Socio-Economic Inequality" (2014) 4:4 *Onati Socio-Legal Series*, forthcoming; Marie-Eve Sylvestre et al, "Liberté d'expression et de réunion pacifique et tactiques judiciaires de contrôle des espaces publics", *Conférence Enjeux émergents en droit public* (22 May 2014).
204 Marie-Eve Sylvestre et al, "Liberté d'expression et de réunion pacifique et tactiques judiciaires de contrôle des espaces publics", *Conférence Enjeux émergents en droit public* (22 May 2014).
205 Marie-Eve Sylvestre, Dominique Bernier & Céline Bellot, "Zone Restrictions Orders in Canadian Courts and the Reproduction of Socio-Economic Inequality", (2014) 4:4 *Onati Socio-Legal Series*, forthcoming; Marie-Eve Sylvestre et al, "Spatial Tactics in Criminal Courts: The Legal Geography of Conditions of Release" (forthcoming).
206 Marie-Eve Sylvestre et al, "Liberté d'expression et de réunion pacifique et tactiques judiciaires de contrôle des espaces publics", *Conférence Enjeux émergents en droit public* (22 May 2014).
207 *R v Anoussis*, 2008 QCCQ 8100, 242 CCC (3d) at para 23.
208 *Re Keenan and the Queen* (1979), 57 CCC (2d) 267, 12 CR (3d) 135 (Que CA).
209 *R v DA*, [2014] ONCS 2166.

Court upheld the decision of a justice of the peace who refused to release the accused on the conditions jointly proposed by the Crown and Defence Counsel, and instead released the accused without conditions. The Court ruled that the extensive joint conditions proposed by counsel would have been unlawful and brought the administration of justice into disrepute as they were not related to a purpose which would otherwise justify the accused's detention and were overly broad when viewed in relation to the known allegations. As stated by Justice Sonsa:

> the terms imposed on bail release must have a related purpose which justifies their imposition. Without a purpose, the terms are unreasonable and thus arbitrary. Imposing unreasonable or arbitrary terms would bring the administration of justice into disrepute.[210]

The Court also ruled that the proposed terms, and in particular the requirement to sign all releases allowing a Children's Aid Society worker to fully communicate the charges and ongoing proceedings to the youth's college, violated the accused's privacy and risked ostracizing him while he is presumed innocent. Finally, the proposed terms also risked violating the accused's rights under s 11(*d*) of the *Charter*:

> Read as a whole, the suggested joint conditions are akin to conditions often imposed . . . after convictions. . . . Under Section 11(d) of the *Charter*, the respondent has the right to be presumed innocent until proven guilty. Imposing bail release conditions that are virtually identical to terms a court may impose under Section 161(1) after conviction for the prescribed offences are release terms that are both punitive and violate of the respondent's *Charter* rights.[211]

Rejecting joint submissions regarding bail release conditions should not be done lightly. Where, however, the proposed conditions are unlawful, unconstitutional and punitive, judges and justices of the peace should exercise their powers to reject such proposals.

Finally, as described above, bail conditions may also be unconstitutional by virtue of the impact they have on other *Charter* rights, including freedom of expression and association, equality, and the right to life, liberty and security of the person. Unfortunately, however, constitutional rights are rarely, if ever, raised as relevant in the course of a bail decision. In fact, a forthcoming study that interviewed a wide variety of court actors, including judges and prosecutors, found that all interviewees expressed surprise when researchers raised the possibility that bail conditions impact fundamental rights.[212] Only two interviewees noted a connection between a condition not to demonstrate and freedom of expression and peaceful assembly, and both were of the view that such restrictions would be justified under s 1 of the *Charter*.

The more conditions accused are subject to and the longer they are required to comply with conditions, the more likely they are to accumulate charges of failing to comply with a court order.

210 *Ibid*.
211 *Ibid*.
212 Marie-Eve Sylvestre et al, "Liberté d'expression et de réunion pacifique et tactiques judiciares de contrôle des espaces publics", *Conférence Enjeux émergents en droit public* (22 May 2014).

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Recommendation 6.3: Bail conditions must be clearly related to the purposes of the bail system and the specific facts of the case.

Recommendation 6.4: Bail courts must be more attuned to the ways in which bail conditions – in particular, no-contact orders, curfews and movement restrictions or zone exclusion orders – can fundamentally and unjustifiably impair a wide range of constitutional rights.

Recommendation 6.5: Judges and justices of the peace should use their authority to reject a joint submission on bail release conditions where the proposed terms of release are either unlawful or would bring the administration of justice into disrepute. Proposed conditions that are unrelated to the purpose of bail are unreasonable and arbitrary, and bring the administration of justice into disrepute.

Recommendation 6.6: For those jurisdictions where inappropriate, unlawful or unconstitutional bail conditions are frequently imposed, a purposive, targeted, rapid bail review procedure should be implemented to ensure timely access to effective review of conditions by a judge who can offer remedies, establish precedents and stimulate improved decision-making at first instance. Defence representation for these purposes should be funded by legal aid or targeted provincial/territorial funds.

Even where conditions may be nominally related to the facts of the case and the purposes of bail, they should be utilized only when absolutely necessary; the law requires that conditions of release, like incarceration, be imposed with restraint. Conditions related to ensuring the accused appears for a court date should not be imposed where other administrative methods would likely be effective.

Moreover, in our view, many courts are taking too broad an interpretation of the secondary grounds. The Supreme Court premised the constitutionality of this bail provision on a narrow interpretation of when detention is justified:

> I am satisfied that the scope of the public safety component of s. 515(10)(b) is sufficiently narrow to satisfy the first requirement under s. 11(e). Bail is not denied for all individuals who pose a risk of committing an offence or interfering with the administration of justice while on bail. Bail is denied only for those who pose a "substantial likelihood" of committing an offence or interfering with the administration of justice, and only where this "substantial likelihood" endangers "the protection or safety of the public." Moreover, detention is justified only when it is "necessary" for public safety. It is not justified where detention would merely be convenient or advantageous.[213]

213 *R v Morales*, [1992] 3 SCR 711 at 737, 77 CCC (3d) 91.

214 It appears that simple reminders to those charged with criminal offences, combined with educational material about the consequences of failing to appear for court, can significantly reduce the rate of failures to appear. See David I Rosenbaum et al, "Court Date Reminder Cards" (2012) 95:4 *Judicature* 177.

215 The case law is not clear what behaviour will constitute a breach of the condition to keep the peace and be of good behaviour. Some courts have indicated that the behaviour must breach a substantive law: *R v Grey* (1993), 19 CR (4th) 363

Not every potential *Criminal Code* offence or bail condition violation will engage public safety – particularly if this phrase is taken at face value to primarily refer to the physical safety of others. The fact that an individual has, in the past, violated bail conditions does not necessarily make a person a threat to public safety.

Recommendation 6.7: Conditions of release must be imposed with significant restraint. Where appropriate, adjudicators should question the necessity and legality of the conditions proposed in consent releases. When necessary, adjudicators should exercise their jurisdiction and decline to impose unnecessary conditions.

Recommendation 6.8: Conditions related to ensuring the accused appears for court should not be imposed where other administrative methods – such as a phone call to remind the person of an upcoming appearance – are likely to be effective.[214]

Recommendation 6.9: Conditions relating to the secondary grounds should be reserved for cases where the underlying offence is a violent one with ongoing risk to public safety, or the circumstances give rise to specific concerns regarding future violent acts. Non-violent accused should not be placed under strict bail conditions justified on the grounds of public safety.

Many regularly imposed bail conditions are vague, making it difficult for accused to comply and putting a significant amount of discretion in the hands of sureties and the police. The requirement to "keep the peace and be of good behaviour" or "be amenable to the rules and discipline of the home" can ostensibly encompass a wide range of behaviours. An accused person is unlikely to know what behaviours will contravene these conditions,[215] and both restrictions are unlikely to be related to the offences before the court or the enumerated grounds for detention.[216] Overly broad or vague criminal provisions violate s 7 of the *Charter*.[217] Courts have found that conditions such as "be amenable to the rules of the house" and other similarly vague directions are unconstitutional.[218] Individuals will often not have the means to challenge these conditions independently, and courts have ruled that many conditions may not be legally challenged at trial due to the rule against collateral attack on judicial orders.[219] The condition to "keep the peace and be of good behaviour" must be very narrowly interpreted in order to withstand *Charter* scrutiny such that it largely applies to acts already prohibited by law.[220]

From a policy perspective, these conditions download court responsibility to craft reasonable bail restrictions onto sureties, who may then make their own rules the accused has to comply with, or to the police who assess what constitutes a breach of the peace. Surety-controlled conditions create particularly dangerous

(Ont Ct (Prov Div)) and *R v D(R)*, [1999] NJ No 228, 138 CCC (3d) 405 (CA). Others have found a breach where no substantive law was contravened: *R v Stone* (1985) 22 CCC (3d) 249 (Nfld CA); *R v Jefferson*, 2012 NSPC 3; *R v S(S)*, [1999] NJ No 230, 138 CCC (3d) 430 (CA). Being charged with breaching the bail condition to "keep the peace and be of good behaviour" can trigger the reverse onus provisions in s 515(6)(*c*) as well as potentially result in a revocation of bail under s 524. As a result, a charge for breach of this term can have serious consequences. In *R v S(S)*, a youth was convicted of a breach of this probation condition as a result of his disruptive behaviour in his classroom at school. In *R v Grey*, "substantive law" was defined as a contravention of a federal, criminal, provincial, or municipal law. On a literal reading, this would encompass behaviour such as jay walking. The notion that these kinds of behaviours could lead to breach charges, and could result in a reverse onus, s 524 bail proceeding where an accused would be at risk of being detained pending trial, raises constitutional concerns.

216 "Keep the peace and be of good behaviour" was not imposed as a condition of bail for this reason in *R v K(S)*, [1998] SJ No 863 (Prov Ct) and *R v B(AD)*, 2009 SKPC 120. See also Justice Gary T Trotter, *The Law of Bail in Canada*, 3d ed (loose-leaf) (Toronto: Carswell, 2010) at 6–41.

217 *R v Levkovic*, 2013 SCC 25.

218 *R v CCH*, [1994] NSJ No 334 (NS Fam Ct); *R v D (JA)*, 1999 SKQB 262; *R v F(A)* (1990), 74 OR (2d) 107.

219 See, for example, *R v Reed* (1994), 91 CCC (3d) 481 (BCCA); *R v Lee*, 1999 CanLII 2341 (ON CA). The rule applies even where the challenge to the validity of a court order takes on a constitutional flavor: *R v Domm* (1996), 111 CCC (3d) 449 (Ont CA) at 458 (leave to appeal refused [1997] SCCA No 78 (QL)).

220 *R v R (D)*, 1999 CanLII 13903 (NL CA).

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situations for youth and women in abusive relationships who may name an abusive partner or parent as surety simply to be released from detention.

> **Recommendation 6.10:** The requirements to "keep the peace and be of good behaviour" or "be amenable to the rules and discipline of the home" are constitutionally questionable, open to abuse, of limited legal utility and frequently immune from challenge at the prosecution stage. They should not be imposed.

Abstain conditions

> Abstinence clauses – not to drink alcohol: well, the reason he's been arrested is because he was intoxicated because he's an alcoholic. Those kinds of conditions, the guy, he's going to breach right away.
>
> – British Columbia defence counsel

> I don't think they [the courts] are sensitive to that [imposing abstention conditions where the accused is an alcoholic], and sometimes they do say they are, but they usually aren't. I do see that as a problem, especially the no drinking one. . . . Even if the drinking is rationally connected to the allegations, they're still innocent until proven guilty, and furthermore, they probably have an issue with booze. It's just setting them up for breaches.
>
> – Halifax defence counsel

In-court observations, as well as interviews with justice system participants, reveal that bail release orders frequently require individuals to abstain from consuming drugs, alcohol or both. Across all courts, a quarter of releases required the accused to not purchase, possess or consume any non-medically prescribed drugs, and 27.3% of releases required accused to abstain absolutely from the purchase, possession or consumption of alcohol. These conditions were most commonly required in Manitoba (40.9% for drugs, 45.5% for alcohol), Nova Scotia (45.2% for drugs, 45.2% for alcohol) and Yukon (71.4% for drugs, 85.7% for alcohol). Manitoba and Yukon also commonly imposed the condition that accused are not to enter any establishment whose primary source of revenue is generated through the sale of alcohol (22.7% and 71.4%, respectively).

In Ontario, close to 20% of releases included a condition prohibiting alcohol consumption. A 2013 report on Ontario's bail system found that a large number of abstention conditions were imposed on bail program releases. Over 80% of clients who reported ongoing problems with alcohol were released on a condition that they not consume alcohol.[221] Similarly, over 81% of accused who reported drug use problems were specifically required to abstain from consuming drugs while on bail.[222]

221 John Howard Society of Ontario, *Reasonable Bail?* (Toronto: John Howard Society of Ontario, 2013) at 12.
222 *Ibid.*

Interviewees raised particular concerns about accused with addictions being ordered to abstain absolutely – a condition many felt set people up for failure. Researchers were told that abstention conditions are almost automatically imposed when the allegations are in any way related to alcohol,[223] and many Crowns and judges will not modify the conditions even if a person suffers from alcohol or addiction problems. According to one Ontario study, the imposition of abstention conditions is positively correlated with subsequent breaches.[224] For individuals with substance addictions, abstinence conditions often do little more than set the person up for a subsequent breach charge, more pre-trial detention and a longer criminal record.

In Yukon, abstinence conditions are placed on individuals regardless of whether the underlying charge is connected to alcohol. One defence counsel's strong assertion that "everyone is on an abstain" regardless of the nature of the alleged conduct was supported by others working in the Yukon bail system:

> For me . . . putting any condition on a bail like that [alcohol abstention] . . . is not appropriate because the person is innocent. We are [also] putting conditions that are not connected to the allegations before the court.[225]

Interview subjects from other jurisdictions reported the courts are sometimes sensitive to problems that arise from imposing abstinence conditions on addicts, and craft more tailored conditions that allow a person to continue drinking inside their house or drink as long as they are not in contact with specific people.[226] The response, however, ultimately depends on which Crown or judge is assigned to the case:

> [Whether the jurist is sensitive to abstinence conditions] all depends on the judge, to be honest with you – it really does, and I think it depends on the judge . . . and it depends on the prosecutor. . . . A lot of prosecutors out here are about 23 years of age with no life experience; they know nothing about human behaviour except their own middle-class existence. I'm hugely over-generalizing here, but there's a significant number of people who don't know anything about addictions, or the cycle of addictions, all those kinds of things; that takes life experience, and a lot of them don't have it.[227]

While interview subjects recognized abstention conditions present problems, there was also acknowledgment that some individuals really do present a danger when intoxicated. At times, the choice an individual will face is either to be released with an abstention condition or to remain in detention. Participants agree these are difficult cases, and there is no clear consensus as to how to deal with this group of addicted individuals who are facing pre-trial detention.

"Ordering an alcoholic not to drink is tantamount to ordering the clinically depressed to "just cheer up." This type of condition has been characterized by some courts (at least in the context of a probation order) as "not entirely realistic." . . . It has been found to have set the accused up for failure."
– R v Omeasoo, 2013 ABPC 328

223 Duty counsel, Toronto ("Oftentimes when the allegations have anything to do with alcohol, the Crown is asking for an absolute abstention condition. They would ask for it for an alcoholic or a non-alcoholic. That's something that's not so much a blanket imposition. Some justices have different views on it; there's some conflicting case law on it.")
224 John Howard Society of Ontario, *Reasonable Bail?* (Toronto: John Howard Society of Ontario, 2013) at 12.
225 Interviewee, Yukon.
226 Duty counsel, Nova Scotia.
227 Defence counsel, British Columbia; defence counsel, Manitoba.

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A recent Alberta case, *R v Omeasoo*,[228] addresses police-imposed abstinence conditions for those with alcohol addictions. The court found that while "[t]here are circumstances where individuals can be expected to comply with bail conditions merely because they are pronounced by a person in authority and will result in penal sanctions if breached," this is "seldom the case with alcoholics subjected to abstention clauses."[229] The court continues:

> Ordering an alcoholic not to drink is tantamount to ordering the clinically depressed to "just cheer up." This type of condition has been characterized by some courts (at least in the context of a probation order) as "not entirely realistic." . . . It has been found to have set the accused up for failure.[230]

The court urges that, where an accused may be an alcoholic, a police officer who is releasing a person must consider "(i) whether the detainee is reasonably capable of complying with an 'abstinence clause'; (ii) if so, under what circumstances; and (iii) whether those circumstances are themselves reasonable."[231] The court cautions police officers to be "wary of the detainee's *pro forma* agreement to abide by an abstinence clause (whether realistic or wholly unrealistic) simply to secure his or her immediate release from custody."[232] The judge also notes that "[t]he absence of an abstention clause from an order for judicial interim release does not place the community in any greater danger than release of an offender on an undertaking with an abstention clause that (s)he will not comply with."[233] The difference, however, is that an abstention clause in a bail order puts the alcoholic suspect in the position of becoming a criminal if he or she has a drink.

The John Howard Society of Ontario recommends a moratorium on all abstinence conditions. There is significant merit to this position. The court is not in a position to assess addiction status at the bail stage, nor is it capable of determining whether there is a link between drinking and committing criminal acts. Accused are often unwilling to admit to substance abuse issues – particularly if required to do so on the record, in open court, when there are pending charges against them. Against the threat of further detention, individuals often feel pressure to agree to any condition the Crown requests, regardless of whether they believe they can comply. Imposing a condition that an individual cannot comply with violates the *Charter* and provides no benefit to public safety, the bail system or the administration of justice. Overall, it is our belief that the prejudice caused by abstinence conditions far outweighs any benefit obtained.

At a minimum, the approach in *R v Omeasoo* should be adapted to inform the imposition of abstention conditions by courts. At the bail stage, the Crown, defence counsel, justices of the peace and judges must turn their minds to whether an individual is an alcoholic. Not all abstention conditions will be

228 *R v Omeasoo*, 2013 ABPC 328.
229 *Ibid* at para 37.
230 *Ibid* at para 37.
231 *Ibid* at para 40.
232 *Ibid* at para 40.
233 *Ibid* at para 39.

unreasonable; such an order may be appropriate if alcohol is, with this accused, related to the offence and the accused is not suffering from alcoholism or can comply with a more narrowly tailored condition (e.g., no public consumption of alcohol). Given the prevalence of addictions issues, however, Crown counsel should not ask for these conditions as a matter of routine. Consent releases containing abstinence conditions should be critically examined by the presiding judicial officer, and declarations from the accused that they have no addictions issues, or are capable of complying with abstention orders, need not be accepted at face value. Where there is serious concern for public safety, and no other alternative measure ameliorates these concerns, detention may be justified. However, when the courts are satisfied to release a person with an abstention condition, knowing it almost certainly will not be followed, they should also be satisfied to release that person without the unrealistic condition attached.

> **Recommendation 6.11:** Given the prevalence of addictions, the difficulties accused persons will have openly admitting to addictions and the low likelihood of abstention conditions contributing to public safety or the administration of justice, there should be a moratorium on abstention conditions at the bail stage.

Treatment conditions

> Persons released on bail have not undergone a trial determining guilt; therefore interventions do not include requirements for risk assessment, programming or treatment.
>
> – British Columbia government[234]

> Almost every single bail, both male and female, [includes conditions around counselling and treatment]. There's bails where you have to attend at your doctor's within seven days of your release and sign any [medical] releases. . . . And there's this one – "take any medical treatment and don't discontinue without your doctor's express permission" – which is crazy . . .
>
> – Ontario duty counsel[235]

Interviews revealed that conditions requiring individuals to seek or attend medical treatment or addictions counselling, while used regularly in a few jurisdictions, are viewed as inappropriate at the bail stage by other jurisdictions. These views are supported by the court observation data. Treatment conditions at the bail stage appear to be largely an Ontario phenomenon, with 57.3% of all observed releases requiring accused to attend treatment or counselling. Treatment conditions were rarely directly imposed in British Columbia and Manitoba and

Conditions requiring individuals to seek or attend medical treatment or addictions counselling, while used regularly in a few jurisdictions, are viewed as inappropriate at the bail stage by other jurisdictions.

234 British Columbia Corrections, "Remand and Bail Supervision in British Columbia", Powerpoint presentation to authors (30 September 2013).
235 Duty counsel, Toronto.

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were never imposed in Nova Scotia or Yukon. That said, a significant proportion of accused in British Columbia (54.1%), Manitoba (22.7%) and Yukon (100%) were required to report to a bail program within a specified period of time; treatment requirements could conceivably be imposed in the course of bail supervision. British Columbia is the only jurisdiction that appears to have a clear policy against imposing treatment conditions at the bail stage.[236]

These patterns were reflected in interviewees' views on the appropriateness of treatment conditions. In British Columbia, for example, correctional staff reported individuals on bail do not generally have treatment conditions imposed, as they have not yet been convicted.[237] A probation officer supervising a person on bail might identify drug or alcohol issues and attempt to connect a person with the appropriate community services; however, court-mandated treatment is reserved for sentenced offenders. Similarly, counsel in Nova Scotia indicate treatment conditions are "more a probationary condition as opposed to a bail condition"[238] and are reserved for times "when defence is desperate and where going into a treatment program with both the structure and supervision that the programs involve sort of replaces the need for a stable place of residence and a surety."[239]

Interviewees from Ontario, in contrast, state alcohol, drug and medical treatment conditions are regularly imposed at the bail stage. One defence counsel reported "concerns about conditions like 'go to a family doctor within 24 hours of release . . . and sign releases to the surety' [so the surety can monitor the accused's treatment progress]" but found it hard to contest these conditions when the Crown insisted their consent to the accused's release was contingent on their imposition.[240] Similarly, counsel from Manitoba felt that a treatment condition is

> a condition that's over-imposed. It'll be like, "oh, alcohol was associated with the offence. Okay, we're going to put him on an abstain – go to AFM [Addictions Foundation Manitoba], take the first available appointment, take any and all counselling as recommended" – before there's even been a finding of guilt.[241]

Nonetheless, at times it may be that the accused's only other option is detention. One defence counsel describes these scenarios, where

> there's some kind of serious issue going on, and you know there's no way a judge is going to let them out without the comfort of knowing there's some kind of intervention going on, especially where it's a borderline case where you think, "hmm, maybe this is the kind of client that needs to go into a residential program." I mean, there's just been such a history of alleged re-involvement; there's a record, but you don't want the client waiting for four or five months in custody for a residential treatment program . . . so it kind of is that middle ground between no conditions or a lengthier detention.[242]

236 British Columbia Corrections, "Remand and Bail Supervision in British Columbia", Powerpoint presentation to authors (30 September 2013).
237 Government representative, British Columbia.
238 Defence counsel, Halifax.
239 Duty counsel, Nova Scotia.
240 Defence counsel, Ontario.
241 Defence counsel, Manitoba.
242 Defence counsel, Manitoba.

Recommendation 6.12: Conditions requiring accused to access medical treatment or take medications are unconstitutional and should not be imposed.[243]

Conditions to seek substance abuse treatment are arguably less coercive, but nonetheless raise similar concerns and should generally be reserved for sentencing once guilt has been determined. While some interviewees felt court-imposed substance abuse treatment orders help people access needed services, many acknowledged that if a person does not voluntarily attend treatment, a court order will not help the situation. Like abstinence conditions, treatment conditions can present difficulties at the bail stage, as the court is generally not in a position to assess addiction status, and requiring an accused to admit to addiction in court may undermine the right to silence and prejudice their case. Since accused often feel pressure to agree to abide by any conditions the Crown requests instead of facing further detention, they may agree to conditions they are unable to comply with. Interviewees also recounted cases where clients experienced minor setbacks while attending court-mandated treatment services and this resulted in further criminal charges and their detention, even when on the whole the person was doing well and was still engaged in the treatment process. Although it may be desirable to encourage an accused to access treatment, wherever possible, courts should avoid criminalizing the failure to seek treatment or the setbacks that commonly occur during the recovery process.

Since accused often feel pressure to agree to abide by any conditions the Crown requests instead of facing further detention, they may agree to conditions they are unable to comply with.

Recommendation 6.13: Substance abuse treatment conditions are coercive and should not be imposed at the bail stage absent exceptional circumstances.

Recommendation 6.14: Governments should study the claimed benefits of bail-related treatment conditions and the relative utility of providing access to community-based treatment options without making it a formal bail condition.

4.3 The Revolving Door of Pre-trial Detention: Breach of Conditions

> Most of the [breaches] I've seen in my practice are pretty trivial ones – so there's a curfew and someone's an hour late, or there's a no drugs or alcohol [condition] and they've got an addiction issue and there's a relapse. . . . So the secondary ground relates to, you know, is this person a threat to society or are they going to interfere with the administration of justice? And quite frankly, I can't think of a situation in my practice where someone's either been released and breached, or has come to me with a breach where they had actually done something to interfere with the administration of justice, or where they've done something dangerous. The breaches that you do see tend to be trivial.
>
> – Ontario defence counsel

243 *R v Rogers* [1990], 61 CCC (3d) 481 (BCCA); *Fleming v Reid* [1991], 4 OR (3d) 74 (ONCA).

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> We are denying too many people bail for breaching court orders when the conditions themselves probably never should have been imposed in the first place. Everybody gets revoked bail if they breach in Manitoba. There's a Crown policy that everyone is to be revoked, and the law in the *Criminal Code* is that a person "shall" be revoked. . . . Even for the silliest breaches, people find themselves in custody because Manitoba is taking a zero tolerance approach towards breaching bail conditions.
>
> . . .
>
> We're also taking a hammer approach rather than a blanket approach to putting people out on bail. What I mean by that is we have people with all kinds of issues, we don't offer a whole lot of support, we don't correct the issues or identify the issues when we release them – we just expect them to change overnight because we gave them a piece of paper and we hammer them when they don't respect that piece of paper . . .
>
> – Manitoba defence counsel

> The cost to the justice system – with the increase in administration of justice charges and processes, clogging up the jails, clogging up the courts and all of that – is a huge burden. I have no idea what this bail phenomenon results in in terms of costs to the taxpayer, but I bet it's significant.
>
> . . .
>
> I have seen people with criminal records that go back years and years and years, and the majority of that is breach charges . . . because of the bail conditions. . . . It's a ridiculous phenomenon where someone's charged with a relatively minor charge and continues to breach and breach and breach so that they're incarcerated, and then they get in trouble in jail, and it's like this downward spiral for them where, if they had been dealt with in a reasonable manner in the first place, their criminal record would have shown one charge and it's dealt with and it's over. I just think it's an awful situation.
>
> – Interviewee, Yukon

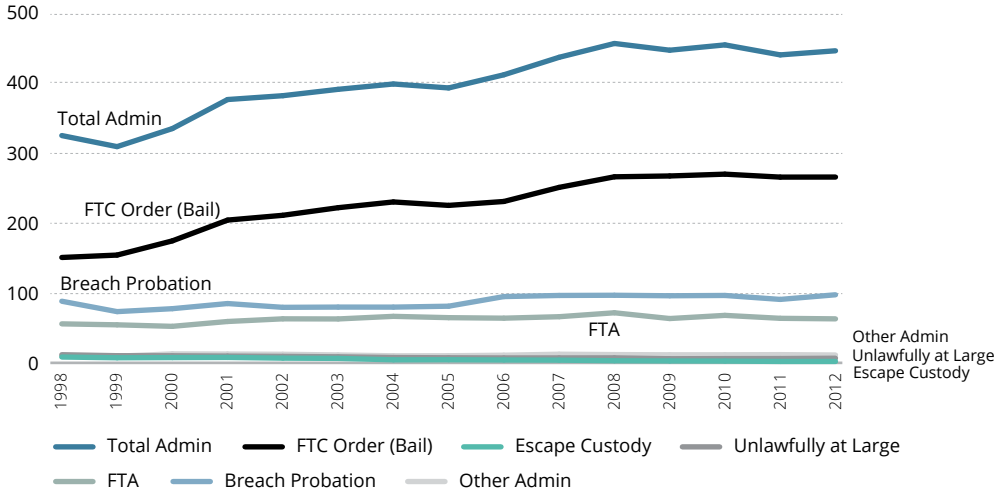
Those who breach a bail condition can be charged with the criminal offence of "failure to comply with a court order." Statistics show Canadian courts are being inundated with a large number these charges. Between 2006 and 2012, the number of charges of failing to comply with a bail order increased from 131,841 to 167,291 – an increase of 27%.[244] As depicted in Figure 7 below, the charge rate for administration of justice offences has generally been increasing (see

244 Statistics Canada, CANSIM Table 252–0053.

'Total admin'); however, this increase is largely driven by increases in charges of failing to comply with a (bail) order (see 'FTC order [bail]'). This increase in failure to comply charges has significant implications for the bail system because, once there is a failure to comply charge, the Crown no longer has to prove why a specific individual should be detained; instead, the accused has to demonstrate why he or she should be released into the community again. As explained by one defence counsel, "once you've been breached, of course getting bail that second time, or if you're ever charged again, it doesn't matter what the nature of the breach is. It is extremely difficult because you're labelled as someone who breached."[245]

Between 2006 and 2012, the number of charges of failing to comply with a bail order increased 27%.

Figure 7: Administration of Justice Charges in Canada, Rate per 100,000 Residents (Over the Age of 12), 1998–2012[246]



245 Defence counsel, Toronto.
246 Statistics Canada, CANSIM Table 252–0051.

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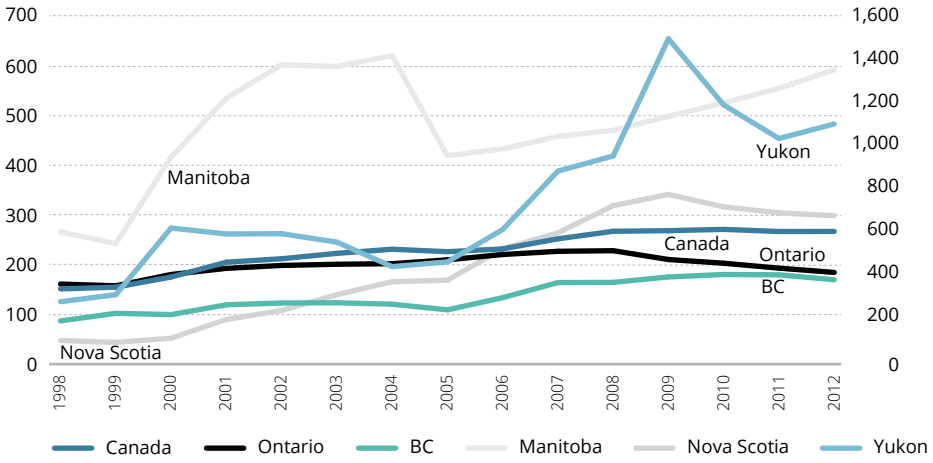
Figure 8 below depicts the charge rate per 100,000 residents for each of the jurisdictions. While all jurisdictions show an overall increase in the rate of charges for this offence, there were large differences in the size of the increase as well as the overall prevalence of these charges. In 2012, for example, British Columbia laid 169 charges per 100,000 residents and Yukon laid 1,099 charges per 100,000 residents.[247]

Figure 8: Charges of Failing to Comply with a (Bail) Order, Rate per 100,000 Residents (Over the Age of 12), 1998–2012*

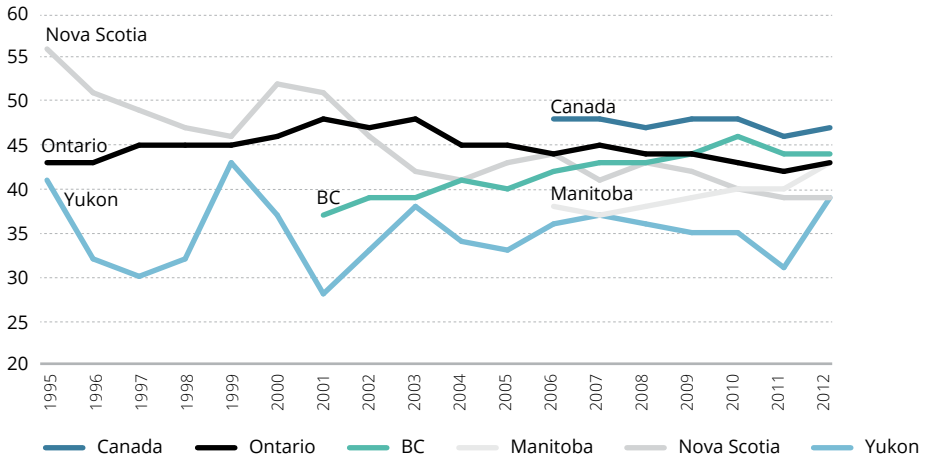


* Note: Yukon uses the scale on the right.

The rate of conviction for charges of failing to comply with a bail order has remained relatively stable across time and jurisdiction. While there clearly is some variability, in 2012 the jurisdictions ranged from a low of 39% in Nova Scotia and Yukon to a high of 47% for Canada as a whole. This means less than half of charges of failing to comply with a bail order result in a conviction for the offence.[248]

247 Statistics Canada, CANSIM Table 252–0051.
248 Statistics Canada, CANSIM Table 252–0053.

Figure 9: Percentage of Charges of Failing to Comply with a Finding of Guilt, 1995–2012



The amount of court resources expended processing charges of failure to comply is concerning. Bail conditions generally criminalize behaviour that is not otherwise prohibited under the *Criminal Code*. Failing to comply with a condition of bail is taken seriously by the court, as it may be seen as demonstrating a disrespect for the court's authority or a threat to public safety. Interviewees, however, suggest that in the vast majority of cases, the targeted conduct – curfew breaches, abstention violations, failure to reside at a required address, and no-contact violations pursuant to a minor underlying charge – is not in itself a crime and does not reflect a risk to public safety. This was emphasized by a defence counsel recounting the following example:

> I remember one accused person in particular who, on his entire record – he was about 38 to 39 [and] he'd been in and out of the system since he was about 16 or 17 – he had no substantive convictions on his record. His record was six to seven pages long, he had probably 25–30 convictions – not one was substantive. There were no substantive offences that he'd been convicted for. But every time he got arrested and there'd either been a discharge, or he was acquitted, or the charges were stayed, he would get three or four breaches in between. The man had substance abuse problems, and when you give somebody with a chemical addiction an abstain condition . . . and when the police know these people, because it's the same people getting picked up all the time, the police are going to look for the guy, find him of course drunk because that's what he does . . . he ends up getting three convictions for breaching his bail, landing in jail for a couple of weeks at a time. The man's never actually been convicted of what I would call an actual offence. I mean, obviously breaching court orders is serious, but there has to be some kind of balance and I don't think we have it.[249]

Bail conditions generally criminalize behaviour that is not otherwise prohibited under the Criminal Code.

249 Defence counsel, Manitoba.

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Not all countries criminalize failure to comply with court-ordered conditions in the bail process. There are numerous common law jurisdictions that do not have criminal provisions directed at such conduct, and instead use other methods to supervise and enforce compliance with bail conditions.[250]

> **Recommendation 7.1:** The government should study whether decriminalizing failure to comply with bail conditions would have any negative impact on the justice system or public safety. If criminalization is maintained, a more narrow provision targeting public safety risks may be sufficient.

The reverse onus provisions in the *Criminal Code* require an accused to demonstrate why he or she should be re-released on bail when they are facing a charge of failing to comply with previous release conditions. While all of the reverse onus provisions are, in our view, problematic, reversing the onus on allegations of failing to comply is of particular concern. The reverse onus provision legally reinforces the cycle of increasingly restrictive release conditions, accumulation of more breach charges and ultimately further pre-trial detention. In light of the non-criminal nature of the conduct underlying administration of justice charges and the justice system participants' perceptions that most breach conduct presents no threat to public safety, there is little justification for the reverse onus provisions. The reverse onus provisions on any drug trafficking offence – no matter how small the amount or minor the offence – is also a disproportionate burden to place on accused in light of the potentially wide range of underlying offences.

> **Recommendation 7.2:** The reverse onus bail provisions in ss 515(6)(*c*) and (*d*) of the *Criminal Code* should be repealed.

British Columbia

Of the jurisdictions studied, British Columbia had the lowest charge and conviction rate for failing to comply with a bail order.[251] Defence counsel from British Columbia reported breaches of bail conditions are dealt with "with an increasing level of enlightenment":

> At one point 60% of charges in BC were what we describe as administrative offences, breaches of court orders. [Now] it depends on the nature of the accused: if the conditions are in place because the person's been shown to be a prolific offender – so he's breaking into cars all the time, he's shoplifting all the time, and the police have identified 20 or 30 people like that in Vancouver, 20 or 30 people like that in Victoria – then I would say that the breaches are dealt with very quickly because the police or probation officers

250 A summary of several common law jurisdictions is provided in Northern Ireland Law Commission, *Consultation Paper: Bail in Criminal Proceedings* (2010) at 100–102, online: Northern Ireland Law Commission <http://www.nilawcommission.gov.uk/nilc7__2010__consultation_paper_bail_in_criminal_proceedings.pdf>.

251 Statistics Canada, CANSIM Table 252–0053.

> recognize that they're breaching their conditions probably because of re-offending. But in other cases, probation officers are showing a significant degree of discretion; and then in BC you see the charges are done by the Crown, [providing] that extra level of discretion, and I would say by and large prosecutors show quite a degree of discretion.[252]

Ontario

Ontario also has a relatively low and stable rate of failure to comply charges and convictions. The provincial Bail Verification and Supervision Program policy gives individual bail programs considerable discretion to determine when failures to comply will be reported as breaches. Various Ontario bail supervision interviewees affirmed there was flexibility with regards to reporting breaches. Two bail programs stated missed appointments do not automatically result in breach reports and, after the first missed appointment, the individual is sent a reminder letter. Multiple missed appointments or a failure to reside at the required location generally resulted in a breach report and a subsequent charge. Practices in other areas of non-compliance varied between different programs. One bail program professional could not think of a time a client had been reported for breach of an abstinence condition. Another bail program interviewee explained the process in her jurisdiction as follows:

> Where it can be a little bit more of a grey area can be . . . the alcohol condition. You know, if they come in here and they maybe [are] under the influence, I can report that to an officer. And then if I were to say to them, . . . he is in . . . under the influence, but what we're working on is trying to get him into this program. At that point they'll just monitor it and won't do anything . . .
>
> . . .
>
> And then the issue with the school thing – it's looking, I think, at the grand scheme of things. Is this something where you really want to have a breach – someone . . . not attending school . . .
>
> . . .
>
> If we have information, like especially in domestic assault cases, we won't put in a formal report, but we will contact the investigating officer if we have any information that the accused has [had] contact with the victim or anything like that, so that we notify them right away and they take it from there.[253]

252 Defence counsel, British Columbia.
253 Bail supervision program interviewee, Ontario.

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Nova Scotia

Yukon, Manitoba and Nova Scotia all have relatively high, and rising, rates of failure to comply charges and convictions. In Nova Scotia counsel report individuals are frequently charged with breaching their bail conditions. One lawyer said that while some of his clients would say a specific police officer had "overlooked" a breach, in his opinion that would be "pretty rare."[254] Another lawyer echoes these sentiments:

> Unfortunately [people are brought in on breaches of their bail] very frequently. The local police created a few years ago a breach squad, so that they go out on shifts and all they do is they go around and check compliance with things like curfew, house arrest – the whole shift, it's what they do. . . . It is a large use of resources and there was no specific incident that prompted it. I guess they philosophically think there's too much bail.[255]

Yukon

Yukon has, by far, the highest rate of failure to comply charges and convictions of the jurisdictions studied. Researchers were told probation officers are using a significant amount of discretion when deciding what behaviour is reported as a breach. The RCMP, however, reportedly take a much stricter approach. As related by one interviewee:

> Our policy states that if it's something like the person hasn't come in and you know they're not engaging in any of the high-risk behaviours, like breaching the no-contact order in a domestic violence case, then it's just up to the bail supervisor. . . . When it's things like the person didn't show up but now they've shown up again, then discretion is with the bail supervisor. When it comes down to things that put individuals or the public at risk, then it's a conversation with me and it's noted in their case notes as to why or why not. Curfew breaches are the same thing.
>
> The RCMP do the curfew check and a lot of our bails have that on it, so the bail supervisor will have a conversation with the individual to find out why. Sometimes it's because the individual has been sleeping and they can prove that, or it's been that the person has been working and we forgot to tell the RCMP. So we're able to not breach all the time if we feel that there are circumstances surrounding it that could actually mitigate that. We had one individual who was living in a home and he had a curfew and it started to get volatile, so he left. He left a message for us, which we didn't get 'til the next day. The RCMP tried to breach him and when the RCMP found out about this message then there wasn't a breach done. Normally, it would have been a breach automatically, but we're trying to be careful to do it so

254 Defence counsel, Nova Scotia.
255 Duty counsel, Nova Scotia.

> that it's something that is really needed. . . . But the counter to that is that we get back to the issue that it's a small town, and the RCMP will breach. We try to exercise discretion and do so wisely, but the RCMP have a different orientation than we do.[256]

Participants from Yukon also consistently highlighted the clear connection drawn between mental health and addictions issues, strict bail conditions and charges for failure to comply:

> I can tell you one thing [that is contributing to the rise in the remand population]: it's the breach of conditions. There's no doubt in my mind that that is absolutely correlated, particularly here. When you have somebody with 19 conditions that has a mental health problem or is FASD [Fetal Alcohol Spectrum Disorder], they're not going to meet them. It's a set-up to fail. They breach them and they put them in jail.[257]

Participants highlighted the clear connection between mental health and addictions issues, strict bail conditions and charges for failure to comply.

Similar comments are made by another interviewee, who focuses on the impact of releasing alcoholics on abstention conditions with no social or housing support:

> We also have chronic alcoholics who have never been sober. And we put on an abstain and be sober clause – [it's] guaranteed that person is going to go through withdrawal, but they're also going to drink again 'cause it's [abstaining] not something they even want to do. . . . If we're making a decision for an adult that we're going to put you in the community, not going to give you any support, not going to give you the housing, and say, "don't hang around with all the people you hang around with who drink," that's a set-up for failure because they're going to breach.[258]

Manitoba

The situation in Manitoba also merits particular attention. In contrast to the discretion exercised by bail supervision programs across the country, all interview participants from Winnipeg report there is zero tolerance towards any breach of conditions. Government officials confirm all breaches are automatically reported to the police, but were unable to explain the rationale for this policy or how long it has been in place. The result is that a single missed appointment after months of perfect attendance or one late arrival automatically leads to criminal charges:

> If you miss appointments with your probation officer, even though it's there to assist you with your rehabilitation, you're breached and a lot of times you go to jail for missing appointments with your probation officer. As opposed to saying, "what we're going to do is we are going to charge you, but we're

256 Interviewee, Yukon.
257 Interviewee, Yukon.
258 Interviewee, Yukon.

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> going to divert it, and if you make your next three appointments, we'll stay the charges," for example. That would make sense to me – you know, "you missed some appointments. What was going on? Okay, you're back on track, so instead of reporting once a month, you gotta report once a week for the next month, and we'll be back on track and you'll get the message. You otherwise have been compliant in following the spirit of the order." [With the current set-up,] a probation [officer] who wants to build trust with an individual and work with an individual, they become a police officer to someone they're supposed to help rehabilitate. It's counterintuitive. There's no fiscal or social prudence here – it's all driven by perceptions of being hard on crime.[259]

Another defence counsel related almost precisely the same information, confirming that if a client had "been signing in for nine months straight, and then they miss a day, . . . a warrant will go."[260]

Defence counsel report these charges are frequently fully pursued by the Crown. One counsel said that if her client is late to an appointment and notifies her right away with an extenuating circumstance, she phones the Crown immediately and most of them will agree to withdraw the charge – "but not always."[261] Another defence lawyer, when asked about Crowns exercising discretion not to prosecute breaches, simply laughed: "we have a lot of junior Crowns who even try to prosecute KPBGB [keep the peace and be of good behaviour] breaches. . . . They've never heard of *Kineapple*."[262] The Crown policy documents posted on the Manitoba Justice website do not directly address Crown discretion to prosecute bail condition breaches.[263]

Recommendation 7.3: Bail supervisors should exercise discretion in the decision to report a bail condition violation to the police. The Manitoba government should craft explicit policy directing bail supervisors to exercise this discretion.

Recommendation 7.4: Police should exercise discretion in the decision to formally charge an accused with failing to comply with a court order.

259 Defence counsel, Manitoba.
260 Defence counsel, Manitoba.
261 Defence counsel, Manitoba.
262 Defence counsel, Manitoba.
263 Manitoba Justice, *Manitoba Prosecution Service: Prosecution Policies*, online: Manitoba Justice <http://www.gov.mb.ca/justice/prosecutions/policy/index.html>.

Recommendation 7.5: Governments should examine the purposes and effectiveness of police bail compliance units. Proactive police supervision of bail compliance should be strictly reserved for cases where the police and Crown jointly determine there is an elevated risk of physical violence.

Recommendation 7.6: Prosecutors should also exercise considerable discretion when deciding whether to pursue failure to comply charges. Crown Policy Manuals should provide explicit guidance to prosecutors regarding failure to comply charges. British Columbia's Crown Policy Manual, which explicitly directs prosecutors to consider whether prosecution of a failure to comply charge is in the public interest, may serve as a model in this regard.[264] Where the underlying charge is dismissed or withdrawn, there should be a presumption that any failure to comply charges should also be withdrawn.

264 British Columbia Ministry of Justice, *Crown Counsel Policy Manual: Bail Breaches*, online: British Columbia Ministry of Justice <http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/BAI1.1-BailBreaches.pdf>; British Columbia Ministry of Justice, *Crown Policy Manual: Charge Assessment Guidelines*, online: British Columbia Ministry of Justice <http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/CHA1_ChargeAssessmentGuidelines.pdf>.

05

Systemic Discrimination and Bail

> I'm not saying it's a class-based system, . . . and I'm not saying it's prejudicial, but if you're more middle class and you have money, a house, a job and attachments here, you're a lot more likely to get bail.
>
> – Halifax defence counsel

> Income makes a huge difference. . . . Even though the amount of the recognizance is supposed to be something that is meaningful for the person, you look much more compelling if you can pledge $100,000, $250,000, $500,000 recognizance than if you can pledge $2, even if $2 is all the money that you have. So wealth makes a huge difference.
>
> – Toronto defence counsel

The revolving door of pre-trial detention – arrest, release with conditions, re-arrest for breach of conditions – has its most devastating impact on individuals with marginal social support, who are already struggling with addiction, health problems, poverty and discrimination.

5.1 Addiction and Mental Health

Those living with addictions or mental health issues often have difficulty securing release on bail. Although some jurisdictions may have a mental health court, these services are not universally available at the bail stage, and some individuals with mental health problems may not qualify to have their cases transferred. Similarly, drug treatment courts are generally not available at the bail stage, as individuals must plead guilty as a condition of entry into the drug treatment court. Individuals with mental health and addictions issues may also be unlikely to have a support network that can assist in preparing a bail release plan. The lack of social support presents a particular problem in jurisdictions where sureties are routinely required.

Interviewees suggest that if these individuals are released, they face significant difficulties abiding by the conditions of release. One defence counsel describes the difficulty of even representing such clients on the underlying charges because of all the breaches that keep occurring:

> The problem is for people who are kind of erratic because of addiction issues or mental health issues. Strict conditions just mean that they're likely to breach, and so you never really get to focus on their case 'cause they're constantly phoning because they've been breached.[265]

The cycle of addiction and detention is reinforced by conditions of release requiring those with addiction issues to abstain absolutely. In these cases, the condition criminalizes the accused's addiction and sets them up to be re-arrested and charged with failing to comply.

Interview participants from Yukon stated the court was grappling with how to best structure bail and craft manageable conditions for those suffering from cognitive impairment, mental illness or Fetal Alcohol Spectrum Disorder. It was reported that justices of the peace and judges are at times "being creative" and issuing more flexible conditions along the lines of "if you're able, report to your bail supervisor" or "try not to contact the victim, and if you do, make sure she's not drinking."[266]

> **Recommendation 8.1:** The courts should refrain from imposing bail conditions that are likely to criminalize the symptoms of an underlying mental health or substance abuse problem.

> **Recommendation 8.2:** A history of failure to comply should be given significantly less weight where these prior incidents are tied to poverty or addiction.

5.2 Socio-economic Status

Money also seems to play a role in determining the likelihood of release. On average the amount of bail is set at a mean of $2,669 and a median of $1,000.[267] Despite a long-standing recognition that people should not be able to buy their way out of detention, in some jurisdictions lawyers report the courts are not scaling the recognizance of bail amounts to accused's financial means. Even where the courts are sensitive to these issues, defence counsel still find it easier to secure the release of clients who have money because a solid release plan can be pulled together and presented to the Crown and the court:

> It's so biased. . . . For clients who are [privately] retaining you, it's easier to find sureties. For clients on legal aid, it's a lot harder. In Manitoba the over-incarceration rates for Aboriginal people and Aboriginal people being in custody [are high] . . . typically [there are] socio-economic factors that go along with that [trend]. If they're on assistance, chances are their family members are on assistance too, so it can make it hard to find sureties or to find sureties that would qualify for the amount the court would want.[268]

On average the amount of bail is set at a mean of $2,669 and a median of $1,000.

265 Defence counsel, British Columbia.
266 Interviewee, Yukon.
267 See Appendix B, Table 13.
268 Defence counsel, Manitoba.

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Individuals without a job, property, strong family support or ties to middle-class social networks often struggle to find a suitable surety and stable housing. Individuals without stable housing have particular difficulties securing bail. In Yukon, for example, housing for vulnerable individuals is a major concern:

> The lack of housing up here for people who have FASD [Fetal Alcohol Spectrum Disorder] is one of the biggest problems we have. . . . It's incredibly difficult to find secure housing – I mean housing where they're safe, where they're not going to be put at risk by the people around them. It's our biggest challenge, there's no question. . . . It's a huge, huge gap.[269]

The housing crisis has a direct impact on the bail system, as adjudicators are unwilling to release individuals without a fixed address. One defence counsel stated they have "never seen someone released who didn't have a home" and that "women trying to get bail will put themselves in an unsafe housing situation just so they can get out [of custody]."[270]

In 1972 with the *Bail Reform Act*, Canada made a concerted effort to move away from requiring cash deposits at the bail stage based on the principle that individuals should not be able to buy their freedom. Despite a general recognition that the amount of recognizance should be tied to an accused's means, other factors closely associated with poverty can work to systematically prevent an individual's release on bail. Relevant considerations often include whether the accused has a job, whether he or she has a reliable network of family and friends that can act as sureties, and whether there is a criminal record – in particular, a record of failures to comply – a factor which may be inflated by an individual's history of mental health or addictions issues. Despite the move away from cash deposits, the bail system still presents systemic and discriminatory barriers. More recognition of the interaction between conditions, sureties, poverty, mental health and addictions is necessary to ameliorate ongoing discrimination in the bail system.

> **Recommendation 8.3:** Courts should refrain from requiring accused to provide a fixed address or imposing residency conditions where the individual is homeless or has transitory living arrangements.

> **Recommendation 8.4:** Given the disproportionate barriers imposed by surety requirements, requests for surety releases should be made with restraint, and the Crown and judiciary should be more flexible when determining whether a proposed surety is appropriate.

269 Interviewee, Yukon.
270 Interviewee, Yukon.

5.3 Aboriginal People

> I think systemic racism plays a big role in the justice system in the Yukon. Most of the clients are vulnerable citizens with a recent residential school history, and there's intergenerational residential school stuff going on. That plays out in the whole justice system and the bail system.
>
> – Interviewee, Yukon

> I walked into bail court, waiting to do a bail, and there was this poor Aboriginal woman on the screen. She had a terrible record for shoplifting stuff, and breaches, and she was on another shoplifting charge and a breach. You know she had a bit of an explanation and a lot of *Gladue* factors, but the judge denied her bail. The next guy is this white guy, in custody on a conditional sentence order for drug offences, now charged with a home invasion with a group of others, where they go into a house. One of them had some kind of weapon, either a tire iron or a firearm or something. Mom is there to sign a $1,000 surety, [and] the judge lets him out! This poor Aboriginal woman who couldn't find a surety to save her life – but really, what's she gonna do, shoplift? She gets detained and this other guy gets out.
>
> – Manitoba defence counsel

There is a general recognition that the bail system operates in a manner that disadvantages individuals living in poverty and those with mental health or addictions issues. Aboriginal people, who are disproportionately impacted by substance abuse issues, poverty, lower educational attainment, social isolation and other forms of marginalization, are being systematically disadvantaged as result.

Aboriginal people are drastically overrepresented at every stage of the criminal justice system. The over-imposition of conditions of release and subsequent breaches are identified as major contributors to the over-arrest and incarceration of Aboriginal people. A number of interview participants highlighted the many barriers faced by Aboriginal accused and the intersecting issues of poverty and addiction. Interviewees identified abstention conditions on release orders as severely detrimental to Aboriginal accused struggling with alcoholism:

> Often [police officers on reserves are] okay with giving someone a promise to appear or a release with an undertaking at the first instance. But then they'll be put on a probation order and they'll be caught breaching – and often the police will make a note of it and release them, or maybe not arrest them. But if they do arrest them, they'll put them on a separate undertaking – so now

The bail system operates in a manner that disadvantages individuals living in poverty and those with mental health or addictions issues.

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> the person has a probation order with conditions and an undertaking with basically overlapping conditions. So the next time they get caught drinking – because substance abuse is a huge issue in these communities – basically the ledge is built up, and I'll get someone in [a cell] with 24 breaches. It's awfully hard to argue that they should be released on a recognizance with 24 breaches. A lot of breaches will get dropped if they plead to some of them, but now their criminal record is inflated because of all these breaches.[271]

The systemic barriers faced by those living on remote Aboriginal reserves appear particularly difficult to overcome. The combination of high levels of unemployment, a lack of property ownership and long distances to base courts creates significant hardship for accused persons from these communities:

> The problem here in Thompson is that the surety has to be someone with a job, and most people don't have jobs in these communities; most people are on social assistance. If they do have a job, it's hard to get away from their job to fly into Thompson to get approved as sureties. Another issue that we have is that you need real property to be a surety in some situations, so where these people are on reserve, they don't have real property in that sense. So finding a surety is a major problem. . . . Often the Crown and the judges know the financial situation here, so you get a pretty low surety of $500 to $1,000, but to someone who is working on reserve, $500 is a lot of money. . . . If the person does breach, they will collect on it.[272]

Counsel in northern Manitoba also report the distance and difficulties arranging for transportation result in accused who are arrested from reserves spending up to eight days in custody before they can make their first appearance in bail court or place a phone call to start setting up a release plan.

Gladue

Although most participants had some awareness that *Gladue* principles should operate at the bail stage, it is unclear exactly how often or in what manner *Gladue* principles are being incorporated into the bail process.

With the exception of Manitoba, where one government official stated *Gladue* was only applicable at the sentencing stage, all interviewees agreed *Gladue* factors should impact bail proceedings. Many interview participants across the jurisdictions, however, indicated the principles are not being raised or are not being raised in a consistent or meaningful way. Where there are high concentrations of Aboriginal communities, it appears that *Gladue* is often implied rather than explicitly addressed. A Manitoba defence counsel who works predominantly with Aboriginal clients in remote areas said, "it almost goes

271 Defence counsel, rural Manitoba.
272 Defence counsel, rural Manitoba.

without saying . . . all you need to say is '*Gladue*.'"[273] Interviewees in Yukon echoed these statements, reporting, "it's almost as if 'we're all just doing *Gladue*' so it's not spoken about. . . . It's not talked about at the bail stage at all that I've heard."[274]

Other lawyers indicated that although *Gladue* may be explicitly argued at the bail stage, the impact of those arguments is limited: "I [raise *Gladue*] quite often, whenever I have an opportunity. . . . I find it's done quite a bit, but I find that some people aren't aware of it. I find when I bring it up, some justices are quite irritated with me."[275] Similarly, an Ontario defence counsel stated, "there's a limit to how it can be raised in the sense that there's very little programming available and we don't have an Aboriginal court worker."[276]

Another interview participant explained there is limited room for *Gladue* factors at the bail stage because any detention or conditions must be necessary for public safety or to ensure subsequent court appearances – arguably leaving very little room for discretion or leniency.

Nearly every issue highlighted in this report – over-policing, routine adjournments, the overuse of numerous bail conditions, abstention and treatment conditions, difficulties with surety requirements, and the particular challenges faced by individuals detained in remote communities – disproportionately impacts Aboriginal people. The weight of judicial authority confirms that the principles in *Gladue* and *Ipeelee* must be taken into account whenever an Aboriginal accused's liberty is at stake – including at the bail stage. In judicial interim release, *Gladue* must be raised and considered in a meaningful way by defence counsel, having regard to the systemic barriers faced by the individual Aboriginal accused as well as the ways in which judicial interim release may disproportionately impact Aboriginal people.

This does not necessarily mean bail courts should require extensive background information about the individual accused's circumstances as is required in most sentencing cases in the form of *Gladue* reports. Rather, the broad principles articulated in *Gladue* and reiterated in *Ipeelee* must be used as a social context lens through which judges are to view the entire process of bail, including the interaction with police in the arrest and charging of the accused, the granting of adjournments, the review of evidence presented at the bail hearing, the form and terms of release, and the quantum of bail. The recommendations found throughout this report are underscored by an obligation to take into account the reality that these issues systemically and disproportionately impact Aboriginal people.

The weight of judicial authority confirms that the principles in Gladue and Ipeelee must be taken into account whenever an Aboriginal accused's liberty is at stake – including at the bail stage.

273 Defence counsel, rural Manitoba.
274 Interviewee, Yukon.
275 Defence counsel, Ontario.
276 Defence counsel, Ontario.

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Recommendation 8.5: When dealing with an Aboriginal accused, the recommendations found throughout this report – for example, to refrain from imposing abstention conditions; to increase unconditional releases; to carefully tie any conditions to the purposes of bail and actual threats to public safety; to curtail over-policing of bail compliance; and to exercise significant discretion in reporting, charging and prosecuting failure to comply charges – must be applied while also taking into consideration systemic discrimination against Aboriginal people.

It is not enough for courts and defence counsel to passively recognize that *Gladue* should have an impact. The fact that bail courts are regularly imposing too many conditions that are unconnected to the purposes of bail shows there is room for more nuanced decision-making. Courts should strive to provide jurisprudential guidance for how to meaningfully apply *Gladue* in the bail context. The following principles, taken from case law and a plain reading of *Gladue* and *Ipeelee*, provide a potential starting point to guide the application of *Gladue* to judicial interim release:[277]

- *Gladue* must be applied in all bail proceedings in a meaningful way that recognizes the unique circumstances of Aboriginal peoples in Canada, and failure to do so is an error of law.[278]
- *Gladue* necessitates a unique method of analysis which is to be employed in every case, regardless of the seriousness of the offence for which the accused is charged.[279]
- The disproportionate impact of detention on Aboriginal people, including over-incarceration, must be considered.[280]
- Courts must consider the potential for institutional bias in the arrest and charging of the accused, including the possibility of over-policing and overcharging[281] – both in the assessment of the charges before the court and in examining any prior criminal antecedents.[282] Charges and convictions of failure to comply, in particular, should be viewed in this light.
- Any convictions prior to 1999 should be given reduced weight as the accused would not have had the benefit of *Gladue* in the determination of sentence.
- To the extent that the accused's criminal record is attributable to systemic factors such as poverty or substance abuse, courts should view prior convictions as systemically motivated rather than as intentional disregard for the law, particularly in relation to prior breaches of court orders.
- The necessity of a surety must be scrutinized carefully as securing a suitable surety may be disproportionately difficult for Aboriginal accused.

277 Jillian Rogin, Forthcoming LLM thesis (University of Toronto: 2014).
278 *R v Silversmith*, [2008] OJ No 4646 (SCJ).
279 *R v Ipeelee*, 2012 SCC 13 at paras 86–87.
280 *R v Gladue*, [1999] 1 SCR 688; *R v Ipeelee*, 2012 SCC 13; *R v Brant*, [2008] OJ No 5375 (SCJ).
281 Over-policing and over-charging were discussed in *Bridging the Cultural Divide* as well as the Manitoba Public Inquiry into the Administration of Justice and Aboriginal People. *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, "Aboriginal Over-Representation" and "Manitoba Courts: Criminal Court Process, Release from Custody" (Winnipeg: The Inquiry, 1991).
282 Institutional bias and systemic discrimination in the criminal justice system was noted in *R v Gladue*, [1999] 1 SCR 688 at para 65, as factors contributing to injustices experienced by Aboriginal people. Although sentencing justices may not be able to address systemic bias due to the nature of sentencing proceedings, justices presiding over bail proceedings can appropriately consider these factors in assessing the arrest, detention and prior criminal antecedents of the Aboriginal accused before the court.

- Surety suitability should be determined in a culturally competent manner, having regard to the systemic barriers facing Aboriginal people that may otherwise render a person ineligible.[283]
- The quantum of bail must be determined having regard to the disproportionate poverty and, where applicable, lack of private ownership of land faced by Aboriginal people.
- The imposition of conditions must be approached with restraint having regard to the ability of the Aboriginal accused to comply – a condition that the accused is not capable of complying with is not reasonable.[284]
- Requests for the adjournment of bail proceedings must be determined having regard to the over-incarceration of Aboriginal peoples – routine adjournments as a result of a lack of institutional resources should be denied.

Recommendation 8.6: Courts must develop ways to incorporate *Gladue* considerations into the bail process. Courts must have regard to the systemic barriers Aboriginal people face in the process of arrest and judicial interim release, and properly consider these in the determination of release.

283 *R v Brant*, [2008] OJ No 5375 (SCJ) and *R v Silversmith*, [2008] OJ No 4646 (SCJ). See also *R v Pitawanakwat*, 2003 CanLII 12645 where the sureties were approved notwithstanding the fact that they themselves had prior interactions with the criminal justice system.

284 *R v Omeasoo*, 2013 ABPC 328.

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Conclusion and Recommendations

> I think we need a big revamp of the entire structure of bail as it's undertaken now; I think the judiciary needs to be involved, and the defence bar, and the Crowns. And there needs to be some strong evidence about what the impacts of this are on people's lives and the justice system. I'm kind of hopeful . . . that your research may push us in a different direction. I've raised this . . . a couple of times, and while there may be some acknowledgment of the problem, nobody seems keen on tackling it. We can try to make change at our level – policies, education – but really, unless the entire justice system is on board with this, you just run into walls. . . . The entire justice system needs to look at whether this is an appropriate use of bail and what the unanticipated outcomes of the current practices are.
>
> – Interviewee, Yukon

Occasionally, a case comes before the court that is emblematic of the larger issues. In December 2013, Justice Rosborough of the Provincial Court of Alberta released his ruling in *R v Omeasoo*, sentencing Jennifer Iris Omeasoo and Ryan Cody Okeynan for the crime of being found drunk contrary to their police-imposed conditions of release. Both Omeasoo and Okeynan are Aboriginal, both had difficult childhoods, both were alcoholics from an early age and both had lengthy histories of incarceration related to their drinking. Okeynan, who was 26 and grew up in foster care, had a record with 44 convictions, "all in relation to his alcohol consumption." Of his 19 youth court offences, 18 related to breaching some form of a court order. Over his life, he had already spent 992 days in jail. Omeasoo, whose parents had been alcoholics, also became an alcoholic at a very young age. After remaining sober for nine years for her children, she relapsed at the age of 27. In separate incidents in early 2013, Okeynan and Omeasoo were arrested on minor charges and released by the police with a condition that they abstain from consuming alcohol. They were subsequently found intoxicated, in contravention of their release order. They were both re-arrested and charged with breaching their conditions, to which they both pled guilty.

Omeasoo and Okeynan are just two of the thousands of Canadians that, on any given day, are legally innocent and detained in overcrowded jails, waiting for their release on bail or trial. They represent just two of the thousands of individuals each year who are arrested, released on conditions, re-arrested and incarcerated. And they are just two of the hundreds that, every day last year,

were found guilty of crimes based on actions that would not, outside of their bail conditions, constitute criminal offences.

The signs of a broken pre-trial system are visible in Canadian criminal justice statistics. Crime in our communities is down, but for the past 20 years, the number of people held in pre-trial detention has steadily increased. Today, there are more people in our provincial jails who are legally innocent than there are convicted and sentenced offenders. Many remand detention centres are at double, triple or quadruple their original intended capacity. Dozens of cases from across the country describe violent, overcrowded institutions, where people sleep on the floor, where programming is non-existent and where fresh air is limited to 20 minutes a day. Even a few days in pre-trial detention can mean lost income, a missed rent payment, emergency child care and lapses in medication. The pressure on individuals to agree to any proposed condition in order to be released, or simply plead guilty to get it all over with, is enormous.

Our bail system is setting people up to fail. Canadian bail courts frequently impose abstinence on alcoholics and drug addicts, residency conditions on the homeless, strict check-in requirements for those who are struggling to make ends meet, no-contact conditions between family members, and strict curfews that interfere with jobs and other essential components of adult life. Court observations in Yukon saw individuals released with a median of 13 conditions. One person observed in Ontario was released with 34 conditions. Every breach of a condition can lead to another criminal charge – and statistics show that breaches occur frequently. There is little hope than an alcoholic will be able to abstain from drinking simply because of a court order. But even individuals with significant family support and a steady income find it extremely difficult to live under severely restrictive bail conditions for the months – or years – that it usually takes to resolve criminal charges. Even when the original substantive charge is withdrawn or dismissed, the Crown will still frequently pursue a conviction for the failure to comply.

All of this could theoretically be justified if it were necessary for public safety or to ensure an accused person who is released will return to court to face the charges. Research suggests, however, that the conditions being imposed are frequently unnecessary and, at times, completely unrelated to the purposes of bail. In Yukon, for example, interviewees reported many of the accused were known on a personal level, and the courts would impose conditions unrelated to the underlying offence that aimed at behaviour modification and veered towards punishment. Ontario courts were observed imposing unconstitutional conditions to take medication. And across the jurisdictions, interviewees reported they thought individuals were simply being subject to too many conditions. The jurisdictions also varied in how breaches of bail conditions were dealt with. In

> "The entire justice system needs to look at whether this is an appropriate use of bail and what the unanticipated outcomes of the current practices are."
> – Interviewee, Yukon

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Manitoba, for example, being a few minutes late to an appointment with your bail supervisor will result in a breach charge.

Most of the bail courts observed showed signs of inefficiency, adjourning a large proportion of cases on a daily basis and spending only a fraction of open court time actively addressing bail matters. Ontario, however, is experiencing unique problems of systemic delay: in numerous cases individuals were returned to jail simply because the courts ran out of time to process their cases. Ontario is also an outlier in its reliance on sureties. The cost of requiring surety releases for most cases – and, moreover, demanding that sureties testify in court prior to release – is significant. Accused spend more time in detention trying to put a release plan together. Families and friends must take time off work, pledge their money and act as jailors in the community. This practice disproportionately impacts those with few resources and little social support, and individuals from remote communities. Even consent releases become lengthy, contested affairs, as sureties are cross-examined in open court. British Columbia, in contrast, processes the vast majority of bail cases without resorting to surety requirements at all. This suggests that the significant personal, systemic and financial costs of Ontario's default position are unnecessary.

The research also revealed how individuals from remote communities are being uniquely prejudiced by the bail system. Most individuals, unless released directly by the police, are flown to the nearest provincial detention centre to have their bail processed. Arranging for transportation can take a significant amount of time, and some accused are spending over a week in detention just waiting for their first appearance in bail court. Once removed from their communities, they are frequently cut off from social support networks and do not have access to the phone numbers they need to try to secure their release. If a surety is required, friends or family frequently must spend hundreds of dollars on flights to testify or simply sign the required papers in person at court. Counsel in northern Manitoba report that their Aboriginal clients regularly spend more time in pre-trial detention than they would if they were just sentenced for the crime, and will frequently plead guilty just to be released and return home.

Nearly every issue highlighted in this report – over-policing, routine adjournments, overuse of numerous conditions, abstention and treatment conditions, difficulties with surety requirements, and the particular challenges faced by individuals detained in remote communities – disproportionately impacts Aboriginal people. The weight of judicial authority confirms that the principles enunciated by the Supreme Court of Canada in *Gladue* and *Ipeelee*, which are aimed at addressing the drastic overrepresentation of Aboriginal people in our criminal justice system, must be taken into account whenever an Aboriginal accused's liberty is at stake. Unfortunately, our research suggests that in areas with the highest

concentrations of Aboriginal people, *Gladue* is rarely explicitly raised. Even when *Gladue* is argued by counsel, the practical impact this has on the bail process is uncertain.

The law governing bail aims to uphold individual liberty, the presumption of innocence and the right to a fair trial by emphasizing a strong presumption of release, and only imposing restrictions on liberty where absolutely necessary. The *Charter of Rights and Freedoms* guarantees not only our right to liberty, but specifically enshrines a constitutional right to reasonable bail. In many courts across this country, however, the bail system is broken. Our system puts accused, who are to be presumed innocent, into a slow, risk-averse bail process that disproportionately penalizes – and frequently criminalizes – poverty, addiction and mental illness. Those who are innocent are being pressured into pleading guilty just to escape the bail system. Others who insist on their right to a fair trial are living under highly restrictive conditions that criminalize a wide range of non-criminal behaviour. Individuals' *Charter* rights to reasonable bail are being violated, at times on a systemic scale, without meaningful remedy. Our courts are bogged down with administration of justice charges stemming from breaching conditions that were often unnecessary and should not have been imposed in the first place.

Our system puts accused, who are to be presumed innocent, into a slow, risk-averse bail process that disproportionately penalizes – and frequently criminalizes – poverty, addiction and mental illness.

Bail and pre-trial detention are complex. Police, prosecutors, defence counsel, justices of the peace, judges, bail supervisors and the correctional system all play key roles. Reform must be approached with all these actors at the table. The individual, societal, human and financial costs of the *status quo* are unsustainable. In 1972, Canada passed comprehensive bail reform legislation in response to studies that showed vast numbers of people were being unnecessarily detained in custody prior to trial. In our view, we have once again reached a point where concrete action is necessary to ensure the bail system upholds – rather than undermines – public safety, fundamental rights and the administration of justice.

6.1 Consolidated Recommendations

Recommendation 1.1: The RCMP and other police services operating in rural detachments should review the conditions of confinement in police holding cells, recognizing that individuals may be detained there for multiple days while they await transportation to provincial correctional centres.

Recommendation 1.2: Police should make increased use of their power to release, and ensure that any conditions imposed are constitutional and legally permissible under the *Criminal Code*.

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Recommendation 1.3: Individuals released from police custody should be proactively informed of the procedures that can be used to vary police-imposed conditions under ss 499(3) and 503(2) of the *Criminal Code*.

Recommendation 2.1: Provincial and territorial governments should implement the recommendation of the Ontario Court of Justice and Ministry of the Attorney General Joint Fly-In Court Working Group that, "[w]here appropriate, northern police should exercise their discretion to release the accused person into the fly-in community. Police should consult with the Crown whenever detention is contemplated, northern police services and Crown Offices should review, and adopt if appropriate, a bail consultation process as a best practice to ensure that accused persons are not taken out of the community where the Crown will consent to release."

Recommendation 2.2: In line with the recommendation of the Ontario Court of Justice and Ministry of the Attorney General Joint Fly-In Court Working Group, s 516(1) of the *Criminal Code* should be studied further, particularly in light of the requirement that no adjournment be for more than three clear days except with the consent of the accused. If s 516(1) does clearly prevent an accused from staying in police custody after the first bail appearance, the federal government should study amending the provision to "permit an accused person, with his or her consent, to be remanded to somewhere other than 'custody in prison' (i.e., police custody) before or during a bail hearing. Such an amendment could potentially allow an accused person to remain in the community for his or her bail hearing."

Recommendation 3.1: All justice participants should ensure only meaningful adjournments are requested. Where it is found that an adjournment would violate s 516(1), or the accused's *Charter* rights, the justice should release the accused on an undertaking with no conditions.

Recommendation 3.2: All justice participants should state on the record who is requesting the adjournment and the reason for the request. Adjudicators should, where appropriate, question the necessity of the adjournment prior to granting or denying the request.

Recommendation 3.3: Governments should establish mechanisms to track the reasons for adjournments. Where adjournments are frequently requested in order to facilitate administrative needs (for example, to get access to a phone to contact potential sureties or gather court paperwork), initiatives should be explored to address the underlying causes of delay. This may help identify the specific resources and procedures that need to be put in place in a particular location to enable earlier bail decisions.

Recommendation 3.4: All steps of the pre-trial process should facilitate the individual's release from custody as soon as possible. Procedures should be explored to allow defence counsel, including duty counsel, to speak to accused individuals before the first bail appearance (e.g., *Brydges* counsel) to assist the accused in preparing for bail release. Phone access should be provided both in police custody and in court so accused may prepare for release by contacting potential sureties and retaining private counsel.

Recommendation 3.5: The Ontario government must take immediate and concrete steps to end ongoing unconstitutional adjournments in bail court. As a starting point, policies should ensure that the courts have the resources to remain open until individuals who are ready to have their bail hearing have been addressed.

Recommendation 3.6: Regularly refusing to hold cases down so as to allow for consultations with lawyers, case preparation and the attendance of sureties violates the right to be free from arbitrary detention. Cases that are not ready to proceed in the morning should be held down until later in the day rather than immediately adjourned to another day. All hold down requests that are intended to facilitate the timely release of the accused should be granted by the presiding justice. It should be presumed that all cases will be dealt with to the fullest extent possible each day.

Recommendation 3.7: Yukon government should examine the frequent practice of remanding individuals in order to obtain a bail supervision report from probation. The practice is costly for both accused and probation services.

Recommendation 3.8: Yukon justice system participants should consider whether regular adjournments for a bail supervision report are warranted.

Recommendation 4.1: Ontario must develop and implement a concrete strategy for reducing delays in the bail system, including measures to address and reverse the province-wide overreliance on sureties.

Recommendation 4.2: Ontario and Yukon's Crown Policy Manuals and training materials should be revised to emphasize the presumption of release and the ladder approach to the bail process. In Ontario, specific policy guidance and court procedures should be put in place to reverse the over-reliance on sureties and the widespread practice of having sureties testify in court. As recommended by the Bail Experts Round Table, "witnesses should not be called in consent release matters, except in the rarest of circumstances. Relying on a 'read-in' of allegations and affidavit of surety (when a surety is necessary) should ordinarily be sufficient."

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Recommendation 4.3: Concrete measures should be taken to combat institutional risk aversion. We endorse the recommendation adopted by previous reports: "Senior levels of all relevant organizations (including the police, prosecution and the judiciary) should create an environment conducive to the appropriate exercise of discretion by providing greater public support, including in the media, for decision makers in the bail process." Ontario's Crown Policy Manual and any associated training material should be edited to reflect the appropriate level of institutional support for individual decision-makers.

Recommendation 4.4: Experienced Crowns and duty counsel should be assigned to bail court. Rotating counsel should be avoided to promote work-group consistency, encourage case ownership and preserve institutional knowledge.

Recommendation 4.5: Where appropriate, adjudicators should question the necessity and legality of requiring a surety in proposed consent releases. Given the systemic overuse of sureties in some jurisdictions, adjudicators should exercise their jurisdiction and decline to impose unnecessary surety requirements even in circumstances when Crown and defence counsel might agree to a surety requirement.

Recommendation 4.6: The relevant recommendations of the Ontario Court of Justice and Ministry of the Attorney General Joint Fly-In Court Working Group should be adopted, including developing "a protocol for sureties to appear in front of a justice of the peace presiding in a base court location by video or telephone from their home community." The judiciary receive education "regarding ss. 515(2.2) and (2.3) of the *Criminal Code* and the various options to receive surety information, which include, but are not limited to, the standard bail surety affidavit form." Standard procedures should be adopted in courthouses that regularly serve remote communities to reinforce that requiring sureties to testify is the exception, rather than the default.

Recommendation 5.1: Given the fundamental importance of bail decisions, conditions of release and the high possibility for constitutional rights violations in the bail process, justices of the peace should be required to have further specialized training prior to adjudicating bail matters.

Recommendation 5.2: Chief Justices should establish programs to monitor and evaluate the quality of adjudication provided by justices of the peace. Where necessary, bail adjudication should be reallocated to judges.

Recommendation 6.1: Crown policy manuals should be revised to emphasize the presumption of unsupervised release for low-risk accused.

Recommendation 6.2: Bail program supervision should be reserved for cases that are facing probable detention; referrals to bail supervision should not be routine. Regular reviews of bail program cases should be conducted to ensure the purpose of bail programs – to increase releases – is not being subverted by imposing unnecessarily strict conditions and supervision. Bail supervision manuals should be revised to explicitly state that bail supervision is not suitable for individuals who can be released on their own recognizance, and standard bail supervision forms should allow bail program workers to suggest that an individual is not suitable for bail program supervision for this reason. Bail supervision manuals should also be revised to clearly reflect the statutory presumption of unconditional release and minimal supervision within the bail program. Standard checklists of conditions attached to bail supervision programs should be avoided, and conditions should only be recommended by bail programs where they are necessary to meet the statutory requirements for release. In order to ensure that bail supervision programs are reserved for those who would otherwise face probable detention, bail supervision manuals should specify that individuals with a history of failure to comply charges are, in general, appropriate supervision candidates. Although concerns about public safety may make an individual an inappropriate candidate for bail supervision, a history of failure to comply alone should not prevent an individual from participating in a bail supervision program.

Recommendation 6.3: Bail conditions must be clearly related to the purposes of the bail system and the specific facts of the case.

Recommendation 6.4: Bail courts must be more attuned to the ways in which bail conditions – in particular, no-contact orders, curfews and movement restrictions or zone exclusion orders – can fundamentally and unjustifiably impair a wide range of constitutional rights.

Recommendation 6.5: Judges and justices of the peace should use their authority to reject a joint submission on bail release conditions where the proposed terms of release are either unlawful or would bring the administration of justice into disrepute. Proposed conditions that are unrelated to the purpose of bail are unreasonable and arbitrary, and bring the administration of justice into disrepute.

Recommendation 6.6: For those jurisdictions where inappropriate, unlawful or unconstitutional bail conditions are frequently imposed, a purposive, targeted, rapid bail review procedure should be implemented to ensure timely access to effective review of conditions by a judge who can offer remedies, establish precedents and stimulate improved decision-making at first instance. Defence representation for these purposes should be funded by legal aid or targeted provincial/territorial funds.

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Recommendation 6.7: Conditions of release must be imposed with significant restraint. Where appropriate, adjudicators should question the necessity and legality of the conditions proposed in consent releases. When necessary, adjudicators should exercise their jurisdiction and decline to impose unnecessary conditions.

Recommendation 6.8: Conditions related to ensuring the accused appears for court should not be imposed where other administrative methods – such as a phone call to remind the person of an upcoming appearance – are likely to be effective.

Recommendation 6.9: Conditions relating to the secondary grounds should be reserved for cases where the underlying offence is a violent one with ongoing risk to public safety, or the circumstances give rise to specific concerns regarding future violent acts. Non-violent accused should not be placed under strict bail conditions justified on the grounds of public safety.

Recommendation 6.10: The requirements to "keep the peace and be of good behaviour" or "be amenable to the rules and discipline of the home" are constitutionally questionable, open to abuse, of limited legal utility and frequently immune from challenge at the prosecution stage. They should not be imposed.

Recommendation 6.11: Given the prevalence of addictions, the difficulties accused persons will have openly admitting to addictions and the low likelihood of abstention conditions contributing to public safety or the administration of justice, there should be a moratorium on abstention conditions at the bail stage.

Recommendation 6.12: Conditions requiring accused to access medical treatment or take medications are unconstitutional and should not be imposed.

Recommendation 6.13: Substance abuse treatment conditions are coercive and should not be imposed at the bail stage absent exceptional circumstances.

Recommendation 6.14: Governments should study the claimed benefits of bail-related treatment conditions and the relative utility of providing access to community-based treatment options without making it a formal bail condition.

Recommendation 7.1: The government should study whether decriminalizing failure to comply with bail conditions would have any negative impact on the justice system or public safety. If criminalization is maintained, a more narrow provision targeting public safety risks may be sufficient.

Recommendation 7.2: The reverse onus bail provisions in ss 515(6)(*c*) and (*d*) of the *Criminal Code* should be repealed.

Recommendation 7.3: Bail supervisors should exercise discretion in the decision to report a bail condition violation to the police. The Manitoba government should craft explicit policy directing bail supervisors to exercise this discretion.

Recommendation 7.4: Police should exercise discretion in the decision to formally charge an accused with failing to comply with a court order.

Recommendation 7.5: Governments should examine the purposes and effectiveness of police bail compliance units. Proactive police supervision of bail compliance should be strictly reserved for cases where the police and Crown jointly determine there is an elevated risk of physical violence.

Recommendation 7.6: Prosecutors should also exercise considerable discretion when deciding whether to pursue failure to comply charges. Crown Policy Manuals should provide explicit guidance to prosecutors regarding failure to comply charges. British Columbia's Crown Policy Manual, which explicitly directs prosecutors to consider whether prosecution of a failure to comply charge is in the public interest, may serve as a model in this regard. Where the underlying charge is dismissed or withdrawn, there should be a presumption that any failure to comply charges should also be withdrawn.

Recommendation 8.1: The courts should refrain from imposing bail conditions that are likely to criminalize the symptoms of an underlying mental health or substance abuse problem.

Recommendation 8.2: A history of failure to comply should be given significantly less weight where these prior incidents are tied to poverty or addiction.

Recommendation 8.3: Courts should refrain from requiring accused to provide a fixed address or imposing residency conditions where the individual is homeless or has transitory living arrangements.

Recommendation 8.4: Given the disproportionate barriers imposed by surety requirements, requests for surety releases should be made with restraint, and the Crown and judiciary should be more flexible when determining whether a proposed surety is appropriate.

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Recommendation 8.5: When dealing with an Aboriginal accused, the recommendations found throughout this report – for example, to refrain from imposing abstention conditions; to increase unconditional releases; to carefully tie any conditions to the purposes of bail and actual threats to public safety; to curtail over-policing of bail compliance; and to exercise significant discretion in reporting, charging and prosecuting failure to comply charges – must be applied while also taking into consideration systemic discrimination against Aboriginal people.

Recommendation 8.6: Courts must develop ways to incorporate *Gladue* considerations into the bail process. Courts must have regard to the systemic barriers Aboriginal people face in the process of arrest and judicial interim release, and properly consider these in the determination of release.

Appendix A: Methodology

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In an effort to achieve regional representation, five provinces/territories were selected for examination: British Columbia, Manitoba, Nova Scotia, Ontario and Yukon. This study used both in-court observations of bail court and interviews with criminal justice professionals.

7.1 Court Observation

Observational bail court data was collected from British Columbia, Manitoba, Nova Scotia, Ontario and Yukon. Two complementary types of data were collected in an effort to capture not only the way cases were processed in court but the manner in which time was used and the relationships amongst court actors. Notes were taken on the use of time – specifically, when court started and finished; the timing, length and reason for court recesses; and time spent waiting for accused to appear in court.

A uniform data sheet was used for routine administrative data collection and for individual case information. Data were collected for each individual accused and included information on how each case was discussed and the manner in which each case was disposed; for example, the type of counsel present, the onus, the details of the charges and criminal record as discussed in open court, and the case outcome for the day. For cases in which the accused was released, either as the result of a release with the consent of the Crown Attorney or after a show cause hearing, the number and type of conditions were noted. We also collected data on the form of release (e.g., was the accused released with or without a surety). Any comments made by the Crown, defence counsel or justice of the peace justifying the imposition of these conditions was documented.

For all locations the data collected comprised only that which was read aloud in open court; this may or may not include the information listed above. The authors acknowledge the importance of the charges before the court and the impact a criminal record has on the bail decision and type of conditions imposed. Having access to this data would have allowed for further analyses and would have strengthened the conclusions drawn from this research. Despite this limitation, when a consent release or show cause hearing was conducted, the Crown would generally list the charges, read in the allegations and discuss the presence or absence of a criminal record. While this is not perfect, the information presented by the Crown in court is largely the information that formed the basis for the justice to accept the proposed release (including the

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conditions of release) or to release after a show cause hearing. The details of the criminal record were only available to the researchers to the extent it was discussed in court. Ultimately, whether the release is by consent of the Crown or as a result of a contested show cause hearing, the justice is expected to be satisfied that the conditions of release are appropriate.

7.2 Interviews with Criminal Justice Professionals

Semi-structured face-to-face and/or phone interviews were conducted with criminal justice professionals with knowledge of and experience with the bail system in each jurisdiction. Legal professionals were contacted through professional e-mail lists and pre-existing professional contacts of the Canadian Civil Liberties Association. The call for participation was posted on CCLA's website and e-mailed to a list of professional contacts that had already indicated to the CCLA that they were interested in the issue of bail and/or pre-trial detention. These professional contacts were asked to share the call for participation with other professionals who may have been interested. It was also distributed to various professional body listservs and e-mail groups that have membership from the criminal defence and prosecutorial bars. We also distributed the call for participation to members of the CCLA Board who are involved in the criminal justice system, and asked that they pass it on to other colleagues who may be interested. Finally, we contacted directly the responsible government ministries to request the participation and official views of government representatives.

Semi-structured interviews allowed the researcher to guide the interview, while giving participants room to steer the conversation to their particular experiences. Participants were asked about their thoughts and experiences with the bail process. Questions explored perceived challenges with the current operation of the bail system and use of pre-trial detention. Participants were also asked their perspectives on how to best address the challenges with the system and what would make the bail system operate more effectively. These data were used to supplement and provide more qualitative personal narratives to the more quantitative data that was collected from in-court observations.

Participants were asked if they were comfortable with quotes being attributed to their general occupational category/organization (e.g., defence counsel or Crown Attorney). If participants indicated they would prefer not to have their interview accredited to their specific job title, all information was used anonymously.

Repeated efforts were made to solicit interviews from each jurisdiction and each profession involved in the bail process. These included private defence counsel; duty counsel; Crown counsel; professional service providers such as bail program staff, John Howard Society staff and Native Courtworkers; and government officials. Unfortunately, some professions and jurisdictions are overrepresented. This imbalance of representation makes generalizations difficult; however, the interviews shed light on a number of issues that have been seen across the country. These interviews offer important insight into the jurisdictional variation seen across Canada. Indeed, despite a single *Criminal Code*, what is clear is courts develop their own local practices. The practices in one location are not necessarily the same in another location. Interview participants were able to provide valuable insight into local practices and challenges. This resulted in a deeper understanding of how each court operates and helped identify a number of issues that require further attention.

Interviews were conducted with the following:

Jurisdiction	Interviewees	Total
British Columbia	2 government representatives, 2 defence counsel	4
Manitoba	3 defence counsel (urban), 2 defence counsel (rural), 3 government representatives	8
Nova Scotia	2 defence counsel (urban), 1 defence counsel (rural)	3
Ontario	4 bail program workers, 1 Native inmate liaison officer, 1 civil society bail policy researcher, 6 defence counsel (urban and rural)	12
Yukon	2 defence counsel, 4 government representatives and employees, 2 First Nations court workers. Due to the small size of the legal community in Yukon, all Yukon interview participants quoted in the report are identified simply as "Interviewee."	8
Total		**35**

Note: government representatives included both ministry contacts as well as Crown Attorneys.

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Appendix B: Data

8.1 Descriptive Statistics

The bail courts were observed for a total of 44 days between June and November 2013. Each jurisdiction was observed for a minimum of five and maximum of 14 days. Some of the jurisdictions are overrepresented in the dataset. Analyses are presented for individual courts and are then aggregated across the courthouses. The findings of this study are limited to the courts observed in each jurisdiction. The authors caution against generalizing these findings to all courts in the province/territory or elsewhere in Canada as this study only provides a snapshot of the daily court observation.

Manitoba presents unique challenges; the Winnipeg bail court does not operate the same way as other jurisdictions. As described in Appendix C, Winnipeg's consent releases are generally not spoken to in open court. It was therefore not possible to collect data on a significant proportion of bail cases, and those cases that were spoken to in open court are disproportionately contested matters. Data from Manitoba should be considered with this in mind.

Over 44 days of bail court observation, 718 bail cases were seen. Not all of these cases were unique as some accused were seen on more than one day. As would be expected, the daily caseloads in the bail court varied by the size of the jurisdiction. Overall, on average, each court heard 17.5 bail matters; the larger jurisdictions heard closer to an average of 21 bail matters a day and the smaller jurisdictions average closer to eight cases a day.

Ontario is the only jurisdiction in our sample where all observed cases are presided over by justices of the peace. In British Columbia, Manitoba and Nova Scotia, all bail matters are addressed before a provincial court judge. Yukon uses both justices of the peace and judges. Manitoba appears to utilize more video technology at the bail stage than any other jurisdiction studied.

Table 1: Descriptive Statistics

	Days of observation	Cases observed	Average daily cases	Judge presides	% Women accused	Video appearance
British Columbia	10	224	22.7	100%	17% (38)	13.80%
Manitoba	5	88	22.8	100%	36.4% (32)	69.30%
Nova Scotia	10	102	9.1	100%	16.7% (18)	1.00%
Ontario	14	269	20.5	0%	4.1% (11)	0%
Yukon	5	35	7	60%	5.7% (2)	0%
Overall	**44**	**718**	**17.5**	**63.60%**	**14.1%**	**13%**

8.2 Court Use of Time

The bail courts opened for the day between 9:30 a.m. and 10:00 a.m. depending on the jurisdiction. The courts closed for the day between 3:00 p.m. and 4:00 p.m. On average the court was open for operation for five hours and 22 minutes on any given day. 'Time spent on recess' calculates the total amount of time the court was on recess or lunch break; on average two hours and nine minutes each day was spent on recess. There is, however, significant variability, with Yukon and Manitoba spending much less time on recesses than the other jurisdictions. 'No one in court' calculates the total amount of time when the court was open for operation, but nothing was actively happening in court; on average this consumed 23 minutes of court time each day. This measure does not refer to time when counsel were speaking with each other; rather, this is time when the court is sitting, waiting for accused to be brought in from the holding cells. 'Total dead time' includes both time spent on recesses and any time when nothing is happening in court; it refers to the total time the court is open but not actively addressing bail matters.

Table 2: Court Use of Time

	Start time	End time	Time open	Time on recess	No one in court	Total dead time	Total time used	Proportion of time used
British Columbia	9:33	15:31	5:57	3:01	0:11	3:12	2:45	46.20%
Manitoba	10:07	15:19	5:12	0:57	0:15	1:24	3:49	73.40%
Nova Scotia	9:42	15:20	5:40	2:34	0:42	3:17	2:15	39.70%
Ontario	9:57	16:08	6:11	2:21	0:23	2:35	3:36	58.20%
Yukon	13:20	14:56	1:35	0:16	0:15	0:31	1:04	67.40%
Overall	**10:13**	**15:34**	**5:22**	**2:09**	**0:23**	**2:31**	**2:51**	**53.10%**

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On average there was two hours and 31 minutes of 'dead time' each day. 'Total time used' subtracts 'total dead time' from 'time open.' Across all bail courts, each day on average two hours and 51 minutes was used actively addressing bail matters. When this is converted into a percentage to reflect the proportion of the court day that was spent addressing matters, we see that overall courts spent 53% of their opening hours dealing with cases. There was, however, significant variation, with Nova Scotia actively using a low of 39.7% of open court time and Manitoba using 73.4% of open court time addressing cases.

8.3 Legal Representation

Overall, 46.9% of observed accused retained counsel[285] and 47.2% used the services of duty counsel.

Table 3: Type of Legal Representation

	Counsel retained by accused	Duty counsel	Unrepresented	Unknown	Total
British Columbia	50.0% (112)	40.6% (91)	2.2% (5)	7.1% (16)	100% (224)
Manitoba	87.5% (77)	11.4% (10)	1.1% (1)	0%	100% (88)
Nova Scotia	25.5% (26)	64.7% (66)	0%	9.8% (10)	100% (102)
Ontario	44.2% (119)	52.8% (142)	0.4% (11)	2.6% (7)	100% (269)
Yukon	8.6% (3)	85.7% (30)	0%	5.7% (2)	100% (35)
Overall	**46.9% (337)**	**47.2% (339)**	**1% (7)**	**4.9% (35)**	**100% (718)**

There is significant jurisdictional variation in the type of legal representation used by accused at the bail stage. In Manitoba, most (79.5%) accused appeared to have private counsel. This may be higher than other jurisdictions because cases in bail court were cases the Crown was not consenting to and thus there would be a contested show cause hearing. Conversely, duty counsel services were almost solely relied upon in Yukon (85.7%); very few accused retained private counsel.

8.4 Daily Case Outcome

Looking at the average daily outcome for each accused observed overall, few (8.8%) accused were formally denied their bail. Although it appears Manitoba formally detains a greater proportion of accused, it should be remembered this court hears primarily contested bail matters; most matters deemed appropriate for release by the Crown were addressed outside of court.

On an average day, 27.3% of accused across all courts observed were released on bail. This means that in 36% of cases in the bail court, a bail decision was made on the day observed. The proportion of cases with a bail release order on an average day ranged from 20% in British Columbia to 38% in Nova Scotia.

285 'Retained counsel' includes those who may have had a legal aid certificate; this is due to the difficulty of determining if an accused has retained defence counsel privately or through a legal aid certificate.

Table 4: Case Outcome

	Detain	Release	Adjourn	Traverse	Plea/sentence	Miscellaneous	Total
British Columbia	12.1% (27)	20.1% (45)	61.2% (137)	2.2% (5)	2.7% (6)	1.8% (4)	100% (224)
Manitoba	22.7% (20)	28.4% (35)	30.7% (27)	1.1% (1)	15.9% (14)	1.1% (1)	100% (88)
Nova Scotia	3.9% (4)	38.2% (39)	42.2% (43)	2.0% (2)	5.9% (6)	7.8% (8)	100% (102)
Ontario	3.3% (9)	29.7% (80)	58.7% (158)	6.3% (17)	1.1% (3)	0.7% (2)	100% (269)
Yukon	8.6% (3)	20% (7)	68.6% (24)	2.9% (1)	0%	0%	100% (35)
Overall	**8.8% (63)**	**27.3% (196)**	**54.2% (389)**	**3.6% (26)**	**4% (29)**	**2.1% (15)**	**100% (718)**

On average, each day 54.2% of all cases were adjourned to another day. The frequency of adjournments varies considerably; in Manitoba 31% of bail matters were adjourned, and in Yukon 69% of cases were adjourned each day.

8.5 Adjournments

Consistent with previous research, most (70.4%) requests for an adjournment of a bail hearing came from defence counsel or the accused. Across jurisdictions, defence counsel were responsible for the majority of adjournment requests. In 9.5% of adjournment requests, the Crown was asking for the adjournment and a further 6.7% came from the presiding justice.

Table 5: Who Requests the Adjournment

	Crown	Defence/ accused	Justice	Unknown	Total
British Columbia	8.8% (12)	70.6% (96)	4.4% (6)	16.2% (22)	100% (136)
Manitoba	11.1% (3)	77.8% (21)	11.1% (3)	0%	100% (27)
Nova Scotia	16.3% (7)	74.4% (32)	2.3% (1)	7.0% (3)	100% (43)
Ontario	7.6% (12)	68.8% (104)	9.5% (15)	10% (27)	100% (158)
Yukon	12.5% (3)	83.3% (20)	4.2% (1)	0%	100% (24)
Overall	**9.5% (37)**	**70.4% (273)**	**6.7% (26)**	**13.4% (52)**	**100% (388)**

Over half of all cases in bail court each day were adjourned. With the exception of Yukon, close to a third of all adjournments were granted without any justification being provided to the court. In Ontario, 19% of adjournment requests were for the purposes of finding an appropriate surety for release.

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Table 6: Reason Case Was Adjourned

	Surety	Counsel	Paperwork/ 524/ further investigation	Court service/ admin	Release plan	Court out of time	No reason provided/ unknown	Miscellane-ous	Total
British Columbia	0.7% (1)	29.2% (40)	6.6% (9)	4.4% (6)	4.4% (6)	0%	33.6% (46)	21.2% (29)	100% (136)
Manitoba	7.4% (2)	11.1% (3)	33.3% (9)	3.7% (1)	7.4% (2)	0%	33.3% (9)	3.7% (1)	100% (27)
Nova Scotia	2.3% (1)	27.9% (12)	7% (3)	2.3% (4)	9.3% (4)	0%	34.9% (15)	16.3% (7)	100% (43)
Ontario	19% (30)	17.1% (27)	12% (19)	7% (11)	4.4% (7)	12.7% (20)	25.3% (40)	2.5% (4)	100% (158)
Yukon	20.8% (5)	0%	29.2% (7)	29.2% (7)	8.3% (2)	4.2% (1)	0%	8.3% (2)	100% (24)
Overall	**10% (39)**	**21.1% (82)**	**12.1% (47)**	**6.7% (26)**	**5.4% (21)**	**5.4% (21)**	**28.3% (110)**	**11.2% (43)**	**100% (388)**

The most common reason across the courts for an adjournment request, when a reason was provided, was for the purposes of counsel (for accused to retain private counsel or for private counsel to attend court). Despite the small numbers, in Yukon most adjournments were for the purpose of a court service or court administration.

Twenty accused in Ontario had their bail hearing adjourned because the court ran out of time to hear any more matters.

8.6 Release on Bail

Most accused are ultimately released on bail, though in light of the high number of adjournments in all jurisdictions, it may take several appearances to arrive at this outcome. Most accused who were released were released with the consent of the Crown. Across the courts, each day an average of 20.5% of cases were released via consent. There was, however, significant variation, with Yukon's Crown consenting to the release of 8.6% of the daily caseload and Nova Scotia's Crown consenting to the release of 39.2% of the daily caseload.

Table 7: Crown Consents to the Accused's Release

	Yes	No	Total
British Columbia	13.4% (30)	86.6% (194)	100% (224)
Manitoba	11.4% (10)	88.6% (78)	100% (88)
Nova Scotia	39.2% (40)	60.8% (62)	100% (102)
Ontario	23.8% (64)	76.2% (205)	100% (269)
Yukon	8.6% (3)	91.4% (32)	100% (35)
Overall	**20.5% (147)**	**79.5% (571)**	**100% (718)**

The bail courts hold very few contested show cause hearings. Overall, 2.4 show cause hearings were held each day in each bail court. Manitoba was anomalous with seven show cause hearings a day. Again, this is a reflection of Manitoba's unique bail processes. When Manitoba is removed, the average number of daily show cause hearings per day across the courts falls to 1.5.

Table 8: Show Cause Hearing

	Yes	No	Total	Daily average
British Columbia	15.2% (34)	84.8% (190)	100% (224)	3.4
Manitoba	39.8% (35)	60.2% (53)	100% (88)	7
Nova Scotia	2.9% (3)	97.1% (99)	100% (102)	0.3
Ontario	8.9% (24)	91.1% (245)	100% (269)	0.6
Yukon	25.7% (9)	74.3% (26)	100% (35)	1.8
Overall	**14.6% (105)**	**85.4% (613)**	**100% (718)**	**2.4**

Across the courts about half of the accused who had a full show cause hearing were released. Although there does appear to be some regional variation, the low number of show cause hearings observed in each jurisdiction makes it difficult to assess trends.

Table 9: Result of Show Cause Hearing

	Detain	Release	Adjourn	Total show cause hearings
British Columbia	55.9% (19)	41.2% (14)	2.9% (1)	100% (34)
Manitoba	51.4% (18)	42.9% (15)	5.7% (2)	100% (35)
Nova Scotia	100% (3)	0%	0%	100% (3)
Ontario	29.1% (7)	66.7% (16)	4.2% (1)	100% (24)
Yukon	33.3% (3)	44.4% (4)	22.2% (2)	100% (9)
Overall	**47.6% (50)**	**46.7% (49)**	**5.7% (6)**	**100% (105)**

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8.7 Form of Release

There are some important differences across the jurisdictions in terms of the forms of release. It is clear that Ontario is anomalous in its heavy reliance on sureties. In 53.1% of all consent releases, the accused was required to have a surety. In addition to this, 21.9% of consent releases in Ontario were with bail program supervision, a kind of quasi-surety. Taken together, 75% of accused released on consent in Ontario were required to be under the supervision of a surety or a bail program.

Table 10: Form of Bail Order after Crown Consents to Release

	Cash	Undertaking	Own recognizance	Bail program	Surety	Same bail[286]	Total
British Columbia	0%	6.7% (2)	50% (15)	20% (6)	0%	23.3% (7)	100% (30)
Manitoba	0%	0%	90% (9)	10% (1)	0%	0%	100% (10)
Nova Scotia	0%	0%	55% (22)	0%	25% (10)	17.5% (7)	100% (40)*
Ontario	4.7% (3)	1.6% (1)	15.6% (10)	21.9% (14)	53.1% (34)	3.1% (2)	100% (64)
Yukon	0%	33.3% (1)	0%	33.3% (1)	33.3% (1)	0%	100% (3)
Overall	**2.0% (3)**	**2.7% (4)**	**38.1% (56)**	**15% (22)**	**30.6% (45)**	**10.9% (16)**	**100% (146)**

* Note: one unknown type of release in Nova Scotia.

Indeed, it is interesting to note that British Columbia and Manitoba never required a surety for release on consent of the Crown; instead, there is a much higher use of release on the accused's own recognizance.

Release orders after a show cause hearing followed a similar pattern. Despite the likelihood that contested cases are more serious cases, British Columbia and Manitoba still did not require surety supervision. Ontario, on the other hand, required sureties even more in contested cases, with 68.75% of contested releases requiring a surety.

Across all the courts, the most common form of release when the Crown consents to the accused's release was on the accused's own recognizance (38.1%) – an acknowledged indebtedness to the Crown and a promise to return to court and comply with any condition the court imposes. A release with surety supervision was the next most common form of release at 30.6%.

286 'Same bail' means the accused was already subject to a bail release order, was subsequently charged or otherwise brought before the court, and is now being re-released on the same bail that they were previously released on. This generally means there was little, if any, in-court discussion of the original form of release or any conditions that may be attached to it.

Table 11: Form of Bail when Released after a Show Cause Hearing

	Own recognizance	Bail program	Surety	Same bail	Total releases
British Columbia	35.7% (5)	50% (7)	0%	14.28% (2)	100% (14)
Manitoba	80% (12)	13.3% (2)	0%	6.7% (1)	100% (15)
Nova Scotia	0%	0%	0%	0%	0% (0)
Ontario	0%	25% (4)	68.75% (11)	6.25% (1)	100% (16)
Yukon	25% (1)	0%	75% (3)	0%	100% (4)
Overall	**36.7% (18)**	**26.5% (13)**	**28.6% (14)**	**8.2% (4)**	**100% (49)**

Looking at all releases together, whether the Crown consented to the accused's release or the accused was released by the justice after a show cause hearing, most accused outside of Ontario and Yukon were released on their own recognizance. While Ontario and Yukon required sureties regularly, British Columbia and Manitoba never used them. That said, when looking at surety and bail supervision together, close to 50% of accused released across all the courts were required to be under some form of supervision.

Table 12: Form of Bail Release for All Released Accused

	Cash	Undertaking	Own recognizance	Bail program	Surety	Same bail	Total
British Columbia	0%	4.5% (2)	45.45% (20)	29.5% (13)	0%	20.45% (9)	100% (44)
Manitoba	0%	0%	84% (21)	12% (3)	0%	4% (1)	100% (25)
Nova Scotia	0%	0%	55% (22)	0%	25% (10)	17.5% (7)	100% (40)*
Ontario	3.75% (3)	1.25% (1)	12.5% (10)	22.5% (18)	56.25% (45)	3.75% (3)	100% (80)
Yukon	0%	14.3% (1)	14.3% (1)	14.3% (1)	57.1% (4)	0%	100% (7)
Overall	**1.5% (3)**	**2% (4)**	**37.75% (74)**	**17.9% (35)**	**30.1% (59)**	**10.2% (20)**	**100% (196)**

* Note: one unknown form of release in Nova Scotia.

8.8 Amount of Bail

The quantum of bail required was known in 133 of the 196 releases. Overall, the amount of bail was a mean of $2,669 and a median of $1,000.

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Table 13: Amount of Bail

	Mean	Median	Range
British Columbia	$1,159	$1,000	$250–$2,000
Manitoba	$2,142	$2,000	$250–$10,000
Nova Scotia	$3,124	$2,000	$100–$25,000
Ontario	$3,004	$1,000	$0–$20,000
Yukon	$1,192	$750	$250–$2,500
Overall	**$2,669.17**	**$1,000**	**$0–$25,000**

8.9 Conditions of Release

Across the courts, a mean of 7.1, or a median of 6.5, conditions of release were imposed on accused. There is, however, significant variation in the number of conditions, with a range of one to 34 conditions being attached to the bail order. There is considerable consistency across the jurisdictions, with the exception of Yukon. In Yukon, the court routinely imposed close to twice as many release conditions (a mean of 12.71 and a median of 13).

Table 14: Number of Conditions of Release

	Mean	Median	Range
British Columbia	6.26	6	1–20
Manitoba	7.38	7	1–12
Nova Scotia	6.97	6	2–13
Ontario	6.99	6.5	1–34
Yukon	12.71	13	8–16
Overall	**7.1**	**6.5**	**1–34**

*Note: Number of conditions of release known in 175 of 196 releases.

A total of 196 releases were observed across the courts. In 24 of these cases, all of the conditions imposed were unknown. The percentages below are calculated on the basis of the 172 cases in which the conditions were known.

A wide variety of conditions were routinely imposed on release orders. Across the courts, conditions prohibiting the possession of weapons (45.9%), not to attend particular addresses (usually including the address of the alleged offence) (30.2%), not to enter a boundary around an address or person (40.1%) and not to contact any victim or witness (51.2%) were most common.

Looking across all jurisdictions, it is clear the court is concerned about where accused live when they are released on bail. Most accused (69.2%) were required to reside with their surety (26.2%) or at an address approved by their surety or the bail program (43%); 44.2% were required to report their residential address to the police.

Looking at individual jurisdictions, however, it is clear that there are local perspectives on the appropriateness of certain conditions of release. Consistent with Ontario and Yukon's requirement of sureties for release, close to half of accused in Ontario (42.7%) and in Yukon (42.9%) were required to reside with their surety.

In nearly half of all cases (43%), the accused was required to "keep the peace and be of good behaviour" and in a quarter of cases accused were required to "be amenable to the rules and discipline of the home" (25.6%). In Ontario 42.7% and in Yukon 57.1% were required to comply with any rule the surety imposed in their home.

Close to a third of all accused released on bail were required to attend treatment or counselling (28.5%); abide by a curfew (23.8%); not purchase, possess or consume drugs (25%) or alcohol (27.3%); and/or report to a program (27.2%). Treatment conditions at the bail stage, however, appear to be largely an Ontario phenomenon, with 57.3% of all releases requiring accused to attend treatment or counselling. Treatment conditions were rarely imposed in British Columbia or Manitoba and were never imposed in Nova Scotia or Yukon. That said, 21.2% in Ontario, 54.1% in British Columbia, 22.7% in Manitoba and 100% in Yukon were required to report to a program within a specified period of time.

Abstaining absolutely from the purchase, possession or consumption of alcohol or non-medically prescribed drugs was commonly required in Manitoba, Nova Scotia and Yukon. Manitoba and Yukon also commonly imposed the condition that accused are not to enter any establishment whose primary source of revenue is generated through the sale of alcohol (more commonly, "not enter any bars").

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Table 15: Conditions of Release[287]

	Reside with surety	Reside at approved address	Report address to police	Be amenable to rules of home	Keep the peace and be of good behaviour	Not possess any weapons	No gun licence (FAC)
British Columbia	2.7% (1)	24.3% (9)	37.8% (14)	16.2% (6)	78.4% (29)	24.3% (9)	8.1% (3)
Manitoba	13.6% (3)	72.7% (16)	72.7% (16)	4.5% (1)	50% (11)	45.5% (10)	13.6% (3)
Nova Scotia	19.4% (6)	35.5% (11)	35.5% (11)	3.2% (1)	90.3% (28)	41.9% (13)	0%
Ontario	42.7% (32)	45.3% (34)	38.7% (29)	42.7% (32)	2.7% (2)	61.3% (46)	14.7% (11)
Yukon	42.9% (3)	57.1% (4)	85.7% (6)	57.1% (4)	57.1% (4)	14.3% (1)	0%
Overall	**26.2% (45)**	**43% (74)**	**44.2% (76)**	**25.6% (44)**	**43% (74)**	**45.9% (79)**	**9.9% (17)**

	Not contact victim or witness	Not be at address	Not enter boundary	Remain in province	Curfew	House arrest	Present self at door on police request
British Columbia	37.8% (14)	40.5% (15)	18.9% (7)	0%	13.5% (5)	0%	5.4% (2)
Manitoba	45.5% (10)	27.3% (6)	13.6% (3)	0%	54.5% (12)	4.5% (1)	0%
Nova Scotia	51.6% (16)	25.8% (8)	45.2% (14)	19.4% (6)	19.4% (6)	16.1% (5)	16.1% (5)
Ontario	56% (42)	29.3% (22)	52% (39)	4% (3)	20% (15)	12% (9)	0%
Yukon	85.7% (6)	14.3% (1)	85.7% (6)	57.1% (4)	42.9% (3)	0%	0%
Overall	**51.2% (88)**	**30.2% (52)**	**40.1% (69)**	**7.6% (13)**	**23.8% (41)**	**8.7% (15)**	**4.1% (7)**

	Attend treatment/ counselling	Report to program within specified time	Co-operate with health worker	Take medicine	No drugs	No alcohol	Not enter any bars
British Columbia	8.1% (3)	54.1% (20)	0%	0%	16.2% (6)	10.8% (4)	2.7% (1)
Manitoba	13.6% (3)	22.7% (5)	4.5% (1)	0%	40.9% (9)	45.5% (10)	22.7% (5)
Nova Scotia	0%	0%	0%	0%	45.2% (14)	45.2% (14)	3.2% (1)
Ontario	57.3% (43)	21.3% (16)	8% (6)	4% (3)	12% (9)	17.3% (13)	8% (6)
Yukon	0%	100% (7)	0%	0%	71.4% (5)	85.7% (6)	71.4% (5)
Overall	**28.5% (49)**	**27.9% (48)**	**4.1% (7)**	**1.7% (3)**	**25% (43)**	**27.3% (47)**	**10.5% (18)**

287 Note: the percentages are of the cases in which people were released and the particular condition was imposed; totals will add up to more than 100%.

	Attend court	Attend work/ school	Report to police	Restrict internet/e-com	No contact with anyone with criminal record	Not operate vehicle	Conditional access to own child
British Columbia	16.2% (6)	0%	2.7% (1)	5.4% (2)	0%	0%	0%
Manitoba	40.9% (9)	0%	0%	9.1% (2)	0%	9.1% (2)	0%
Nova Scotia	83.9% (26)	0%	9.7% (3)	0%	0%	0%	0%
Ontario	4% (3)	8% (6)	6.7% (5)	4% (3)	2.7% (2)	2.7% (2)	5.3% (4)
Yukon	100% (7)	42.9% (3)	0%	0%	0%	0%	0%
Overall	**29.7% (51)**	**5.2% (9)**	**5.2% (9)**	**4.1% (7)**	**1.1% (2)**	**2.3% (4)**	**2.3% (4)**

	Reside in weapon-free home	Not be in public with minors	Not be with minors under age 16	Surrender passport	Not possess documents not in own name	Not possess forging instruments
British Columbia	0%	2.7% (1)	2.7% (1)	0%	2.7% (1)	13.5% (5)
Manitoba	0%	0%	0%	0%	0%	0%
Nova Scotia	0%	0%	3.2% (1)	6.5% (2)	0%	0%
Ontario	1.3% (1)	1.3% (1)	1.3% (1)	2.7% (2)	4% (3)	1.3% (1)
Yukon	0%	0%	14.3% (1)	0%	0%	0%
Overall	**0.6% (1)**	**1.1% (2)**	**2.3% (4)**	**2.3% (4)**	**2.3% (4)**	**3.5% (6)**

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Appendix C: The Practice of Bail in British Columbia, Manitoba, Nova Scotia, Ontario and Yukon

9.1 Bail in British Columbia

Weekday bail proceedings in British Columbia are usually conducted before provincial court judges. Individual accused may appear in court either in person or via video, and the Crown and duty counsel are available at the courthouse. Some remote sites have neither a local courthouse nor video conferencing technology. In these instances, counsel/accused call the Justice Centre in Burnaby, which is staffed with Judicial Justices[288] almost 24 hours a day to allow for remote bail hearings.

Weekend and after-hours bail matters are also conducted through the Burnaby Justice Centre via tele-bail and video bail.[289] In these cases counsel is not usually involved; police officers regularly act as prosecutors and the accused is generally unrepresented. In some police detachments, there are designated officers or civilian court liaisons who conduct bail hearings. Officers can seek advice from local Crown counsel during office hours and, where necessary, after hours; accused have access to legal advice through the *Brydges* line, which provides 24-hour telephone access to a lawyer for individuals who have been detained or arrested. The only exceptions are Vancouver and Surrey, the two largest urban centres in British Columbia, where Crown counsel is available on weekends to conduct bail hearings via telephone or video conferencing. In Vancouver, Crown counsel is also available on weekday evenings.

288 Judicial Justices are appointed under s 30.2 of the *Provincial Court Act* and are assigned judicial duties by the Chief Judge. To be eligible for appointment applicants must have practiced law for a minimum of five years.

289 Video conferencing technology for court hearings is available in a small number of police detachments, including Surrey, Delta, The Peace District (Fort St. John, Fort Nelson and Dawson Creek), Vancouver and Williams Lake. There are approximately 70,000 bail appearances in the province annually, with 12,000 being remote bail appearances with the Justice Centre, and the majority of these occurring by telephone.

290 British Columbia Ministry of Justice, "Bail Reform Project", online: British Columbia Ministry of Justice <http://www.criminaljusticereform.gov.bc.ca/en/justice_reform_projects/bail_reform/index.html>.

At least one recent reform project has attempted to address delays associated with processing bail in remote communities. In 2006 a review of British Columbia's provincial court statistics found that out of approximately 107,000 bail appearances, almost 40,000 did not result in a bail order being made.[290] In 2007 the province launched a bail reform pilot project "aimed to make bail hearings more effective and allow them to be heard outside of regular court hearings."[291] While the urban reform pilot had little impact on the outcome of bail cases, the bail reforms in the rural area studied were more successful.[292] First appearances, even during weekdays, took place remotely via video link with the Judicial Centre.[293] Video conferencing facilities were installed in police detachments and courthouses to allow the accused, defence counsel, Crown, and required court and judicial officers to communicate with each other. These changes increased the strain on police resources, as they had to transport accused between cells inside the station to facilitate the video link. Otherwise the project reportedly resulted in a number of improvements:

- Police made more release decisions;
- Bail decisions were made earlier in the process, with fewer appearances, and with more consent releases;
- Provincial court judges conducted fewer bail hearings and made fewer bail decisions; and
- Resources allocated to prisoner transfer were significantly reduced.[294]

Ultimately, the pilot was not continued due to increased resource strain on the police. It should be noted, however, that the RCMP suggested additional staff should have been provided to facilitate the video conferencing.[295]

British Columbia employs bail supervisors, whose job is to manage and supervise accused and to ensure the accused abides by bail conditions and appears in court.[296] Bail supervision in British Columbia dates back to 1974, when it was implemented in response to the *Bail Reform Act* passed in 1972.[297] Bail supervisors are probation officers who work out of community corrections offices; these offices also supervise adult offenders serving community sentences and those in pre-trial diversionary programs.[298] It is unclear whether every community corrections office offers bail supervision services, but there are more than 40 offices located throughout the province.[299] Bail supervisors, who receive specialized training with a focus on domestic violence and sexual offences, develop a case supervision plan and a reporting schedule, and provide supervision for accused released on bail.

291 *Ibid*.
292 Malatest Program Evaluation & Market Research, *Evaluation of the Bail Reform Pilot Project Peace Region and Surrey: Final Evaluation Report* (31 March 2010), online: British Columbia Ministry of Justice <http://www.criminaljusticereform.gov.bc.ca/en/justice_reform_projects/bail_reform/docs/brp_evaluation.pdf>.
293 *Ibid*.
294 *Ibid*.
295 *Ibid*.
296 Justice British Columbia, "Bail Supervision", *Criminal Justice Information and Support*, online: Justice British Columbia <http://www.justicebc.ca/en/cjis/you/accused/bail/supervision.html>.
297 Solicitor General of Canada, *International Conference on Alternatives to Imprisonment Report* (Ottawa: Minister of Supply and Services Canada, 1982), online: National Criminal Justice Reference Service <https://www.ncjrs.gov/pdffiles1/Digitization/89021NCJRS.pdf> at 36.
298 Auditor General of British Columbia, *Effectiveness of BC Community Corrections* (Victoria: AudGen British Columbia, Dec 2011), online: Auditor General of British Columbia <http://www.bcauditor.com/files/publications/2011/report_10/report/OAGBC-BC-Community-Corrections.pdf> at 12. This 2011 report refers to the responsible government department as the Community Corrections and Corporate Programs (CCCP) division of the Ministry of Public Safety and Solicitor General, but these offices now appear to be structured within the BC Corrections division of the Ministry of Justice. British Columbia Ministry of Justice, *BC Corrections*, online: British Columbia Ministry of Justice <http://www.pssg.gov.bc.ca/corrections/>.
299 British Columbia Ministry of Justice, *Community Corrections Offices*, online: British Columbia Ministry of Justice <http://www.pssg.gov.bc.ca/corrections/contact/cco.htm>.

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According to British Columbia Corrections, "[p]ersons released on bail have not undergone a trial determining guilt; therefore interventions do not include requirements for risk assessment, programming or treatment."[300] Bail supervisors do verify compliance with conditions of bail by contacting third parties such as the police, other service providing agencies and ministries, employers, family, co-residents, victims and landlords. Where court-ordered conditions authorize, bail supervisors conduct home visits for residency approval purposes. In rural locations where there are no dedicated bail supervisors, supervision duties can be assigned to the RCMP.

Bail supervisors have the legal authority to enforce bail conditions. The decision to report that an accused has violated a condition of their release is left to the discretion of the bail supervisor, who will decide the appropriate course of action based on an assessment of the charges and the individual's criminal history and personal circumstances. Bail supervisors can assist in having bail conditions reviewed in court or negotiating with Crown counsel. Reporting a failure to comply with a condition may result in the accused being re-arrested and returned to bail court to have their release reviewed.[301]

A 2013 Auditor General's report on community corrections in British Columbia shows that bail supervision has consistently represented the second largest category of community supervision orders handled by community corrections offices.[302] In 2012/13 bail supervision accounted for 34% of the total caseload, eclipsed only by the supervision of probation orders (50%), and far exceeding the other categories of supervision – conditional sentences, recognizance orders (peace bonds) and alternative measures (diversion programs) – none of which exceeded 9% of the total caseload.[303]

9.2 Bail in Manitoba

Most bail matters in Manitoba are adjudicated before judges. The Winnipeg court uses an administrative triage system to streamline the bail process.[304] All bail matters first appear on the bail triage docket at 9:30 a.m. Defence counsel generally arrive having already conferred with their clients at the detention centre, and multiple Crowns are present to process any consent releases or adjournments. The necessary paperwork is processed before the justice of the peace without the attendance of the accused or their sureties. From 10:30 a.m. to 11:00 a.m., two of the Crowns argue any contested matters before the provincial court judges in bail court. Any matters that are outstanding after 11:30 a.m. must be addressed in bail court.[305] For those in remote communities, a first appearance may be heard via telephone before a justice of the peace. If an individual is not released, he or she will be flown to a provincial detention facility to have bail processed before the provincial court.

300 British Columbia Corrections, "Remand and Bail Supervision in British Columbia", Powerpoint presentation to authors (30 September 2013).
301 *Ibid*.
302 Corrections Branch, British Columbia Ministry of Justice, *A Profile of B.C. Corrections: Protect Communities, Reduce Reoffending* (Oct 2013), online: British Columbia Ministry of Justice <http://www.pssg.gov.bc.ca/corrections/docs/BCCorrectionsProfile.pdf> at 18.
303 *Ibid*.
304 Provincial Court of Manitoba, *Pre-trial Coordination Protocol: Adult Charges* (Winnipeg: Provincial Court, 4 January 2013), online: Provincial Court of Manitoba <http://www.manitobacourts.mb.ca/pdf/pretrial_jan2013.pdf>.
305 *Ibid*.

The Manitoba Ministry of Corrections provides bail supervision through the probation services office. Additional bail supervision programs are provided by the John Howard Society of Manitoba and the Elizabeth Fry Society of Manitoba, which are focused on accused who would otherwise not receive bail release. The John Howard Society, for example, directs its supervision capacity towards adult men in custody on remand who have a criminal history and/or history of non-compliance, a lack of community stability or support, and addictions issues.[306] In order to be eligible for the John Howard Society supervision, accused persons must not have gang ties nor any sex-related convictions or current charges, and they cannot be first-time offenders.

9.3 Bail in Nova Scotia

In Nova Scotia judges deal with most bail matters. Accused who are detained late on Friday or over the weekend have access to tele-bail: bail hearings conducted by telephone with one of the presiding justices of the peace working at or through the Justice of the Peace Centre in Dartmouth.

Nova Scotia does not currently have any form of adult bail supervision program. A pilot Adult Bail Supervision Program was implemented in the Halifax region in October 2008[307] involving "more intensive" supervision, including electronic monitoring and computerized voice verification[308]. The program was eliminated after the new provincial government conducted a review and found it to be "basically . . . ineffective."[309]

Although youth bail programs were not directly addressed in this study, it should be noted that youth bail supervision in Nova Scotia has recently undergone significant changes. The Nunn Commission of Inquiry was convened by the Nova Scotia government to investigate the circumstances surrounding a youth who was released on bail, and two days later killed a woman after crashing into her car while high on drugs and driving a stolen vehicle.[310] The Commission ultimately recommended the creation of a "fully funded bail supervision program" for youth in Halifax, with efforts to expand the program to other areas of the province, and to "include a focus on both compliance with bail conditions and identification of proactive supports and services for the young persons in the program."[311] In January 2007 the Nova Scotia government announced that a bail supervision program for youth would open in Halifax.[312] The government planned to expand the Youth Bail Supervision Program to Cape Breton and the Annapolis Valley; however, a provincial election intervened in 2009, and after an internal evaluation of the program in 2010, the program was cancelled due to "budget constraints[,] . . . limited use of the program, and concerns over effectiveness."[313]

306 John Howard Society of Manitoba, *Bail Assessment, Support & Supervision Program*, online: John Howard Society of Manitoba <http://www.lawsociety.mb.ca/publications/other-publications/Bail_Assessment_Support_Supervision_Program.pdf/at_download/file>.

307 Nova Scotia Department of Justice, *Annual Accountability Report for the Fiscal Year 2007–2008*, online: Nova Scotia Department of Justice <http://www.gov.ns.ca/just/global_docs/DOJ%20Accountability%20Report%202007-08.pdf> at 17.

308 Canadian Press, "N.S. judge to rule next week on bail for accused killer of Jennifer Horne", *The Canadian Press* (19 March 2010), online: The News <http://www.ngnews.ca/News/Canada-World/2010-03-19/article-930356/N.S.-judge-to-rule-next-week-on-bail-for-accused-killer-of-Jennifer-Horne/1>.

309 Nova Scotia Legislature, *Subcommittee of the Whole House on Supply* (28 April 2011), online: Nova Scotia Legislature <http://nslegislature.ca/index.php/committees/committee_hansard/C13/subsupply_apr28>. A detailed overview of the adult bail supervision program as it existed in July 2009 is available in an archived version of the Department of Justice Correctional Services Policy & Procedures document: Nova Scotia Department of Justice, *Correctional Services Policy & Procedures, Subject No. 23.03.00, Current Revision Date: July 27, 2009 (Adult Bail Supervision Program)*, online: Nova Scotia Department of Justice <http://novascotia.ca/just/Corrections/policy_procedures/Correctional_Services_Policies_Procedures.pdf>.

310 Nunn Commission of Inquiry, *Spiralling out of Control: Lessons Learned from a Boy in Trouble* (December 2006), online: Nova Scotia Department of Justice <http://novascotia.ca/just/nunn_commission/_docs/Report_Nunn_Final.pdf>.

311 *Ibid*.

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9.4 Bail in Ontario

The vast majority of Ontario bail decisions are made by justices of the peace. During the week, accused appear in person or via video link from the police station or correctional centre. There are also several weekend and statutory holiday (WASH) courts that provide in-person and video bail hearings.

Individuals who are arrested in remote communities are flown to provincial correctional institutions in larger-population centres to have their bail processed.[314] While consent releases on the first appearance can be addressed over the telephone without having the accused fly out of the community, if a person is not released within 24 hours of arrest, they will be transported to a correctional centre.[315] Although the Ontario Court of Justice rotates through 29 Aboriginal fly-in communities, the court does not sit frequently enough in any one of the communities to provide timely bail hearings.[316]

Ontario also has a long history of offering bail supervision programs as an alternative to traditional forms of pre-trial release (such as cash bail, own recognizance and surety releases), with a six-month pilot project in two courts dating back to 1979.[317] In contrast to British Columbia and Alberta, where bail supervision is provided through existing probation services, the initiative in Ontario was launched with the partnership of the John Howard Society, the Elizabeth Fry Society and the Salvation Army.[318] The use of bail supervision was motivated in part by economic concerns – namely, the costs of incarcerating individuals previously unable to secure bail – as well as the philosophical objection to an unnecessarily large number of legally innocent individuals being held in custody while awaiting trial.[319]

The Ministry of the Attorney General's website describes the purpose of the Bail Verification and Supervision Program as enabling the pre-trial release of individuals who "are not a threat to the community [but] do not have the finances or social ties to meet bail conditions." [320] The three functions of the program are to "identify the availability of a surety"; provide "verified, neutral and factual information about an accused person at judicial interim release proceedings"; and provide "supervisory, counseling and referral services for people who are released from custody by the courts" where supervision is directed as a condition of release.[321] The verification process involves gathering information regarding an accused's community and family ties, employment and educational status, medical and addiction issues, and past history of failure to comply with court orders, and ultimately sharing these findings with police, the Crown, defence counsel and the court.[322]

312 Nova Scotia, *Helping Kids, Protecting Communities: Response to the Nunn Commission* (January 2007) at 6, online: Nova Scotia Department of Justice <http://www.novascotia.ca/just/nunn_commission/_docs/NunnResponse.pdf>. A detailed overview of the Youth Bail Supervision Program as it existed in July 2009 is available in an archived version of the Department of Justice *Correctional Services Policy & Procedures document: Nova Scotia Department of Justice, Correctional Services Policy & Procedures, Subject No. 23.02.00, Current Revision Date: July 27, 2009 (Youth Bail Supervision Program)*, online: Nova Scotia Department of Justice <http://novascotia.ca/just/Corrections/policy_procedures/Correctional_Services_Policies_Procedures.pdf>.

313 Nova Scotia Auditor General, *Report of the Auditor General* (2011) at 74, online: Nova Scotia Auditor General <http://oag-ns.ca/index.php/publications?task=document.viewdoc&id=817>.

314 Ontario Court of Justice and Ministry of the Attorney General, *Report on Fly-In Court Operations*, (Toronto: 2013), online: Ontario Court of Justice <http://www.ontariocourts.ca/ocj/files/reports/fly-in.pdf>.

315 *Ibid*.

316 *Ibid*.

317 Cameron Brown, *Toronto Bail Program*, online: Centro de Estudios de Justicia de las Américas <http://www.cejamericas.org/manualsaj/Toronto_BailProgram.pdf>.

318 *Ibid*.

319 *Ibid*.

Although Ontario's bail supervision programs are delivered by different community service agencies, each program operates according to a province-wide standards and procedures manual from the Attorney General.[323] In order to be eligible for supervision, an individual must have no appropriate surety. The bail program must also be convinced that adequate supervision can be provided, taking into account:

- the verified information regarding the accused;
- a pattern of previous failures to appear and failures to comply (each local program may develop its own specific criteria);
- previous response to community sanctions;
- ability to comprehend legal obligations and expectations;
- willingness and ability to comply with suggested conditions of release; and
- conditions necessary for effective supervision.[324]

The presence of admission requirements for acceptance into bail supervision programs means that publicly funded bail programs can reject applications; denying supervision in the community means the accused is likely to be detained in custody.

9.5 Bail in Yukon

Bail court in Yukon is mostly presided over by a justice of the peace. The court sits permanently in Whitehorse and travels on a circuit to 14 smaller communities,[325] hearing matters for one to three days every two months.[326] Bail matters are generally heard in Whitehorse, during business hours, by the permanently sitting territorial court. Both duty counsel and Crown prosecutors are present. Prior to proceeding with a bail hearing, it is customary for the accused to be adjourned in order to facilitate a bail supervision assessment, which is completed by a probation officer. The report verifies the information reported by the accused, including their criminal record, employment status, and availability of a surety; it is not used to create a comprehensive release plan.

Accused who are released on bail are generally required to report to and be supervised by one of 10 probation officers, who are part of the Offender Supervision and Services branch of Corrections.[327] In 2008 and 2009, an average of 219 individuals per day were subject to bail supervision[328] and overall bail orders accounted for roughly half of all the community supervision orders overseen by Offender Supervision and Services.[329]

320 Ontario Ministry of the Attorney General, *Published Results-Based Plan 2009–10*, online: Ontario Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/mag_annual/rbp_2009_10.asp>.

321 Ontario Ministry of the Attorney General, *Bail Verification and Supervision Program: Standards and Procedures Manual* (revised April 2009).

322 Cameron Brown, *Toronto Bail Program*, online: Centro de Estudios de Justicia de las Américas <http://www.cejamericas.org/manualsaj/Toronto_BailProgram.pdf>.

323 Ontario Ministry of the Attorney General, *Bail Verification and Supervision Program: Standards and Procedures Manual* (revised April 2009).

324 *Ibid*.

325 Yukon Courts, *Territorial Court*, online: Yukon Courts <http://www.yukoncourts.ca/courts/territorial.html>.

326 Yukon Courts, *Territorial Court Sittings*, online: Yukon Courts <http://www.yukoncourts.ca/pdf/CIRCUIT_CALENDAR_-_2014_Aug_28_13.pdf>.

327 Yukon Department of Justice, *Community Supervision*, online: Yukon Department of Justice <http://www.justice.gov.yk.ca/prog/cor/community_supervision.html>.

328 Statistics Canada, *Trends in the Use of Remand in Canada* (Ottawa: StatCan, 2011), online: StatCan <http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11440-eng.htm>.

329 From 2004-2010, bail supervision comprised a plurality of community supervision orders, with 46.6% of all supervision orders compared with 42.6% for probation supervision. Yukon Department of Justice, *Department of Justice Facts 2011*, online: Yukon Department of Justice <http://www.justice.gov.yk.ca/pdf/Factsbook_2011_web.pdf> at 19.