Creating Criminality: The Intensification of Institutional Risk Aversion Strategies and the Decline of the Bail Process

by

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A thesis submitted in conformity with the requirements for the degree of Doctor of Philosophy
Centre for Criminology and Sociolegal Studies
University of Toronto

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Abstract

The question of whether or not to release an accused on bail pending case resolution involves an evaluation of the risk the accused poses to the community. In addition to this evaluation, the risk posed to the reputation of the criminal justice system should the accused re-offend while on bail has come to influence the timeliness of the bail decision as well as the conditions of the release order. It appears that questions of institutional risk have intensified strategies of process, whereby the bail decision making process has come to take considerably longer as court actors postpone making the release decision. This organizational culture of risk aversion is evidenced in the growing remand population, the dominance of adjournment requests, the presumption of surety supervision, as well as the imposition of numerous restrictive conditions of release that are questionably related to the grounds for detention and allegations of the offence. Due to the additional protections contained in the Youth Criminal Justice Act (YCJA), the expectation is bail should be more liberally used for youths. However, despite the additional legislated protections, bail practices for both adults and youths are operating in remarkably similar ways. Indeed, it appears that routine bail practices for both adults and youths are inconsistent with the essential principles of the bail process.
In Canada there is a presumption in favour of release on bail and a presumption of release on the least restrictive form of release appropriate in the circumstances. Despite these principles there has been a relatively steady increase in the size of the remand population in Canada. Focusing on the situation in Ontario, this dissertation examines the bail process in an effort to understand how the remand population has come to exceed the population of sentenced prisoners in provincial prisons for both adults and youths.
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Table of Contents

Abstract ii
Acknowledgements iv
List of Tables x
List of Figures xii

Chapter 1  Introduction 1

This Historical Purpose of Bail 2
   Bail in England 3
   Early Bail In Canada 4
Friedland’s Study 5
   The Bail Reform Act 7
   The Canadian Charter of Rights and Freedoms 8
   The Case Law 9
Further Amendments to the Law on Bail 11
End of 2 for 1 Sentencing 12
The Current State of the Law on Bail 18
   Police Powers to Release or Detain Accused 18
Justices of the Peace and Ontario Bail Courts 21
The Timeliness of the Bail Decision 22
Bail Court and the Release Decision 23
   Presumption of Release 23
   Conditions of Release 25
   Grounds for Detention 27
   Reverse Onus 28
Bail for Young People: The Youth Criminal Justice Act (YCJA) 30
   Bill C-10 and the Youth Criminal Justice Act 32
Trends in the Use of Pre-Trial Detention in Canada 33
   Summary 45

Chapter 2  Research and Theory 49

Research 49
   Adjournments 49
   Release Decision 51
   Conditions of Release 53
   Youth Bail 54
   Court Culture 56

   Theory 58
   Court Culture 58
      The Court as an Organization 58
      What Courts Are Really Like 60
Coming Together in the Pursuit of a Common Goal 62
The Implications of What the Courts are Really Like 63
Risk Aversion 64
Risk, Uncertainty and Neo-Liberalism 64
Organizational Risk Avoidance 66
Excessive Caution and the Defensible Decision 68
The Politics of Risk 68

Chapter 3  Who Said Anything about Justice? Court Culture and the Courtroom Workgroup 70

Introduction 70
   An Un-bureaucratic Organization 71
   The Ideal and the Reality 72
Methodology 75
A Typical Day in Bail Court 77
An Aggregated Examination of Court Time 83
Hold Downs 85
The ‘Culture of Adjournment’ 90
Who Requests the Adjournments? 96
Reasons for Adjournment Requests 100
What about Release Decisions? 107
WASH Courts 108
Conclusion 114

Chapter 4  Shifting Risk- Bail and the Use of Sureties 117

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Introduction 117
Organizational Risk Avoidance 119
Accountability and Blame-ability 120
Evaluating Risk in the Bail Court 122
The Law on the Books 124
Sureties 126
Methodology 127
‘Is Your Surety Present?’ 130
Court Efficiency and Sureties 135
How Much Can you Afford? 137
Conditions of Release 140
Chapter 5  The Criminal Offence of Entering Any Shoppers Drug Mart in Ontario: Criminalizing Ordinary Behaviour with Youth Bail Conditions

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Chapter 6  A Comparison of the Bail Process for Adults and Youths

Chapter 7  Conclusion
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adults and Youths</td>
<td>220</td>
</tr>
<tr>
<td>The Bail Process</td>
<td>222</td>
</tr>
<tr>
<td>The Expediency of Adjournments</td>
<td>223</td>
</tr>
<tr>
<td>Risk Avoidance</td>
<td>224</td>
</tr>
<tr>
<td>Conditions of Release as a By-product of a Risk-aversion Mentality</td>
<td>225</td>
</tr>
<tr>
<td>The More Things Change the More they Stay the Same</td>
<td>226</td>
</tr>
<tr>
<td>Sureties are Today’s ‘Cash Bail’</td>
<td>228</td>
</tr>
<tr>
<td>Challenging the Presumption of Innocence</td>
<td>231</td>
</tr>
<tr>
<td>Caution Against the Reverse Onus Provision</td>
<td>232</td>
</tr>
<tr>
<td>Unforeseen Consequences of Encouraging Greater Use of Conditions of Release</td>
<td>233</td>
</tr>
<tr>
<td>Court Culture</td>
<td>235</td>
</tr>
<tr>
<td>The Culture of Adjournment</td>
<td>236</td>
</tr>
<tr>
<td>The Culture of Responsibility Aversion</td>
<td>239</td>
</tr>
<tr>
<td>The Politics of Risk</td>
<td>241</td>
</tr>
<tr>
<td>Resistance to Change</td>
<td>243</td>
</tr>
<tr>
<td>Suggestions for Change</td>
<td>247</td>
</tr>
<tr>
<td>Easing the Flow of Cases</td>
<td>247</td>
</tr>
<tr>
<td>Improving the Administration of the Courts</td>
<td>248</td>
</tr>
<tr>
<td>Sureties</td>
<td>249</td>
</tr>
<tr>
<td>Legal Decisions by the Legally Trained</td>
<td>251</td>
</tr>
<tr>
<td>Moving Forward</td>
<td>252</td>
</tr>
</tbody>
</table>

**Bibliography**

| Bibliography                                                                 | 254  |
List of Tables

Chapter 3
Table 1: Distribution of Bail Court Observations 76
Table 2: A Typical Day in Bail Court 78
Table 3: Court Operating Time (hours: minutes) 84
Table 4: Primary Reasons for Hold Down Requests 86
Table 5: Daily Case Outcomes 92
Table 6: The Proportion of Cases Remanded by the Bail Appearance Number Observed 95
Table 7: Who Requests an Adjournment? 98
Table 8: Reason Provided to the Court for the Adjournment Request 102
Table 9: WASH Court Operating Time 110
Table 10: WASH Court Daily Case Outcomes 111
Table 11: WASH Court- Who Requests an Adjournment? 112
Table 12: WASH Court- Reason Provided to the Court for the Adjournment Request 113

Chapter 4
Table 1: Outcome of Case on the Date Observed 129
Table 2: Was a Surety Required for a Release as a Result of Consent by the Crown? 131
Table 3: Was a Surety Interviewed in Court for a Release Consented to by the Crown? 133
Table 4: Was a Surety Required for a Release Contested by the Crown after a Show Cause Hearing? 134
Table 5: Was a Surety Interviewed in Court during the Show Cause Hearing? 135
Table 6: Reason Provided to the Court for the Adjournment Request 136
Table 7: Amount Surety Required to Promise the Court for a Consent Release 139
Table 8: Amount Surety Required to Promise the Court after a Show Cause Hearing 140
Table 9: Were Conditions Required for a Release Consented to by the Crown? 141
Table 10: Were Conditions Required for a Release Contested by the Crown? (After a Show Cause Hearing) 142
Table 11: Number of Conditions Imposed on a Release Consented to by the Crown 143
Table 12: Number of Conditions Imposed on a Release Contested by the Crown (After a
Chapter 5
Table 1: Coding Rule for Conditions 163
Table 2: Descriptive Statistics 165
Table 3: Predictors of the Number of Conditions Imposed 172
Table 4: The Most Commonly Imposed Conditions 174
Table 5: Relationship of Each Bail Condition to the Grounds for Detention and the Facts of the Case 175

Chapter 6
Table 1: Proportion of Provincial/Territorial Custodial Population on Remand in 2009/2010 189
Table 2: Descriptives for Vases with an Early Bail Hearing 197
Table 3: ‘Simple’ Cases by Decision to Hold for Bail Hearing (% with ‘early bail’) 200
Table 4: Outcome of the Bail Process 201
Table 5: Collapsed Outcome of the Bail Process 202
Table 6: ‘Simple’ Cases by the Bail Decision 203
Table 7: Time Spent in the Bail Process 208
Table 8: Time to Case Completion After Bail 210
Table 9: Time to Case Completion for Accused Denied and Granted Bail 214

Chapter 7
Table 1: Example of Possible Caseload Reduction in Bail Court 237
List of Figures

Chapter 1

Figure 1: Imprisonment Rates (Total, Federal and Provincial) in Canada from 1958 to 2010
Figure 2: Provincial Imprisonment Rates (Total, Sentences and Remand) in Canada from 1978 to 2010
Figure 3: Ontario Provincial Imprisonment Rate per 100,000 Residents 1978-2010
Figure 4: Average Remand Counts by Province (2009/2010)
Figure 5: Percentage of Provincial Counts which are Remand, by Province (2009/2010)
Figure 6: Total Crime Rate (excluding traffic offences) per 100,000 Residents for Canada and Ontario (1975-2009)
Figure 7: Efficiency Measures (Number of Cases, Court Appearances and Days to Disposition) in Ontario Provincial Courts from 2001 to 2007
Figure 8: Efficiency Measures Number of Cases, Court Appearances and Days to Resolution) for Ontario Bail Cases from 2001 to 2007
Figure 9: Provincial Admissions per 100,000 Residents in Ontario between 1978 and 2008
Figure 10: Efficiency Measures (Number of Court Appearances and Number of Days) in the Bail Process in Ontario from 2001-2007
Chapter 1
Introduction

The Bail Reform Act (1972) created a presumption in favour of release on bail and a presumption of release on the least restrictive form of release appropriate in the circumstances. Enacting these principles suggests that Parliament recognized the severe deprivation of liberty involved in denying bail and the importance of minimizing the encroachment on the liberty of people who are to be presumed innocent. Despite these principles there has been a relatively steady increase in the size of the remand population in Canada. While the growth in the remand population has been gradual it has reached proportions that present significant implications for the criminal justice system. Focusing on the situation in Ontario, this dissertation examines the bail process in an effort to understand how the remand population has come to exceed the population of sentenced prisoners in provincial and territorial prisons in Canada as a whole. In order to understand the current situation it is important to look at the bail court and the way decisions are being made. Indeed, what is happening in court is in many ways responsible for the growth of the remand population. Using data collected from court observations around Ontario and data used with the permission of the Ministry of the Attorney General, this dissertation examines the bail court practices that have developed by exploring the disjuncture between the law as it is written and the law as it is being practiced.

In order to understand how bail practices have come to be inconsistent with the essential principles of the bail legislation and how the principles of bail have been eroded in various ways, Chapter 1 outlines the historical development of the law on bail, followed by a review of imprisonment trends. Chapter 2 provides the theoretical framework that will be used throughout the dissertation and reviews the limited research that has been done on the bail process. Chapter
3 looks at the operation of the bail court and suggests that a court culture has developed that centres on a shared desire to get through the working day as quickly as possible. This chapter will suggest a ‘culture of adjournment’ has taken over the bail process, whereby an adjournment is the most commonly accepted and indeed expected daily case outcome for a case in bail court. Chapter 4 describes the release decisions that are being made. This chapter explores the use of sureties and makes the argument that in requiring surety supervision for release the court is attempting to insulate the system from being held responsible should the accused fail to comply or commit another criminal offence while on bail. Chapter 5 examines the use of conditions of release in youth court. Despite legislation that provides additional barriers to custody and further protections for youths, the youth remand population has developed in tandem with the adult remand population. Using observational court data this chapter explores the relationship between conditions of release and the grounds for detention and allegations of the offence. Chapter 6 uses data from the Ministry of the Attorney General to see if the bail process is operating in different ways for adults and youths, as would be expected given the additional protections for youth in the Youth Criminal Justice Act (YCJA). Chapter 7 provides an overview of the findings, considers current bail policy, and discusses some implications the remand population has for the administration of justice in Ontario.

The Historical Purpose of Bail

This chapter outlines the history of law on bail in Canada and provides an overview of the current legislation. It is important to understand the historical purpose of the law on bail and the concerns about bail that inspired a conceptual shift in the way bail was to be administered under the Bail Reform Act (1972). In various ways, this thesis examines the bail process as it
currently exists. Following an overview of the law, I will present data on the criminal court process, demonstrating that despite the change in the law and a decreasing crime rate, the population of people held in remand awaiting the determination of their bail or the commencement of their trial has grown considerably since the enactment of the Bail Reform Act.

_Bail in England_

The law of bail in Canada takes its origins from the British legal tradition. Bail was originally developed, according to Pollock and Maitland (1953), out of necessity and not “due to any love of an abstract liberty” (584). This necessity for bail was a result of the dark, damp conditions, overcrowding and poor sanitation that characterized British gaols. Indeed, many accused people died while in custody in the gaol awaiting the arrival of a justice who would preside over their trial. In some instances accused would wait in detention for a number of years before a decision with respect to their case was made. Given the deplorable detention conditions and the length of time accused were often held in confinement, many accused escaped lawful custody (584).

In the time between arrest and adjudication, accused were the responsibility of local sheriffs (the King’s representatives) and these sheriffs were liable to substantial fines each time an accused escaped. As suggested by Qasem (1952), this was ample motivation for sheriffs to try to divest themselves of this responsibility (379). From this system of detention, an ad hoc arrangement developed whereby family or friends of the accused would guarantee a financial obligation in the event they failed to produce the accused before the court to face the charges against them (Pollock and Maitland 1953).
In 1275 the *Statute of Westminster, I* was enacted; this statute created bailable\(^1\) and non-bailable offences\(^2\). So long as sufficient surety was produced on behalf of the accused, bail could not be refused for those who had been charged with a bailable offence. The *Statute of Westminster, I* remained the foundation for the law on bail for the next 550 years with only minor amendments made in an effort to combat the continued abuses of the bail process by sheriffs then by justices (Trotter 2010: 4-5). In 1826 the *Criminal Justice Act* fundamentally changed the way bail was used, by abolishing the distinction between bailable and non-bailable offences and mandating that accused only be remanded in custody where there was credible evidence that raised ‘a strong presumption of guilt’. By the end of the 19\(^{th}\) century in England, ensuring that the accused attended for trial remained the sole basis for the granting or denial of bail (Trotter 2010: 6).

*Early Bail in Canada*

In Canada, from 1869 until 1972, bail was discretionary for all offences. However, ensuring attendance at trial was the sole legitimate rationale for denying an accused bail. In making the bail decision, the court considered such factors as the need to ensure the accused returned to court, the seriousness of the offence and the associated sentence that may be imposed upon a finding of guilt, the strength of the Crown’s evidence against the accused and the general

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1 These offences included: persons indicted for larceny; persons apprehended on “light suspicion”; petty larceny if not guilty of some other larceny “aforetime; receiving or aiding felons and misdemeanors in general” (Trotter, 2010, 4).

2 These included: homicide; abjurers of the realm; approvers; those who have broken the King’s prison; thieves openly defamed and known; felonious arson; counterfeiting currency; counterfeiting the King’s seal; persons excommunicated and treason touching the King himself (Trotter, 2010, 4).
quality of the accused’s character. It was not until 1947, in *R v. Phillips*\(^3\), that ensuring the protection of the public became a required consideration (Trotter 2010: 9). In the 1950s and 1960s, the fairness of bail provisions became subject to question and challenge. Concerns were primarily associated with the fairness of remanding people in custody who had yet to be convicted. This convention was felt to be particularly disturbing in light of the relationship between being held captive in pre-trial detention and the ultimate outcome of a trial. These concerns were granted recognition in the *Canadian Bill of Rights (1960)* which provided for the ‘right to reasonable bail’. Despite the enactment of this right, debate emerged around the possibility of an alternative, less intrusive means of compelling an accused’s appearance in court.

**Friedland’s Study**

In 1961 Martin Friedland began the first systematic study on the use of bail and remand in Canada, using data on almost 6,000 cases tried in Toronto’s Magistrates’ Courts over a 6 month period in 1961/1962. Friedland (1965) concluded that the system of cash bail operated not as a method of ensuring appearance in court, but as a means of purchasing freedom. This bail policy was ineffective, inequitable and applied in an inconsistent manner, thus facilitating and encouraging unnecessary deprivations of liberty. Many accused were being held in detention when less intrusive means could have been employed to compel their appearance in court. Friedland (1965) contended detention prior to trial should be kept to an absolute minimum, as it

is a flagrant disregard for the principles of justice to have more people held in custody before rather than after trial (169-173).

Friedland (1965) continued in his scathing evaluation of cash bail, arguing that an inability to raise bail should not be a legally sanctioned reason for keeping a person in custody, especially when requiring a security in advance was not envisioned by the *Criminal Code of Canada*. Canada, he stated, had effectively adopted the most restrictive features of a bail system, borrowing the requirement of a security in advance from the United States and copying the English prohibition against the professional bondsman or indemnification in any form (178-183). Friedland (1965) insisted that there must be clear, definite and unequivocal criteria for the denial of bail. He suggested that there is an inherent danger in denying bail based on a concern or risk of repetition, as this concept presumes the defendant is guilty of what they have been charged with, and thus deprives liberty for what that person may do in the future. Solidifying the salience of his point, Friedland (1965) asserted there was no evidence to suggest there was a significant difference in danger to the public if an accused was released before trial or after serving a custodial sentence (188).

Friedland (1965) also found that accused spent a considerable amount of time in custody awaiting the disposition of their case and in many cases these accused were not ultimately convicted, and if they were convicted were not sentenced to jail. This reality was made all the more problematic given the conditions of the remand centres, which “are often more restrictive and onerous than those that exist for persons already convicted and serving their sentences” (175). The remand problem, however extended beyond the denial of liberty for people who were to be presumed innocent, as Friedland (1965) found a relationship between being held in pre-trial detention and the likelihood of pleading guilty to the charges before the court and receiving a
custodial sentence. Indeed, those who were released on bail were more likely to be acquitted and more likely to receive a lighter sentence than those who were denied bail (175).

Friedland’s concerns were reinforced and granted authority by the McRuer Report (1968)\(^4\) and the Ouimet Report (1969)\(^5\), both of which recommended that sweeping changes must be implemented to salvage the bail system. These reports suggested that police powers of release be expanded so as to facilitate the release of more accused, that criteria for release be explicitly delineated and that the requirement of cash in advance for release be used with more restraint. Of particular significance was the recommendation by the Ouimet Report that the state ought to bear the burden of justifying detention rather than the accused being required to justify why they should be released into the community (Trotter 2010: 11-12).

*The Bail Reform Act—“a liberal and enlightened system of pretrial release”*

Promoted as a rights protecting reform, on January 3\(^{rd}\), 1972, the *Bail Reform Act* was proclaimed in force. This Act completely changed the way bail was to be administered in Canada and for the first time codified the law on bail under the new name of ‘judicial interim release’. The Act bestowed police with expanded powers of release, designed to avoid a continuation of unnecessary arrests and detentions. The Act also created new forms of release for the courts to use, so as to encourage and facilitate an increased use of release orders. The Act also placed the onus of justifying detention on the Crown, restricted the use of cash deposits and

\(^{4}\) Royal Commission (Ontario), Inquiry into Civil Rights (1968), Vol, 2 (Chief Justice McRuer, Commissioner) (referred to as the ‘McRuer Report’).

\(^{5}\) Report of the Canadian Committee on Corrections, Toward Unity: Criminal Justice and Corrections, (Ottawa: Ministry of Supply and Services, 1969) (Roger Ouimet, Chairman) (referred to as the ‘Ouimet Report’).

stipulated criteria for the determination of release, which included a new secondary ground ‘in the public interest’, intended to prevent further offending (Trotter 2010: 12). Together, these amendments were hoped to rectify the inefficiency and unfairness that characterized the former bail system. However, within four years of its implementation, a number of ‘housekeeping’ amendments were integrated into the newly formulated Act. Significantly, the Criminal Law Amendment Act (1975) created the first ‘reverse onus’ situations, whereby the accused is required to justify to the court why they should not be detained, rather than the onus being on the Crown to demonstrate why the accused should not be released on bail. The Act reversed the onus in cases in which it was alleged that the accused committed an indictable offence while subject to a release order, had committed certain enumerated offences (including drug trafficking, importing or exporting) or the accused was not ordinarily a resident of Canada. In these cases, unless the accused successfully demonstrated that he/she should remain in the community pending trial, the justice was to order the detention of the accused. The Act also expanded the secondary grounds for detention (Trotter 2010: 13).

The Canadian Charter of Rights and Freedoms

In 1982 Canada’s constitution was amended to include the Canadian Charter of Rights and Freedoms which detailed and guaranteed the fundamental rights of all citizens. Since the enactment of the Bail Reform Act (1972) the Criminal Code no longer uses the term ‘bail’ rather it uses ‘judicial interim release’; however the Charter still makes reference to the right to reasonable bail. A few sections of the Charter specifically address issues surrounding bail and pre-trial detention. Section 7 of the Charter stipulates that everyone has the right to “life, liberty and security of the person and not to be deprived thereof except in accordance with the principles
of fundamental justice”. This fundamental freedom is meant to prevent the state from denying any citizen these rights without legally compelling reasons to do so. Section 9 reads “everyone has the right not to be arbitrarily detained or imprisoned”; said differently, the state cannot detain in custody any of its citizens without just cause to do so. Finally s. 11(e) of the Charter which addresses proceedings in criminal and penal matters states “any person charged with an offence has the right not to be denied reasonable bail without just cause”. Taken together, the Charter provides not only protections against the powers of the state but also could be interpreted as implying that bail is supposed to be decided relatively quickly after an arrest.

The Case Law

The Supreme Court of Canada had its first opportunity to consider the application of s.11(e) of the Charter to the law on bail in R. v. Pearson (1992) and R. v. Morales (1992) (these cases were heard together). The Court held “that the animating consideration in s.11(e) is the presumption of innocence” and this presumption of innocence is to be maintained in the bail process (Trotter 2010: 20). Indeed, the Court liberally interpreted s.11(e) of the Charter, ruling that all bail orders must be fashioned in a manner that is reasonable in terms of any financial requirements and any conditions of release that impose restrictions on accused’s liberty. Said differently, bail is not to be set in a manner that is tantamount to a detention order because the accused or their surety cannot meet the financial obligation. Furthermore, the Court found there to be constraints on the criteria upon which bail can be granted or denied that constitute ‘just cause’. The Court held that the restriction on the basic entitlement to bail is permissible so long as bail is only denied in a narrow set of circumstances and the denial of bail is necessary to
promote the proper functioning of the bail system, without being undertaken for any purpose extraneous to the bail system (*R. v. Pearson* (1992)).

In *R. v. Pearson* (1992) the Supreme Court found the reverse onus provision for accused charged with certain drug offences that were punishable by a maximum of life imprisonment (s.515(6)(d)) to be constitutional and in *R. v. Morales* (1992) the Court also upheld the constitutionality of the reverse-onus provision for those charged with an indictable offence while on bail for another indictable offence. The Court justified upholding these provisions by stating they were sufficiently narrow and established a special bail rule in circumstances where it appears the bail system has not functioned properly (i.e. there are reasonable grounds to believe the accused committed an indictable offence while on bail (s.515(6)(a)) (Trotter 2010).

In *R. v. Morales* (1992) the Supreme Court also laid the groundwork for judicial interpretation of s.515(10)(b). The Court held that since bail could only be denied on this grounds (the secondary grounds) where there was a ‘substantial likelihood’ of re-offence, it was considered ‘sufficiently narrow’. The Court, however, found that the ‘public interest’ protection in s.515(10)(b) was “impermissively vague” and thus did not constitute “just cause” for the denial of bail. The Court consequently struck down the words “or in the public interest” from s.515(10)(b), rather than striking down the entire paragraph (Trotter 2010: 23).

Five years after *Pearson* and *Morales* Parliament enacted a new version of the ‘public interest’ grounds for detention (s.515(10)(c). This new tertiary grounds for detention provided that the detention of an accused may be justified “on any other just cause being shown and without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all of the circumstances, including the apparent strength of the prosecution’s case, the gravity of the nature of the offence,
the circumstances surrounding its commission and the potential for a lengthy term of imprisonment”. In R. v. Hall\(^7\), however, the Supreme Court struck down the expression “on any other just cause being shown and without limiting the generality of the foregoing” as unconstitutional as it “ran afoul of the Pearson “just cause” criteria” (Trotter 2010: 35).

**Further Amendments to the Law on Bail**

Since the first reverse onus provision was enacted in 1975, a number of offences have been added. Section 515(6) (detailed below under ‘reverse onus’) lists most of the circumstances in which the onus is on the accused to demonstrate to the justice why their release is justified (s.522(2) reverses the onus for accused charged under s.469). In 1997, as part of An Act to Amend the Criminal Code (Criminal Organizations)\(^8\) the onus was reversed in cases in which the accused was charged with criminal gang activity. The 2001 Anti-Terrorism Act also saw charges of terrorism being shifted to a reverse onus position. In 2007, under Bill C-35 (39\(^{th}\) Parliament, 1\(^{st}\) Session), 12 more indictable offences were added to the seven offences that were already listed in the Criminal Code as reverse onus offences. These additional offences are all weapons offences or involve offences committed with a firearm. If an accused is charged with one of these indictable offences, the justice is required to order detention unless the accused demonstrates that they should be released pending trial. Valiquet (2007) suggests the onus is only permitted to be reversed in “very specific offences in which it has been shown that the normal system of release on bail is not adequate”. This means that reversing the burden of proof may be justified “in specific offences where, generally speaking, the accused will flee, will

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\(^8\) An Act to Amend the Criminal Code (Criminal Organizations), S.C. 1997, c.23
represent a danger to public safety or will bring the administration of justice into disrepute” (Valiquet 2007).

Bill C-35 also added two factors that the judge must take into consideration in deciding whether an accused should be released or detained. In addition to the grounds outlined in s.515(10), the Bill mandates that the justice, in deciding whether the detention of the accused is necessary to maintain confidence in the administration of justice, must consider:

- the circumstances surrounding the commission of the offence, including whether a firearm was used (new section 515(10)(c)(iii) of the Criminal Code);
- the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more (new section 515(10)(c)(iv) of the Criminal Code).

### End of 2 for 1 Sentencing

On October 22, 2009 the Conservative government’s Bill C-25 (40th Parliament, 2nd Session) the ‘Truth in Sentencing Act’ received Royal Assent. This Bill limits the amount of credit given to accused for time spent in pre-sentence detention. Prior to the passing of this Bill “many courts seem(ed) to have accepted that the customary credit for pre-sentence custody should be 2:1” (Trotter 2010). Indeed, this standard was deemed by the Supreme Court in *R. v. Wust* (2000)⁹ to be “entirely appropriate”. In some rare and exceptional cases, where the conditions of detention were particularly deplorable in terms of over-crowding, unsanitary conditions or the complete lack of programming or activities for those being held, the level of credit allocated was enhanced beyond the two for one convention (it has, however, been

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suggested by Manson (2009) in his presentation before the *Standing Senate Committee on Legal and Constitutional Affairs* that the number of reported cases in which more than 2:1 credit was given was trivial). Credit on the basis of two for one was never automatic and the Supreme Court refused to set an arithmetic formula for determining the appropriate credit to be given in a particular case, preferring to leave this discretion in the hands of the sentencing judge.

Credit at the rate of two for one came to be commonly accepted as this level of credit was roughly commensurate with conditional release from a federal penitentiary and earned remission from provincial/territorial institutions. While offenders are sentenced to a fixed term of custody, the manner in which this time is served varies. The vast majority of people serve their custodial sentence in a provincial institution.\(^{10}\) Indeed, as noted by Doob and Webster (2009) 95% of all prison sentences are for less than two years. Further to this, 86% are sentenced to 6 months or less and for such short sentences there is no statutory right to a parole hearing. Given this, offenders are typically released on earned remission at the 2/3 point in their sentence (Section 6 of the *Prison and Reformatories Act*). For example, an accused who is sentenced to 90 days will normally be released after serving 60 days. The situation for federal prisoners, however, is more complex. Federal prisoners are eligible to apply for parole after serving 1/3 of their sentences and most prisoners are released on statutory release at the 2/3 point of their sentences (*Corrections and Conditional Release Act*). This means that an offender sentenced to 30 months will serve anywhere between 10 and 20 months, depending on when they are released on parole.\(^{11}\)

\(^{10}\) In Canada, sentences of more than two years are served in a federal penitentiary and sentences of two years less a day or less are served in a provincial jail.

\(^{11}\) The exception to this is the small number of accused who are held in custody until warrant expiry.
Time spent in pre-trial detention does not count towards remission/parole eligibility. This means that without giving extra credit for this time, offenders who spend time in pre-trial detention end up serving more total time in custody than offenders who receive the same total sentence but did not serve time in pre-trial detention. In order to try to equate the sentences imposed in two similar cases where one offender was held in pre-trial detention and the other offender was released into the community, judges often gave extra credit at the rate of 2:1 for time spent in pre-trial detention to account for conditions in remand facilities and the loss of remission/parole eligibility.

A number of difficulties were associated with this relatively well established convention. It is possible that the sentencing judge may not be properly apprised of the remand centre conditions and facilities. This means different accused may be granted different levels of credit despite having been held in the same facility. It was also anecdotally suggested that accused may purposely delay trial and sentencing so as to accumulate more credits for a greater reduction of their eventual sentence. Interestingly, despite this noted concern, there are no empirical data available to support this claim. Indeed, the notion that accused will receive a highly reduced sentence was not actually true, as credit on the basis of two for one resulted in credit similar to what accused would have earned towards early release on parole/remission. For example, Offender A is sentenced to 90 days, and is credited at the rate of 2:1 for 30 days in pre-trial detention (60 days credit). Earning 1/3 remission means the offender will serve 20 of the remaining 30 days for a total of 50 days spent in custody. Offender B who received the same 90 day sentence but did not spend time in pre-trial detention, would be released after serving 60 days (1/3 remission). Thus, it appears that to the extent that this practice of purposely delaying the case was occurring, accused were being led to believe that they were getting a dramatically better ‘deal’ than what they would have earned without time spent in pre-trial detention. One of
the difficulties with pre-trial credit being calculated in this way was the sentence that was ultimately imposed (after pre-trial credit has been deducted) would appear to be more lenient than it was in reality.

One of the difficulties with pre-trial credit being calculated in this way was the sentence that was ultimately imposed (after pre-trial credit has been deducted) would appear to be more lenient than it actually was. This serves to skew victims’ and the public’s impression of the fairness of sentences imposed in terms of perceived leniency. Reduced sentences also present difficulties for the administration of custodial sentences as the credit for time spent in pre-trial detention may impact the type of facility in which offenders serve their sentences. Bill C-25 does make efforts to rectify these concerns by requiring bail justices to state the reasons for pre-trial detention in the court record. This is done so that the judge who ultimately sentences the accused (if they are found guilty), knows what the reason(s) were for denying the accused release on bail and therefore the level of credit to give the accused for time spent in pre-trial detention (new s.719(3.2)). For example, if the accused was detained in custody as a result of their criminal record they are only eligible for credit at the rate of 1:1. The Bill also requires judges to provide reasons for the pre-trial credit given and state these reasons for the court record (s.719(3.2)). In these reasons the judge must state the amount of time credited, the sentence actually imposed and the term of imprisonment that would have been imposed if credit had not been given for pre-sentencing custody (719(3.3)).

Section 719(3) of the Criminal Code provides that in determining a sentence a court may take into consideration any time spent in pre-sentence custody. This means the court is not statutorily required to give credit to any time spent in pre-trial custody, let alone give enhanced credit. Bill C-25 did not change this. Judges maintain the discretion to give or withhold credit
for time in pre-trial custody. The Bill does however restrict judicial discretion by setting maximum limits on the amount of credit that can be given. The Bill mandates that credit be given on the basis of one day for each day spent in detention for those who were denied release on bail on the basis of their criminal record, having breached conditions of a previous bail order or who have allegedly committed another offence while subject to a release order (s.719(3)). The Bill does leave open the possibility of giving ‘enhanced credit’ at the rate of up to one and a half days to each day spent in detention only “if the circumstances justify it” (s.719(3.1)). Interestingly, the Bill does not explain what circumstances this includes and does not provide any examples of when the circumstances may warrant this enhanced credit. The likely consequence of this Bill is that sentences imposed by the court will be longer, as accused will no longer be credited with as many days at the front end of the process.

There are a number of difficulties with legislating pre-trial credit at the rate of one for one. Offenders do not generally serve each and every day of their prison sentence in custody (remission/parole), something that is presumed to be the case by a system of credit on the basis of one for one. If the purpose of this Bill was to equate the level of punishment imposed for offenders who are released on bail with those who have been held in detention, credit for time spent in pre-trial detention ought to be calculated at the same rate that offenders earn remission. Since prisoners generally earn one day of remission for every two days served or can have up to one third of their sentence remitted, the time spent in pre-trial detention needs to be calculated at the rate of 1.5:1. To demonstrate this point\(^\text{12}\), let’s return to the earlier example of two accused sentenced to 90 days- Offender A spent 30 days in pre-trial detention and Offender B did not spend any time in pre-trial detention. In the above example, when credit for time in pre-trial detention

\(^{12}\) This example is taken from Doob and Webster (2009).
custody was calculated at the rate of 2:1, Offender A served 10 days less than Offender B. Now if credit is given on the basis of 1:1, Offender A would have 60 days remaining in his 90 day sentence and would serve 40 (being released at the 2/3 point) of these days for a total of 70 days spent in custody. Offender B, however, did not spend time in pre-trial detention and would be released after serving 60 days (2/3). In this example Offender A serves 10 days more of the same 90 day sentence simply as a result of having been held in pre-trial detention. What is clear is giving credit for pre-trial detention at the rate of 2:1 or 1:1 results in differential experiences of the ‘same’ 90 day sentence. In order to ensure that both of these offenders serve the same amount of time in custody, regardless of their bail status, credit would need to be given at the rate of one and a half days for each day spent in pre-trial custody. Indeed, as concluded by Doob and Webster (2009) the government has its arithmetic wrong and enacting this Bill creates a contradiction in the law.

Recognizing these concerns Judge Melvyn Green of the Ontario Court of Justice in R. v. Johnson asks “…Why should accused persons denied bail end up serving longer global periods of incarceration than those released pending their trials?” In order to correct for this, Judge Green advises that the conditions of confinement and the granting of parole/earning of remission should be addressed separately when determining the appropriate sentence. First, judges can reduce the overall sentence they impose in order to reflect the harsh realities of remand facilities. Once the sentence has been reduced to take these conditions into account, judges are then to apply the law’s new one and a half for one enhanced credit. In doing this, Judge Green has indicated that there should be a presumption of enhanced credit simply as a result of the loss of earned remission, as unfairly depriving remand prisoners of this remission constitutes just the

type of ‘exceptional’ circumstances the Act refers to. This approach, Judge Green notes, however does not apply to those who are part of “expressly excluded categories of remand offenders” (those who are alleged to have committed further offences while on bail, are alleged to have breached their bail or were detained as a result of their criminal record). There is however, conflicting case law pertaining to the ‘presumption’ of 1.5:1 credit under the Truth in Sentencing legislative regime.

**The Current State of the Law on Bail**

*Police Powers to Release or Detain Accused*

The police in Canada have a variety of options available to them for how to deal with a person who is accused of committing a criminal offence. Indeed, police have the power to release any accused who has been arrested with a warrant (s.494) or without a warrant (s.495) with the sole exception of those charged with murder.

The *Bail Reform Act* gave police increased powers to release accused at the scene while also compelling them to appear in court as required. Police have a variety of forms of release available to them, including a summons (s.493)\(^\text{14}\), appearance notices (s. 495)\(^\text{15}\), promises to appear (s.498(1) and s. 503(2)) or recognizances \(^\text{16}\) (s.498, s.499 and s.503).

\(^\text{14}\) At one time a summons was the only way of compelling an accused’s appearance in court. While this form of release is still available to police, its use has declined considerably since the enactment of the Bail Reform Act (Trotter, 2010, 91).

\(^\text{15}\) This is the form of release used by police on the street (Trotter, 2010, 92).

\(^\text{16}\) An acknowledgement of indebtedness to the Crown which is defensible upon the fulfilment of certain conditions (see R. v. McDonald (1958), 120 C.C.C 198 (Ont. C.A.).
There are both judicial and non-judicial recognizances. Though these are conceptually similar there are some important differences between them in terms of what can be attached to the recognizance. Police are only allowed to take recognizances up to $500. There is no limit on the amount of a recognizance a justice may impose, however, the recognizance should not be set so high that it is tantamount to a detention order. Police can only take deposits of security from persons who reside out of province or more than 200 kilometres away. Justices have more expansive criteria. Police can only have an accused enter into a recognizance, whereas justices are permitted to impose a surety requirement (Trotter 2010: 91).

In addition to a promise to appear or recognizance, in 1994 Parliament gave police the power to impose conditions through an undertaking (s.503(2.1)) to which the accused is bound to comply while in the community.

s. 503(2.1) In addition to the conditions referred to in subsection (2), the peace officer or officer in charge may, in order to release the person, require the person to enter into an undertaking in Form 11.1 in which the person undertakes to do one or more of the following things:

(a) to remain within a territorial jurisdiction specified in the undertaking:

(b) to notify the peace officer or another person mentioned in the undertaking of any change in his or her address, employment or occupation;

(c) to abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the undertaking, or from going to a place specified in the undertaking, except in accordance with the conditions specified in the undertaking;

(d) to deposit the person’s passport with the peace officer or other person mentioned in the undertaking;
(e) to abstain from possessing a firearm and to surrender any firearm in the possession of the person and any authorization, license or registration certificate or other document enabling that person to acquire or possess a firearm;

(f) to report at the times specified in the undertaking to a peace officer or other person designated in the undertaking;

(g) to abstain from

(i) the consumption of alcohol or other intoxicating substances; or

(ii) the consumption of drugs except in accordance with a medical prescription; or

(h) to comply with any other condition specified in the undertaking that the peace officer or officer in charge considers necessary to ensure the safety and security of any victim of or witness to the offence.

Generally, the peace officer can decide not to release the accused from the scene and instead hold the accused in custody for a bail hearing if the officer is of the opinion that detention is necessary:

- to protect the public interest, including the need to (s.495(2)(d):
  - establish the identity of the person;
  - secure or preserve evidence of or relating to the offence;
  - prevent the repetition of the offence; or
  - ensure the safety and security of any victim or witness; or
- to ensure the presence of the person under arrest in court (s.495(2)(e)
In Ontario, unlike some other provinces in Canada, bail hearings are generally heard by a justice of the peace rather than a provincial court judge. In Ontario, justices of the peace are not necessarily legally trained. Justices of the peace are appointed by the Lieutenant Governor in Council on the recommendation of the Attorney General. The *Justice of the Peace Act* sets out the minimum qualifications for consideration for an appointment.

s. 2.1 (15) A candidate shall not be considered by the Justices of the Peace Appointment Advisory Committee unless he or she has performed paid or volunteer work equivalent to at least 10 years of full-time experience and,

(a) has a university degree;

(b) has a diploma or advanced diploma granted by a college of applied arts and technology or a community college following completion of a program that is the equivalent in class hours of a full-time program of at least four academic semesters;

(c) has a degree from an institution, other than a university, that is authorized to grant the degree,

   (i) under the *Post-secondary Education Choice and Excellence Act, 2000*
   (ii) under a special Act of the Assembly that establishes or governs the institution, or
   (iii) under legislation of another province or territory of Canada;

(d) has successfully completed a program designated as an equivalency under subsection (16); or
(e) meets the equivalency requirement set out in subsection (17). 2006, c. 21, Sched. B, s. 3.

s.2.1(16) For the purposes of clause (15) (d), the Attorney General may designate programs that involve training in the justice system, including programs designed to enhance diversity in the justice system, as programs that meet the educational equivalency, and shall make the list of programs so designated public. 2006, c. 21, Sched. B, s. 3.

s.2.1 (17) For the purposes of clause (15) (e), a candidate may be considered to have met the equivalency requirement if he or she clearly demonstrates exceptional qualifications, including life experience, but does not have the educational requirements set out in clauses (15) (a) to (d). 2006, c. 21, Sched. B, s. 3.

As part of the Education Plan, on appointment justices of the peace are provided with seven weeks of workshop training and up to six months of mentorship by experienced justices of the peace. Included in this training are two workshops on judicial interim release that review the bail process and discuss how to make release decisions. Following this, justices of the peace are required to attend a minimum of six days of continuing education per year. Justices of the peace are also invited to attend one of the annual three-day conferences (Ontario Court of Justice).

The Timeliness of the Bail Decision

The law does not explicitly state that the bail process is designed to involve a single appearance in front of a justice to determine the appropriateness of releasing the accused from custody. The laws surrounding bail however, are comprised of a variety of elements that suggest
bail is supposed to occur over a relatively limited period of time; hence it is reasonable to assume that bail decisions should be determined in one or two appearances whenever possible or as soon as is practicable. This intention is highlighted by a number of bail provisions in the *Criminal Code*. In theory, bail is governed by an underlying presumption that the accused should be released from custody into the community until trial (s.515 (1)). There are however, an increasing number of exceptions to this presumption, specifically shifting the onus of proof into what has come to be called a “reverse onus” situation, whereby accused people must prove why they should not be detained. Section 503(1)(a) and (b) outline that the accused must be taken before a justice within 24 hours of arrest, or as soon as is practicable, unless the accused is released by the peace officer. Finally, s.516(1) explicitly states that "no adjournment shall be more than three clear days except with the consent of the accused". This stipulation suggests that the bail decision is supposed to be quick and occur shortly after an arrest. Multiple adjournments and weeks of remand custody before it is determined whether there is justification for detaining an accused clearly are not envisioned by the legislation. Though back-to-back adjournments are not prohibited, they are not compatible with the philosophical underpinnings of the law governing bail.

**Bail Court and the Release Decision**

*Presumption of Release*

The importance, symbolically (and one would presume practically), of the original legislation (the *Bail Reform Act*) is that it represented a shift from a presumption of detention to a presumption of release. The overall provision would suggest that ‘bail’ decisions are governed
by an underlying presumption that the accused should be released from custody into the community until trial (s.515(1)). This means, absent exceptional circumstances surrounding the offence and the offender, the police officer and subsequently the court are to presume that the accused should be released on bail pending their trial, unless the Crown can show just cause why the detention of the accused is justified. However, conditions of release can be imposed under s.515(4). This, Trotter (2010) asserts, mandates a ‘ladder’ approach to the decision about the appropriate form a release order should take (245). Each possible form of release is to be considered and ruled out in turn, until the court comes to the least onerous form of release that would be appropriate in the circumstances, while being mindful of the necessity of exercising restraint in the use of detention and imposing conditions of release. The mandated ladder approach is consistent with the notion of a presumption of release. Trotter (2010) does suggest, however, that the ladder approach does not appear to be absolute (245). Indeed, it appears to be inapplicable in cases where the accused is required to demonstrate why release is justified. In these cases it would appear to be the responsibility of the accused to demonstrate why the most onerous form of release should not be imposed.

s.515(1) ... the justice shall, unless a plea of guilty by the accused is accepted, order, in respect of that offence, that the accused be released on his giving an undertaking without conditions, unless the prosecutor...shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made...

s.515(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\textsuperscript{17} 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.

\textit{Conditions of Release}

Conditions of release are imposed by the court to constrain accused’s behaviour while they are on bail. However, considering the relevant sections of the \textit{Criminal Code} (s.515(10)) any condition imposed should address the ground(s) in relation to which accused might have otherwise been detained. This means conditions are supposed to be designed to ensure accused

\textsuperscript{17} A surety is someone who indicates a willingness and an ability to pay the court a specified amount of money if the accused person fails to appear in court or violates a condition of their release; this person agrees to effectively police the accused in the community. Sureties are essentially charged with a quasi-policing function, they are jailors in the community- they monitor the accused’s actions, make sure they comply with the conditions of their release and that they are present for all of their court appearances.
return to court, do not commit any further offences or do not interfere with the administration of justice. Indeed, Trotter (2010) suggests that care must be taken in the selection of conditions to ensure they fulfill these stated purposes. Consistent with the presumption of innocence, bail should be designed to be as burden-free as possible while also ensuring accused appear in court and do not continue offending. This means conditions “ought to be approached with restraint and should only be imposed to the extent that they are necessary to give effect to the criteria for release” (Trotter 2010: 241).

Although conditions of release should infringe on the liberty of accused as minimally as possible while serving the functions just described, s.515(4) of the *Criminal Code* provides the bail justice with little explicit guidance on the number and type of conditions that can be attached to release orders.

*s.515(4)* The justice may direct as conditions under subsection (2) that the accused shall do any one or more of the following things as specified in the order:

(a) report at times to be stated in the order to a peace officer or other person designated in the order;

(b) remain within a territorial jurisdiction specified in the order;

(c) notify the peace officer or other person designated under paragraph (a) of any change in his address or his employment or occupation;

(d) abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, or refrain from going to any place specified in the order, except in accordance with the conditions specified in the order that the justice considers necessary;

(e) where the accused is the holder of a passport, deposit his passport as specified in the order;
(e.1) 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; and

(f) comply with such other reasonable conditions specified in the order as the justice considers desirable.

It is well-recognized in Canadian law that any conditions that are imposed as part of a release order be logically related to the criteria for determining release or detention (Trotter 2010: 27 (see Keenan v. Stalker\(^{18}\))). While s.515(4) enumerates some standard conditions, many conditions that are routinely imposed fall under the rather vague provision contained in s.515(4)(f) that directs accused to “comply with such other reasonable conditions specified in the order as the justice considers desirable”. This broad discretion means a wide range of conditions can be justified under this paragraph.

**Grounds for Detention**

There are three enumerated grounds in the *Criminal Code* upon which the detention of the accused may be justified. With the exception of the cases in which the onus is reversed and the accused must demonstrate to the court why their detention is not justified and they should thus be released, the onus is on the Crown to establish that the accused should be detained pending trial. The grounds for detention are set out in s.515(10) of the *Criminal Code*. The detention of the accused may be warranted on one or more of the following grounds:

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\(^{18}\) *Keenan v. Stalker*, [1979], 57 CCC (2d) 267 (Que CA).
s.515(10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

(a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;

(b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and

(c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including

(i) the apparent strength of the prosecution’s case,

(ii) the gravity of the offence,

(iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and

(iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more

Reverse Onus

For certain specified offences the Criminal Code dictates that the accused be detained pending trial, unless the accused can demonstrate that their detention is not justified in the circumstances under the three grounds set out in s.515(10) of the Criminal Code. The burden of
proof is shifted from the Crown to the accused, if the accused has been charged with one or more of the following offences stipulated in s. 515(6):

\textit{s.515(6)(a) with an indictable offence, other than an offence listed in section 469,}

(i) that is alleged to have been committed while at large after being released in respect of another indictable offence pursuant to the provisions of this Part or section 679 or 680,

(ii) that is an offence under section 467.11, 467.12 or 467.13, or a serious offence alleged to have been committed for the benefit of, at the direction of, or in association with, a criminal organization,

(iii) that is an offence under any of sections 83.02 to 83.04 and 83.18 to 83.23 or otherwise is alleged to be a terrorism offence,

(iv) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the Security of Information Act,

(v) an offence under subsection 21(1) or 22(1) or section 23 of the Security of Information Act that is committed in relation to an offence referred to in subparagraph (iv),

(vi) that is an offence under section 99, 100 or 103,

(vii) that is an offence under section 244 or 244.2, or an offence under section 239, 272 or 273, subsection 279(1) or section 279.1, 344 or 346 that is alleged to have been committed with a firearm, or

(viii) that is alleged to involve, or whose subject-matter is alleged to be, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or prohibited ammunition or an explosive substance, and that is alleged to have been committed while the accused was under a prohibition order within the meaning of subsection 84(1);

(b) with an indictable offence, other than an offence listed in section 469 and is not ordinarily resident in Canada,

(c) with an offence under any of subsections 145(2) to (5) that is alleged to have been committed while he was at large after being released in respect of another offence pursuant to the provisions of this Part or section 679, 680 or 816, or
(d) with having committed an offence punishable by imprisonment for life under any of sections 5 to 7 of the Controlled Drugs and Substances Act or the offence of conspiring to commit such an offence.

And under s. 522(2):

Where an accused is charged with an offence listed in section 469, a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which the accused is charged shall order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified within the meaning of subsection 515(10).

Bail for Young People: The Youth Criminal Justice Act (YCJA)

The youth justice system is premised on the fundamental principle of diminished moral blameworthiness and culpability. Though the basic principles and procedures of youth bail are governed by s.515 of the Criminal Code, additional protections and considerations are stipulated within the Youth Criminal Justice Act (YCJA) that supersede any sections of the Criminal Code that are inconsistent with them (s.28 of the YCJA). Indeed the Preamble to the YCJA outlines the Act’s guiding principles and indicates youths have “special guarantees of their rights and freedoms” and stipulates that the criminal justice system is to exercise restraint in the use of custody by reserving “its most serious intervention for the most serious crimes and reduce[ing] the over-reliance on incarceration for non-violent young persons”. One limitation on the use of pre-sentence detention for youths is contained in s. 29(1) which establishes that “A youth justice court judge or a justice shall not detain a young person in custody prior to being sentenced as a substitute for appropriate child protection, mental health or other social measures”. Section 29(2) – until it was changed by the Conservative Government in 2012 (see below) - stated that “In considering whether the detention of a young person is necessary for the protection or safety of
the public...a justice shall presume that detention is not necessary…if the young person could not, on being found guilty, be committed to custody”. Section 39(1)(a) to (d) however provides four specific cases in which the presumption against detention does not apply and thus the young person may be detained until sentencing.

s.39(1) A youth justice court shall not commit a young person to custody under section 42 (youth sentences) unless

(a) the young person has committed a violent offence;

(b) the young person has failed to comply with non-custodial sentences;

(c) the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of findings of guilt under this Act or the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985; or

(d) in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

The legislation also provides an additional option for fashioning a release for youths who may otherwise be detained; s.31(1) states “A young person who has been arrested may be placed in the care of a responsible person instead of being detained in custody…” 19 Together, these

19 A responsible person is someone who according to s.31(1)(b) is willing and able to take care of and exercise control over the youth. Section 31(3)(a) further stipulates that the responsible person must undertake in writing to “take care of and to be responsible for the attendance of the young person in court when required and to comply with any other conditions” the court specifies.
sections of the YCJA suggest custody for youths must be employed with restraint and additional efforts are to be made to ensure youths are not detained unnecessarily in pre-trial custody.

**Bill C-10 and the Youth Criminal Justice Act**

On October 23, 2012 the Conservative government’s Bill C-10 (41st Parliament, Session 1) the ‘Safe Streets and Communities Act’ came into force. This Bill makes a few changes to the way bail and pre-trial detention is to be used for youths. Specifically, the Bill amends s. 29(2) of the *Youth Criminal Justice Act* (YCJA) so that this section will list all the reasons justifying detention and expand the reasons for doing so. In other words, the YCJA as amended would have its own completely distinctive and separate legislative regime pertaining to bail. Bill C-10 provides that the pre-sentence detention of young persons is prohibited, except where the young person is charged with a “serious offence” or where “they have a history that indicates a pattern of either outstanding charges or findings of guilt.” This new provision is broader than what previously existed as it instructs the court to consider not only previous findings of guilt but also any outstanding charges the youth has. In order to detain a young person, the Bill requires the justice to be satisfied, on the balance of probabilities, that:

- there is a substantial likelihood that the young person will not appear in court
- detention is necessary for public safety, including the safety of any victim or witness, considering all the circumstance, including whether there is a substantial likelihood the young person will commit a serious offence if released
- the young person has been charged with a serious offence and there are exceptional circumstances warranting detention and detention is necessary to maintain confidence in the administration of justice

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20 See Chapter 5 on youth bail conditions for a complete overview of the way the *Criminal Code* and YCJA bail provisions are to be used for youth.
This Bill defines ‘serious offence’ as “an indictable offence for which the maximum punishment is imprisonment for five years or more”. In 2005 the Supreme Court defined a ‘violent offence’ under the YCJA as “an offence in which the young person causes, attempts to cause or threatens to cause bodily harm”\(^{21}\). Unlike this definition a ‘serious offence’ includes offences against both the person and against property. This means the Bill has expanded the types of charges for which youths are eligible to be held in pre-trial detention (Bill C-10).

Subsection 29(2) of the Act was also amended to include the additional requirement that a judge may order a young person be detained in custody only if:

\(\text{s.29(2)(c) the judge or justice is satisfied, on a balance of probabilities, that no condition or combination of conditions of release would, depending on the justification on which the judge or justice relies under paragraph (b) (i) reduce, to a level below substantial, the likelihood that the young person would not appear in court when required by law to do so, (ii) offer adequate protection to the public from the risk that the young person might otherwise present, or (iii) maintain confidence in the administration of justice.}\)

\[\text{Trends in the Use of Pre-Trial Detention in Canada}\]

The data presented below will demonstrate that though Canada has seen relative stability in the rate with which it imprisons people, the composition of the custodial population has shifted; today there are more people in custody on remand awaiting the determination of their bail, their trial or their sentencing than there are serving custodial sentences. Indeed, the

proportion of people housed in Canada’s custodial institutions who are on remand continues to rise each year. Despite a declining overall crime rate and a consistently declining violent crime rate, more cases are starting their court case histories in bail court. The crime rate itself is not responsible for the growing remand population. What we do know from the available data is that more cases are starting their case history in bail and more bail appearances are being made by accused before a bail decision is made. This means that not only are more people being admitted to remand, they are spending more time in remand once they are there.

Looking at Figure 1 below a few things can be said about incarceration trends in Canada. Considering the overall (total) rate of incarceration first (the top line in Figure 1), it can be said that Canada has experienced relative stability in its use of imprisonment. While there have clearly been some fluctuations over the past 60 years, the rate of incarceration has remained within the range of 80 to 120 people per 100,000 residents. In 1950 the rate of incarceration was 100 per 100,000 and in 2010 this was not dramatically different at a rate of approximately 112 per 100,000. This overall trend is replicated at both the federal and provincial levels (the middle and bottom line in Figure 1).

22 When I use the term ‘provincial’ it typically should be read to include the territories.
What is perhaps most noteworthy is that despite the relative stability in the provincial prison population (the overall rate of incarceration) there has been a significant shift in the composition of this population. Figure 2 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. 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.

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23 For the purposes of this section, data will be presented on the rates of imprisonment in provincial institutions as these institutions house the majority of incarcerated persons (those who have been sentenced to a term of custody of less than 2 years and all accused who are on remand. Offenders sentenced to a term of custody greater than 2 years serve their sentence in a federal institution).

24 A third category of provincial prisoners, who are generally referred to in governmental statistical reports as ‘other provincial prisoners’, have not been included. This very small group are largely people being held in custody for various other reasons (most commonly immigration issues). While this group is not presented separately in Figure 2, it is included in the provincial total and overall total prisoner counts in Figure 1 and Figure 2.
Indeed, the remand rate has climbed from approximately 13 per 100,000 in 1978 to 38 per 100,000 residents in 2010. In addition to this almost threefold increase, in 2005 the incarceration population shifted so that for the first time in Canadian history the rate with which people were held in pre-trial detention exceeded the rate of sentenced custody. The remand population continued to increase until 2009.

Figure 2- Provincial Imprisonment Rates (Total, Sentences and Remand) in Canada from 1978 to 2010

The pattern seen across Canada is the same in Ontario, though the remand situation is arguably more severe in Ontario. As depicted in Figure 3 below Ontario has seen the same
stability in its overall imprisonment rate. However, the rate with which accused are held in remand has grown faster than that seen in Canada as a whole. Indeed, 2000 was the first year in Ontario in which there were more people being held on remand than were serving custodial sentences. Like Canada as a whole, this shift in the composition of the custodial population in Ontario was part of a slow increase in the rate of remand; a trend that appears to have started in the early 1980s.

**Figure 3: Ontario Provincial Imprisonment Rate per 100,000 Residents 1978-2010**

Despite the growing remand population, there has not been a large increase in the overall imprisonment population. This suggests that at sentencing, time spent in pre-trial detention is being taken into account and is being compensated for by deducting this time from the sentence...
imposed. Indeed, as noted by Webster, Doob and Myers (2009) what we are seeing in the imprisonment rate is “…a ‘constructed’ stability, being produced by an increase in the remand population and a simultaneous decrease in the sentenced population” (83). Said differently, it is not that judges are handing down fewer or shorter custodial sentences as would be suggested by the declining ‘sentenced’ rate, rather the sentences being imposed most likely take into account the increasing amount of time that is being served in pre-trial detention on remand. Indeed, some of the decrease in the sentenced population may be the result of people getting ‘time served’ rather than any ‘sentenced’ time.

While it is clear Canada as a whole has a remand problem, the size of the remand problem is not evenly distributed across the country. Below are two different ways to present measures of the remand population in Canada. Both measures indicate the same story- there is considerable provincial variation in the use of remand across the country. Looking first at the average remand counts (the average number of accused on remand on any given day) expressed as a rate per 100,000 residents in Figure 4 below, there is clearly a significant difference in the rate of remand. While Canada as a whole has a remand rate of approximately 39 per 100,000, Prince Edward Island was as low as 13 per 100,000, while the Northwest Territories was 250 per 100,000 and Manitoba was 106 per 100,000 residents in 2009/2010.
A similar degree of variation can be seen when we look at the proportion of the total provincial custodial population that is on remand. As seen in Figure 5 below, on average 58% of people in provincial custody in Canada were on remand in 2009/2010. There was, however, wide variability across the provinces with Prince Edward Island having only 18% of its custodial remand population on remand, while Ontario had 67% and Manitoba had 69% of their custodial populations on remand in 2009/2010.

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25 Rates were calculated using population data from 2009.
To explain the growing rate of pre-trial detention in Canada it makes sense first to consider the crime rate. Indeed, the growth in the use of remand might make some sense if the overall crime rate were increasing. This would be even more so if the rate of violent crime were increasing as it is the more serious cases where pre-trial detention is more likely to be expected. Despite the intuitive appeal of this relationship, the data do not support this assumption. Figure 6 below depicts the overall crime rate (excluding traffic offences) for Canada overall and Ontario in particular\textsuperscript{26}. What is clear is the overall crime rate peaked in the early 1990s and has been on a relatively steady decline ever since. Similarly, the violent crime rate (not presented) parallels the trends seen in the overall crime rate.

\textsuperscript{26} Data for Ontario are being presented for a couple of reasons. Firstly, all data for this thesis were collected in Ontario. Secondly more detailed data is available on the bail process in Ontario. Thirdly, Ontario has a population of approximately 13 million people, which constitutes 39\% of Canada’s total population. Finally the remand trends in Ontario, though higher than most of the country (Manitoba being the exception) are reflective of the pattern seen across Canada as a whole.
Another way to contextualize the bail problem is to look at the way cases were being processed in the courts. The top line in Figure 7 below indicates that between 2001 and 2007\textsuperscript{27} there was an increase in the caseload being processed in Ontario’s courts. Bear in mind that this increase in the court caseload occurred despite the declining overall and violent crime rate depicted in Figure 6 above. Not only has there been an increase in the number of cases being processed, it is taking on average more appearances to reach case disposition\textsuperscript{28}. Indeed, the number of appearances has increased from an average of 6.4 appearances in 2001 to 8.1 appearances in 2007, an increase of 27%. While there has been relative stability in the mean number of days it takes to dispose completely of a case, increasing the number of appearances an

\textsuperscript{27} The data presented in this table was only available for the period of 2001 to 2007.

\textsuperscript{28} A ‘case’ is defined as all the charges against an accused associated with a single information number. If the accused accumulates more charges in the future while awaiting the completion of the initial charges or accumulates charges of failing to comply with a court order, this is a ‘new’ case with a new information number.
accused has to make is resource intensive and has significant implications for the efficient and effective operation of the court.

Figure 7: Efficiency Measures (Number of Cases, Court Appearances and Days to Disposition) in Ontario Provincial Courts from 2001 to 2007

When we look specifically at the bail process, we see similar, though more dramatic trends in case processing. Indeed, looking at Figure 8 below, the number of cases starting their case processing history in bail has increased from an average of 6 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

29 The data presented in this table was only available for the period of 2001 to 2007.
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 (2009), the proportion of cases that began their case processing lives 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 which were formally detained following a bail hearing stayed much the same (13% and 12.3% respectively) (Webster et. al. 2009: 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.

Figure 8: Efficiency Measures Number of Cases, Court Appearances and Days to Resolution) for Ontario Bail Cases from 2001 to 2007
Webster, Doob and Myers (2009) suggest another possible explanation for the increase in the use of remand- the complexity of the cases being held for a bail hearing. Using the number of charges in the case as a proxy for complexity, they note that cases in Ontario do appear to be becoming more complex; in 2001 there was an average of 1.89 charges per case and by 2007 this had increased to 2.15, an increase of 14% (90). Indeed, it seems police routinely lay multiple charges in criminal cases, thus increasing the complexity of the cases being brought before the court.

Webster et. al. (2009) also suggest that an increase in cases with ‘administration of justice charges’ (failing to comply with bail conditions, failing to appear in court, breaching probation) may be partially responsible for the increases in the remand population. Indeed in 2001, 33% of cases in Ontario had an administration of justice charge; by 2007 this had increased to 40% of cases (91). This is significant because cases with a charge against the administration of justice are more likely to be held for a bail hearing. Indeed, it has been suggested anecdotally that police will automatically hold an accused for a bail hearing if there are allegations that they have breached a court order.

Looking at the number of admissions to remand is another way of looking at the custodial population. While ‘counts’ represent the average number of people in an institution on an average day, admissions represent the number of people admitted to an institution. The remand numbers have increased as a consequence of an increase in both the counts and admissions. Said differently, not only are more people being admitted to custody (admissions), they are staying in pre-trial detention longer (counts).\(^{30}\)

\(^{30}\) Unfortunately systemic data on the length of stay in remand are not available.
Figure 9 below demonstrates this trend in admission rates. The rate of admissions to remand climbed from a low of 179 per 100,000 in 1985 to a high of 493 per 100,000 in 2008, an increase of 276%. This coincided with a decline in admissions to sentenced custody from a high of 588 per 100,000 in 1982 to a low of 243 in 2008, an increase of 50%.

**Figure 9: Provincial Admissions per 100,000 Residents in Ontario between 1978 and 2008**

Looking next at Figure 10 below, it is clear that the number of appearances required to complete the bail process and the number of days spent in remand before a bail decision is made has increased over a relatively short period of time (2001-2007). The number of appearances

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31 The spike in admissions to provincial institutions in 1991 is generally attributed to a new information system being instituted in Ontario, rather than to any real increase in admissions to custody.

32 The data presented in this table was only available for the period of 2001 to 2007.
increased from 2.12 in 2001 to 2.55 in 2007— an increase of 20%. The number of days spent in the bail process also increased from 4.3 in 2001 to 5.9 in 2007. This increase impacts the average ‘counts’ in the remand population as once admitted to remand accused are more likely to spend an increasing amount of time there.

**Figure 10: Efficiency Measures (Number of Court Appearances and Number of Days) in the Bail Process** in Ontario from 2001-2007

![Graph showing mean days and number of appearances in the bail process from 2001 to 2007.]

**Summary**

The size of the remand population is particularly pronounced in Ontario’s prisons. Currently there are more people being held in remand, awaiting a determination of their bail or

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33 The bail ‘process’ is defined as the period from a case’s first appearance in bail court to the formal determination of whether the accused will be released on bail or detained until trial. Within this context, it is important to note that for a non-trivial number of cases, a final decision to release or detain the accused is never made.
the commencement of their trial than there are serving custodial sentences post-conviction. The population of prisoners held in remand in provincial institutions has increased threefold since 1981. Just prior to 2000 the dominant group in Ontario’s prison shifted: there were, after this point, more prisoners who had not been sentenced than there were who had been sentenced. Since then, the proportion of Ontario’s custodial population that was on remand continued to grow. This shift however does not represent a dramatic change in the composition of the custodial population as a result of a single event at one point in time: the remand population has been slowly increasing since the early 1980s (see Figure 3). That said, this shift has interesting implications. Not only does it imply shifting practices surrounding bail determinations, it also suggests judges may be compensating offenders for time spent in pre-trial detention by reducing the overall sentence imposed or imposing no further time in custody (a sentence of time served). Despite the presence of a statutory presumption of bail in Canada, the remand population in Ontario continued to rise, with 2010 seeing the first decrease in the size of the remand population since the early 1980s34. Given that the Canadian criminal justice system is premised on the presumption of innocence, it is of significant concern that many people are serving time before they have been found guilty or sentenced.

The data presented in this chapter provide the context for the following chapters. Despite a generally declining crime rate the remand population has grown substantially over the past 30 years. More cases are being sent through the courts and more cases are starting their case processing in the bail system. In addition to an increase in caseload, cases have become more

34 At this time it is unclear what is responsible for this shift and it may be that 2010 is simply an anomaly rather than the beginning of a trend. That said it is possible that the decrease seen in 2010 is the result of the change in the amount of credit allowed to be given at sentencing for time spent in pre-trial detention. By decreasing the amount of credit given to 1:1 and 1.5:1 in exceptional circumstances, it is possible that offenders are serving less of their sentence in pre-trial detention and more of their sentence post-conviction.
complex in terms of the number of charges and the increased presence of administration of justice offence charges. Bail, a process that is described in the legislation as one that is supposed to happen relatively quickly following an arrest, has come to take considerably longer, both in terms of the number of bail appearances made and the number of days spent in the bail process (while being held in pre-trial detention).
Chapter 2
Research and Theory

Research

In 1961 Martin Friedland conducted the first systematic study on the use of bail and remand in Canada, using data on almost 6,000 cases tried in Toronto’s Magistrates’ Courts over a 6 month period in 1961/1962 (see Chapter 1 for a more detailed review of Friedland’s work). Friedland (1965) found a relationship between being held in pre-trial detention and the likelihood of pleading guilty to the charges before the court and receiving a custodial sentence. Indeed, those who were released on bail were more likely to be acquitted and more likely to receive a lighter sentence than those who were denied bail (175). Friedland (1965) also found that accused spent a considerable amount of time in custody awaiting the disposition of their case and in many cases these accused were not ultimately convicted, and if they were convicted were not sentenced to jail.

Since Friedland’s (1965) work there has not been a lot of Canadian research on the bail and remand situation. That said it appears that in recent years there has been a renewed interest in understanding what is happening in the Canadian bail process that may be contributing to the remand population.

Adjournments

In 1975, Koza and Doob found that most adjournments were requested by the Crown to enable the contacting of witnesses or to seek certain information, with accused rarely requesting
adjournments (269). “Although the Crown’s decision to seek a detention or release order for a particular accused was not mediated by the workload, the heaviness of the schedule undoubtedly influenced when the final judicial order would be made” (266). Koza & Doob (1975a) have reason to suspect that an unfortunate practice has developed on busy court days. They suggest on these days, the Crown decides that since a particular accused is quite likely to be detained anyway, it does not really matter if they are remanded for an extra day or two before the final order is made. This sort of rationalization serves as a mechanism for lessening the individual days’ caseload, offsetting the work by putting over a case to another day (269). In this way, the daily court docket is considered in relative isolation, as a list to get through, without particular concern as to whether cases are actually dealt with or merely adjourned to another day. This concern was reiterated almost 40 years later by Webster (2009) in a study of video remand courts in Ontario. Webster (2009) concludes that there is “…at least a passive tolerance of a culture of adjournment” and “…generalized expectations that adjournments are somehow inevitable, acceptable or perhaps even desirable seem to permeate the daily (bail court) practices…” without any opposition (24). Indeed, “…the immediate need to get through the day’s docket (has) arguably becomes the central focus of the court” (Webster 2009: 25).

Interestingly, a report on a Bail Court Snapshot Survey conducted by the Ministry of the Attorney General in the spring of 2005 confirms the findings of previous surveys of Toronto and other large urban courts which show that most adjournments in recent years in bail court are granted at the request of the accused (Bail Court Snapshot Survey by Ministry of the Attorney General). Though this is different from findings 30 years earlier, similar concerns are still relevant - cases continue to be adjourned with relative impunity. The fact that the accused is responsible for the majority of adjournments, however, suggests problems with the availability of their counsel and the accused’s ability to secure a suitable surety. This however, is also
consistent with the phenomenon of ‘judge shopping’, whereby the accused requests to delay their bail hearing until they are before a justice that is perceived to be more lenient. This may also be part of the acknowledged practice of purposely accumulating ‘dead time’. Up until recently (February 2010), as noted in Chapter 1 this was generally given double credit at sentencing. Dead time however, is not sought by all accused and is of relatively little comfort to those accused who are ultimately acquitted. Kellough and Wortley (2002) suggest that though some people may wish to serve and be credited with ‘dead time’, many do not, and would rather plead guilty and be sentenced (190).

Release Decision

The Crown exercises considerable control over the bail decision. While it is the Justice of the Peace who makes the final bail determination in Ontario, either by accepting a release the Crown is proposing or after a show cause hearing, the Crown’s recommendation appears to hold considerable weight. Indeed, Koza and Doob (1975a) found that in 57.4% of cases in which the prosecutor showed cause for detention the accused was ordered detained, when the Crown recommended release the judges released the accused in 95.4% of cases, rarely disputing the recommended release (265-266).

Similar to Friedland (1965), Koza and Doob (1975b) found a strong association between pre-trial detention status and the outcome of a trial, suggesting that being held in custody implies unfavourable information about the accused and creates an atmosphere of guilt (393). Using hypothetical court cases given to lay people they found there was a “greater tendency to judge an accused as more guilty when he was detained in custody pending trial, compared to when he was
released or when no such information was provided” (396). Adding to this, they tracked a sample of bail cases to case completion and found there was a “greater tendency for those accused who entered court for their trials in custody to receive custodial sentences, while those accused who were not in custody were more likely to receive an entirely different disposition” (398). What is more, accused who were detained were more likely to receive a longer sentence than those who had been released but also received custodial sentences (398).

Kellough and Wortley (2002) found that subjective perceptions of factors that are considered to be risk-related exerted considerable influence on the decision to release an accused on bail. The majority of accused do not have their bail contested; only 26% were ultimately detained (denied bail) (190). Kellough and Wortley (2002) however found that the denial of bail was not equally distributed amongst the population. Consistent with expectations, legal factors such as the number of previous convictions, number of current charges, not having a fixed address as well as other negative legal information were positively related to being denied bail (196). Kellough and Wortley (2002) also found the court was persuaded by subjective assessments of extra-legal factors made by police. Black accused, male accused, and younger accused (in adult court) were more likely to be denied bail (194). Even after controlling for legal factors, black accused and male accused were still more likely be detained (196). It seems then that the bail process puts the “character of accused on trial”, where subjective moral assessments exert independent influence on the bail decision (Kellough and Wortley 2002: 204).

Kellough and Wortley (2002) suggest accused who are denied bail feel considerable pressure to plead guilty to the charges. While initially, accused maintained their innocence and a desire to contest the charges at trial, this resolve dissolved the longer the accused spent in pre-trial detention. Indeed, some accused admitted they decided to plead guilty simply to get the
charges over with so they could be sentenced and either released from custody or start serving their sentence. One of the challenges Kellough and Wortley (2002) note is the factors that predict guilty pleas also tend to be the factors that predict charge withdrawal, but in the opposite direction (197). Accused who are denied bail are at a severe disadvantage in terms of their ability to instruct counsel and prepare a defence, and are thus less likely to have their charges withdrawn than accused who are released into the community pending trial. Indeed, the chances of encouraging a guilty plea are enhanced if the accused is in detention (198).

*Conditions of Release*

Conditional release is the middle ground between detention and unconditional release on bail. Conditions of release are imposed with the seeming belief that they will ensure the accused returns to court and does not commit any further offences while on bail. However, as demonstrated above and reiterated by Dhami (2004) the bail decision may affect the likelihood of conviction and the type of sentence imposed (27). Freiberg and Morgan (2004) argue conditions of release, especially conditions requiring treatment blur the boundaries between bail conditions and sentencing (220). Conditions of release restrict the liberty of legally innocent people and their very existence creates the possibility of a new criminal offence if the accused should fail to comply with a condition. Indeed, conditions of release are often intrusive, unrelated to the circumstances of the alleged offence, and unrelated to offending (Freiberg and Morgan 2004; Raine and Willson 1996) and may be being used for punitive purposes (Raine and Willson 1996: 258; King et al. 2008: 341).
Hucklesby (1994) suggests defence counsel often propose large numbers of conditions to the court, which may or may not be related to the grounds for detention, in the hope of securing the accused’s release. The conditions however seem to be unjustly punitive, are widening the net of social control, lack relevance, do not achieve their objectives and are largely unenforceable (261). Raine and Willson (1996) agree. They found conditions were attached in 40-60% of cases and the grounds for the conditions bore little apparent relationship to the conditions imposed (260). The use of clearly unenforceable conditions along with low perceptions of the likelihood of monitoring and enforcement further challenge the way conditions of release are imposed (264). Indeed, “Often, it appears the conditions are decided first and the grounds for them subsequently, as post facto rationalisations” (266). They argue that there needs be a more clearly established framework for imposing conditions of release.

Hucklesby (2009) suggests a climate of fear has developed around the bail decision as the court seems to over-estimate the likelihood of accused failing to comply with their bail order. Most accused (90%) do not commit offences on bail (Hucklesby and Marshall, 2000, 154). Hucklesby (2009) argues conditions of release are being imposed as a mechanism for ameliorating fears of risk more than actual risk, and insulating the court from criticism.

Youth Bail

There is relatively little research that explores issues surrounding bail for youths and most of what does exist focuses on how the release decision was made and what factors predicted detention under the Young Offenders Act (e.g., Gandy 1992; Kellough and Wortley 2002; Varma 2002; Moyer and Basic 2004; Moyer 2005). Under the Young Offenders Act
Varma (2002) found, that similar to adults, if the Crown consented to release most youths were released. Having a prior record, not attending school and not living at home with their parents were significantly related to the Crown’s decision to contest bail (151). Bail was more likely to be denied in cases with violence, drugs or breaking and entering charges (154). All youths who were released on bail were required to comply with conditions of release, most of which related to issues of control and supervision (157). This is consistent with Harris et al.’s (2004) speculation that that bail conditions are more “related to general behaviour modification or ‘teaching’ the young person a lesson than to the facts of the offence” (374).

We know from a detailed study of bail release conditions in a large Toronto court after the enactment of the *Youth Criminal Justice Act* (Sprott and Doob, 2010) that large numbers of separate conditions were imposed on youths in almost all cases. Sprott and Doob (2010) found that most youths (73%) were released with a surety and youths had an average of six conditions attached to their release. This is similar to Mather (2007/8) who found an average of almost seven conditions. Sprott and Doob (2010) found that the most common conditions imposed were residence requirements (90.7%), being required to obey the rules of the home (86.7%), not communicate with certain specified individuals (71.3%), not possess any weapons (66.3%), abide by a curfew (58.8%), not attend at certain locations (57.0%), and being required to attend school (41.9%) (433-436). Some of the conditions appeared to have a logical link to the alleged offence and to plausibly reducing danger to the public, given the nature of the alleged offence. Though Sprott and Doob (2010) looked at the relationship between conditions and the actual charges, the bail orders they had access to did not contain the details of the cases.

The impact of conditions of release is explored by Sprott and Myers (2011), who tracked a random sample of 225 youths who were held for bail hearings in one Toronto court. On
average, six conditions were attached to release orders. Close to half of the sample ultimately had all the charges associated with the bail hearing withdrawn and close to a third were charged with failing to comply with condition(s) of release. Those who were subject to a bail order for a relatively long time and had numerous bail conditions were most likely to accumulate new charges of failing to comply.

Court Culture

Collectively, the research suggests we are seeing an erosion of the presumption of innocence and an erosion of the presumption of release on bail. This shift in approach to the bail decision does not seem to be related to concerns about the accused re-appearing in court or committing further offences. Understanding what is happening in the bail process, however, is complicated by the absence of systematic data. Hucklesby (1997) suggests that “The culture of the court is…paramount in any explanation of remand decisions” (141). The culture of the court appears to influence the way the court processes cases. Indeed, Hucklesby (1997) contends that the court emphasizes the rapid processing of cases; “working practices had the effect of limiting the number of contested bail hearings which enabled the court to dispose of cases as efficiently as possible” (140).

Leverick and Duff (2002) examined the processing of cases in four courts and observed widespread use of adjournments, often without valid reason, in all but one of the four courts. The importance of informal relationships and working agreements created a culture of shared values and expectations about case processing and the desire for speed was linked to case processing times (Leverick and Duff 2002; Mack and Anleu 2007). Similarly, Mack and Anleu (2007), in
their examination of case processing argue the courts were driven by a desire to ‘get through the list’ and adjournments were the fastest way to dispose of cases for the day.

Leverick and Duff (2002) argue, however, that “court culture can be imposed by the most powerful players in the courtroom: judges” (44). In one court where the judge was routinely proactive in questioning the need for an adjournment, counsel were less likely to request an adjournment because there was no guarantee the request would be granted and it was seen as embarrassing to have to explain why an adjournment was being requested when they were only granted in exceptional circumstances. In this particular court a culture had developed where it was presumed the case would be moved forward towards resolution and adjournments were not the most accepted or expected way to address a case. In this way “Court culture has been said to be one of the most important factors contributing to differences in performance between courts” (Leverick and Duff 2002: 50). Indeed a culture of adjournment can become self-perpetuating when no one challenges adjournment requests (51).

Judicial management of the docket is referred to by Mack and Anleu (2007) as ‘judgescraft’. While judgescraft is important for the processing of cases, they caution that “active time management can enhance or undermine the legitimacy of judicial authority”… as it involves a “…responsibility (that) conflicts with the essentially passive nature of the judicial role in an adversary system” (355, 358). Efforts at active time management are limited by the nature of actual control and authority judges have over time management, along with their dependence on others in the criminal justice system (359). That said, active judicial management of the list meets “the dual temporal goals of getting through the list and moving the case along” towards resolution (358).
Theory

Court Culture

Although there is a single Criminal Code in Canada, it appears that the manner in which decisions are made is determined in part by the ‘culture’ of the court, with each court having developed its own practices and expectations. The court consists of an elaborate system of exchange where actors mutually benefit from the cooperation of workgroup members, as everyone has an interest in the group functioning effectively (Harris and Jesilow 2000; Blumberg 1967). In line with the workgroup’s functional inter-dependence, member interests align around a number of objectives. According to Alschuler (1968), the prevailing incentive for the court is institutional convenience and organizational maintenance, rather than concerns for justice. Specifically, the workgroup shares an interest in getting through the day, maintaining their occupational reputation, and minimizing the uncertainty associated with the inability to control the behaviour of others. These risks to their reputation act as incentives to incite and motivate the participants actions and entice them to cultivate informal cooperative relations with their formal adversaries.

The Court as an Organization

In the context of courts, the organizational system is based on cooperation, exchange and adaptation, rather than on an adherence to formal rules and proscribed roles. In this way, formal rules are only one set of the many factors shaping and controlling decisions. Feeley (1973) suggests the courts are part of a ‘functional system’ of criminal justice. This functionality means there is no particular reason to expect exhibited behaviour to coincide with behaviour prescribed
by formal goals of the system (421). Instead, the system is more likely to be governed by informal rules, established through the cultivation of standard operating procedures, than by officially proscribed rules of conduct. In the end, the court organization brings together groups with formally divergent goals who, on an informal basis, can agree to shared objectives and goals (413).

Feeley (1973) contends that in an exchange system like the court, the authority of legal rules and professionalism should not automatically be assumed to be effective. Rather, conflict between formal organizational goals and the goals of the individual actors is normal and should be expected. There can be many goals operating simultaneously and at odds with each other within any single organization. It is precisely this undercurrent of conflict that necessitates offering incentives to the workgroup, in order to persuade them of the virtues of cooperation in the pursuit of their common goals (414). Eisenstein and Jacob (1977) found incentives and shared goals motivate the workgroup to develop relationships that are cemented by exchanges of inducements and favours. The workgroup operates in a common task environment where they must share limited resources and are subject to occupational and legal restraints on their actions (10).

Indeed, within the criminal courtroom workgroup there are a number of independent organizations, each with its own mandate, motivations and supervisory structure. This collection of organizations is thrust together in the courtroom and is expected to work together in the pursuit of justice. Processual order theory argues that as actors with varying interests, ideologies or commitments confront problematic situations, they continuously engage in interaction strategies of negotiation, cooperation, manipulation and coercion to force solutions that further their individual and collective interests (Ulmer and Kramer 1998: 251). Each member of the
workgroup, while functionally inter-dependent in the processing of cases, comes from a separate sponsoring agency with its own objectives and imperatives. These technically independent actors are then forced, by the nature of their occupation, to try to find common ground on which they can base their ongoing relationships within the larger court organization.

**What Courts Are Really Like**

Blumberg (1967a) suggests there are two different lenses through which to conceptualize the operation and interactions of actors within the court. One is couched in the “constitutional-ideological terms of due process”. This due process model is believed to be what is present, or at least is the ideal of what ought to be present, in court. The other model is administrative, ministerial and rational-bureaucratic. This, Blumberg (1967) contends, is what has actually been institutionalized in the courts. He explains the tensions, pressures and criticisms that are levied on the court organization are the product of the court’s inability to reconcile these two models of justice. Indeed, it is the ideological qualities of due process, the belief in its presence as the guiding principle governing the administration of justice that has concealed the court’s drift toward the “mediocrity of assembly-line justice” (290). According to Gertz (1980), it is precisely this shift that has embedded a lack of concern, or ambivalence, on the part of courtroom participants towards the absence of an adversarial process in a system that is premised on this very trait (46).

Despite the presence of some characteristics consistent with a bureaucratic organization and Blumberg’s assertion that courts are bureaucracies, there is considerable resistance and counter-evidence in the literature to suggest this is not an appropriate characterization of the
courts (Eisenstein and Jacob 1977; Feeley 1983; Jacob 1983). Specifically, the term ‘bureaucracy’ implies the existence of a rational organization, with clearly delineated hierarchical control, central administration and a shared sense of purpose. For Feeley (1983), however, courts are arenas in which a range of competing and conflicting interests vie for attention. “Courts run on a system of interaction whose efficiency and end product are more akin to Adam Smith’s notion of unplanned, unconscious coordination in the pursuit of self-interest than to any theory of rational organization” (10).

What is more, the courtroom work unit is organized in a loosely, rather than strictly hierarchical, fashion. Though judges are the formal superiors in all courts, they in fact share their power with the attorneys who work with them (Jacob 1983: 194). The court consists of an elaborate system of exchange where actors mutually benefit from the cooperation of workgroup members, as everyone has an interest in the group functioning effectively (Harris and Jesilow 2000: 188; Blumberg in Feeley 1973: 417). This level of cooperation has evolved from the inherently inter-dependent nature of work within the courtroom workgroup. This inter-dependence has translated into a shared cultural knowledge of concepts and of the informal working arrangements, which have been developed to deal with the job of administering justice (Mather 1979: 139). Specifically, Mohr (1976) asserts the court is more akin to a business firm than a bureaucracy; judges want to save time and keep matters simple, prosecutors want to maximize production, pleas and convictions, defense counsel want to earn quick fees and satisfy their clients, and duty counsel want to relieve time pressures while providing quality representation (637). Taken as a collective, these desires culminate around a shared interest in rapid daily case processing, not necessarily to increase the efficiency of case disposition, but rather to improve the efficiency of the day in terms of time spent in court.
Coming Together in the Pursuit of a Common Goal

The notion of unstated rules of cooperation underscores the idea that all parties benefit from playing the game, regardless of the formal ‘sides’ they are officially on (Cicourel 1968: 60). Eisenstein and Jacob (1977) suggest all court members are interested in disposing cases; the prosecutor wants to maintain the strength of evidence and witnesses, while defense counsel want a high turnover because their clients can generally only afford modest fees (26). The informal system of collaboration is a response to these pressures and is designed to meet the personal and professional needs of everyone in the system in terms of clearing the daily docket.

Organizational goals may be couched in terms of ‘justice’ and the ‘rule of law’, but the court’s organizational instruments and resources are committed to priorities of efficiency and production (Blumberg 1967a: 206, 310). Though each actor is technically independent and comes from a different sponsoring agency, it is in their best interests to work together in a harmonious manner.

Unofficial organizational goals can effectively discipline a group of independent individuals, endowing them with a uniform set of perspectives in the service of the organization (Blumberg 1967a: 204). Utz (1978) suggests that the court is a system of actions based primarily on cooperation, exchange and adaptation, which emphasizes these considerations over adherence to formal rules and defined roles (4). In this way, though there is a clear divergence in goals, in terms of their professional obligations, the actors are able to agree on a common goal which propels all court actions. Each actor in the workgroup wants to process cases as expeditiously as possible.
The Implications of What the Courts are Really Like

This reality is rather unsurprising when the court is conceptualized as an organization, rather than a state-operated distributor of justice. Within an organizational context, the workgroup’s behavior is rationally connected to the attainment of their shared goals. In time, the workgroup develops a set of shared values that transforms into a local legal culture of shared ideas, expectations, attitudes, practices and behaviours (Dinovitzer and Leon 2001: 113). This culture is one that appreciates the functionally interdependent nature of the workgroup’s relationships and the importance of maintaining a sense of reciprocity in a system premised on an exchange relationship. In this way, informal norms, rather than what is prescribed by formal rules, are the dominant force dictating the context and nature of interactions. The informal culture is what binds the independent specialists together in a cohesive workgroup.

Drucker (1993) suggests that the core organizational mandate must be clearly understood and subscribed to by all members (53). The cultivation of a collective sense of purpose -- one that is binding on all participants-- is the most critical ingredient for a successful organization. Ulmer and Kramer (1998) found that the interactional dynamics in court are based on the local legal culture and the enduring interdependent working relations between actors that share a workspace (251). Similarly, Dinovitzer and Leon (2001) argue the local legal culture is the most significant predictor of the speed of case disposition. Actors are governed by shared expectations, practices and agreed upon informal rules of behaviour which determines the pace of the system (113, 136).
**Risk Aversion**

*Risk, Uncertainty and Neo-Liberalism*

Risk can be operationalized in a number of ways; however, it is commonly understood to be an estimation of the possibility of an event. For Power (2004) the concept of risk is elusive, contested and controversial-- characteristics that can be accredited to risk’s vagueness and ambiguity (13). Risk begins where certain knowledge ends and has evolved into a technique for thinking about and managing the social experience. This orientation is premised on the assumption that risk is knowable, quantifiable and therefore controllable. According to Garland (2003) “something becomes a ‘risk’ only to the extent that its potential for adverse consequence has been brought to notice and subjected to some kind of estimation” (48). In terms of the bail process and the shifting population of prisoners, the accused has been conceptualized as a risk to be managed by virtue of their presence in court and the accusations against them. It is generally held that past behaviour is the best predictor of future actions; if this is true it implies that an accused is likely to re-offend if released back into the community.

It seems that a heightened awareness of the risk of harm an accused poses to the community, a perception amplified by the media’s intervention and interpretation of the situation, has made criminal justice professionals increasingly nervous about making release decisions. Risk aversion may be partially attributed among Crown Attorneys in Ontario bail courts to the recommendations of the 1998 May/Isles Inquest and the 2002 Hadley Inquest. Hutter and Power (2005) suggest that sensationalized events such as these “tend to have

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35 Both women were murdered by their estranged partners who were on bail at the time and were under a court order to stay away from them. The inquests made a number of recommendations with respect to bail. For further information see the Ontario Women’s Justice Network http://www.owjn.org.
substantive institutional consequences and the amplification of risk frameworks” (13). When widely publicized, these shocking events galvanize fear and rouse public official’s anxiety about releasing accused into the community pending trial. This nervousness has been articulated through a general aversion to being the person to make the release decision. Hudson (2003) sees this as shifting from a framework of risk management to one more resemblant of risk control. This transition results in a zero sum approach, where the rights of some may be forfeited to protect the rights of others (65). This inequitable sense of entitlement suggests an acceptance or a belief that only some people deserve rights protection. In this way it is generally uncontroversial to detain an accused pending trial. Rather than being interpreted as an abrogation of their rights, detention is understood as a means of protecting the community from potential harm. What is more, in the aftermath of a serious offence committed by someone on bail, the government is inundated with calls to make it more difficult to get bail. This suggests an invasion of risk thinking and a preoccupation with security, regardless of the social costs. This also implies an ‘othering’ of accused, whereby the community and state actors have separated their identity from that of the accused. The accused then is somehow different, external to conventional society and therefore not as deserving or as entitled to rights protection. In the interests of the right of the community to safety, the rights of accused to bail are being challenged and perhaps compromised.

Though the Bail Reform Act (1972) was enacted before the rise of neo-liberalism in Canada, its objectives can be conceptualized as neo-liberal in their orientation. The legislation signals the state’s interest in withdrawing from the governing and control of individuals through the presumption of release. The prevailing risk mentality and specifically the aversion to risk, however, appears to have subsequently corrupted the legislated intent of the Act. Instead of the state withdrawing, it seems to be increasing the magnitude and scale of its control over
individuals, a fact demonstrated by the rising number of people being held in remand. That being said, while more people are being held and the bail process is taking longer, there seems to be an increase in the use of sureties, the most onerous form of release. Releasing an accused into the custody of a surety is indicative of efforts to responsibilize individuals by having them take over the control which would otherwise have been exercised by the state. Despite the appearance of increased intervention, the state is looking to responsibilize individuals and offload the responsibility of regulating and surveilling accused in the community onto private citizens.

*Organizational Risk Avoidance*

The bail decision involves an assessment of what Power (2004) conceptualizes as both primary and secondary risk. Primary risk is risk posed by the accused if they are released into the community, while secondary risk is the risk to the reputation of the criminal justice system if an accused offends while on bail. Together, these two concerns have created a culture whereby actors are increasingly reluctant to make the decision with respect to release. Power (in Hutter and Power 2005) suggests “risk management routines may have more to do with a certain kind of organizational legitimacy and responsibility framing than with having the organizational capacity to encounter risk inventively and intelligently” (18). This implies concern for organizational legitimacy may be the governing force behind bail decision making, and in so being is preventing the system from addressing other means of negotiating the risk posed by accused people.
Notions of certainty and know-ability are myths used to maintain an impression of manageability. Power (2004) suggests that there is both a functional and a political need to maintain and even perpetuate the believability of this myth (10). Though the government is incapable of fully regulating behaviour and achieving certainty of outcome, it is not politically viable to announce this lack of ability. The expectation is that the government is capable of controlling the polity; to maintain its political authority the government continues to lend the impression that it is able to manage risk and know the unknowable. This is especially so in the face of a consistent stream of failures which challenge and threaten the legitimacy of the organization (Power 2004:10). These failures suggest the government is losing control and Power (2004) asserts there is a growing consciousness of the risk to the authority of the state for failure to deliver on public services (17). This inference is amplified to endemic proportions by an aggressive media that highlights failures and propagates fear amongst the citizenry.

In creating and nurturing perceptions of risk, the government is propelled to reassert its power and risk manageability through legislation and policy change. What is happening though is a feeble attempt to organize and manage that which is uncertain, elusive and potentially risky. In generating elevated levels of fear, criminal justice actors have become reluctant to make the release decision for fear of occupational and reputational repercussions. What then happens, according to Power (2004), is a displacement of valuable, yet vulnerable, professional judgements in favour of defendable processes (11). Concern and a hyper-awareness of uncertainty have made risk the modelling ideology of organizations; where a good organization has come to be equated with a being a good risk manager.
**Excessive Caution and the Defensible Decision**

In a culture of uncertainty and heightened risk consciousness, there seems to be an obsession with safety and security. Rose (1997) argues that since we are bad at making accurate and reliable predications about future behaviour, we are erring on the side of excessive caution (3). This hyper-vigilance and concern leads to overly cautious decision making and over intervention into people’s lives for the sake of pursuing an unattainable assurance of safety. In the quest for security, the managing of the potentially risky has become the cornerstone of risk reduction strategies. In so doing it is demanded that calculations of what may happen tomorrow should and must inform all decisions made today. In this way, risk thinking, in the context of bail is not merely an option; it is an obligation. Rose (1997) suggests imperfect predictions of risk are conceptualized as a failure of the assessment and management of risky people and jeopardize the safety of the community (9). In this context the protection of the community is prioritized over the rights of accused to reasonable bail. The imperative of risk minimization heightens the fear of making an inaccurate prediction and putting the public at risk.

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**The Politics of Risk**

Rose (1997) contends the failures of risk assessments and risk management act as “a perpetual incitement for the incessant improvements of systems, generation of more knowledge, invention of more techniques, all driven by the technological imperative to tame uncertainty and master hazard” (24). Since the government is accountable to the public for failure, the appearance of manageability is vital. The system tries to manage the unknowable by implementing ‘better’ control systems. Indeed, “…‘better’ control systems continue to be
regarded as politically acceptable solutions to crisis, even where it is well known that such systems would not have prevented the crisis in question” (Power 2004: 28).

Through the language of risk we have created the impression that we are being exposed to a growing risk and threat to our security. As pointed out by Power (2004), it is debateable as to whether society is more risky or objectively more dangerous than in the past. The difficulty is that significant operational risk events, though of a low probability, when they do occur, they are of high impact (30). These events lead to public outcries for change; these rare occurrences are translated into the driving force behind a policy response from the government. It may be that the government is overly responsive to public concerns. Power (2004) suggests reputational risk management may itself be part of the amplification of reputational risk. In being unable or unwilling to contest public perceptions the government is reifying risk by reinforcing the public’s interpretations. Crisis, whether real or perceived, are important pressures for change in practices of risk management and risk regulation (35, 43). For politicians, responding with policy change and denouncements of behaviour are the rational response to the perceived crisis; it is politically risky to deny the fears of the citizenry. In this way, institutional responses are very much guided by cultural demands for control, accountability and responsibility attribution (Power 2004: 38). “It is the specific dynamics of these amplification processes in society, rather than any generalised aversion to risk-taking at the individual level, which potentially inhibits organizational innovation” (Power 2004: 45). Politicians are not willing to risk themselves or their reputation; it is easier to appease the public through assurances of closer regulation, stricter control and more surveillance of risky people. In a climate governed by fear and calls for increased security, the government cannot say it is normal or expected that some accused will offend while on bail.
Chapter 3  
Who Said Anything About Justice? Court Culture and the Courtroom Workgroup  

Introduction  

The criminal court is often conceptualized as being the state-sanctioned finder of truth and the distributor of justice – an institution of majesty charged with upholding the sanctity of the law. This conception of the court, however, breaks down when one closely examines the working relationships of the members of the court community. Though the court, according to law, is supposed to be a place of adversarial justice, the realities of the lower level court actor’s interactional dynamics do not, in published research (see Blumberg 1967; Eisenstein and Jacob 1977; Feeley 1983), support the conclusion that these formal legal values translate into practice. The courtroom workgroup, though made up of formal adversaries with widely divergent roles and objectives, is a community of workers whose shared interests include getting through the day as quickly and efficiently as possible (Blumberg 1967; Harris and Jesilow 2000; Blumberg in Feeley 1973).  

An Un-bureaucratic Organization  

The criminal justice system’s emphasis on the importance of efficient case processing (the timely resolution of cases), while maintaining due process, are consistent with characteristics of a bureaucratic organization. Indeed, the court, like a bureaucracy is often criticized for rapid, impersonal assembly-line processing of cases. The court also has a clear
division of labour and written rules for procedures that must be followed. Despite these similarities the court cannot be strictly defined as a bureaucracy because the court does not share some essential bureaucratic characteristics. Indeed, the court is more accurately characterized as a workgroup with a shared culture.

Unlike a bureaucracy, the court is not hierarchically structured. There is no management structure or system of accountability in place to monitor the daily performance of the court. As will be demonstrated, since court actors come from different independent sponsoring agencies, nobody is responsible for, or oversees, the operation of the court; the court is like a ship without a captain. In this sense, no one is ‘steering the ship’, ensuring the court is effectively and efficiently processing and advancing cases through the court system. Without this hierarchical structure and system of accountability, the court has established its own informal culture and objectives.

The lack of hierarchical oversight means the court system lacks the necessary organizational instruments with which to supervise and ensure the workgroups’s compliance with the formal goals of the criminal justice system. While it may be that each of these individual agencies is bureaucratically structured, when the members come together and form a courtroom workgroup, the hierarchy is lost. For example, though judges are the formal superiors in all courts, they in fact share their power with the attorneys who work with them (Jacob 1983: 194). Indeed, the court consists of an elaborate system of exchange where actors mutually benefit from the cooperation of workgroup members, as everyone has an interest in the group functioning effectively (Harris and Jesilow 2000: 188; Blumberg in Feeley 1973: 417).

While the court system may share bureaucratic priorities of production and efficiency, these do not seem to be translated into practice in the bail court. Indeed, the workgroup’s goals
seem to subvert the bureaucratic organizational goals. Bureaucracies are interested in the efficient maximization of production. In the context of the court this means moving cases towards resolution as quickly as possible; as was demonstrated in Chapter 1, this simply is not so, as cases are taking more appearances and are spending more time in the bail process. As will be demonstrated, it does not seem that the workgroup is trying to achieve the organizational goal of moving cases towards resolution. Rather there appears to be a shared group goal of ‘getting through the list’ each day as quickly as possible, an objective that does very little for the efficiency of the court system. Indeed, while the workgroup seems to share the bureaucratic goal of efficiency it has been redefined—the goal of the work group is not efficient case resolution, rather it is an efficient end to the working day.

*The Ideal and the Reality*

The criminal court is supposed to provide a forum in which an impartial independent member of the judiciary rules on the reliability of evidence, determines the accused’s pre-trial liberty, ascertains guilt or innocence, and imposes sanctions. These decisions are presumed to be made after an adversarial process, whereby the prosecution and defence make their case and challenge the credibility of their adversary’s evidence. This, however, is not the every-day reality in the lower courts.

Most of the research on the lower courts (i.e., the courts that are involved in the processing of ordinary cases), suggests that the organizational system of the courts is based on cooperation, exchange and adaptation, rather than on an adherence to formal rules and proscribed roles. In this way, formal rules are only one set of the many factors shaping and controlling
decisions. Feeley (1973) suggests courts are part of a ‘functional system’ of criminal justice. This functionality means there is no particular reason to expect exhibited behaviour to coincide with behaviour prescribed by formal goals of the system (421). Instead, the system is more likely to be governed by informal rules, established through the cultivation of standard operating procedures, than by officially proscribed rules of conduct. In the end, the court organization brings together groups of people with formally divergent goals who, on an informal basis, can agree to shared objectives and goals (413).

Rather than being an efficient adversarial group of people processing criminal cases through the system, the courtroom workgroup shares a simple interest in getting through the day. As will be demonstrated in the case of Ontario bail courts, a court culture has developed that has shifted the court’s focus from moving cases through the system to moving cases off the docket for the day. In this way the interests and values of the courtroom workgroup conflict with the objectives of the criminal justice institution as a whole. This courtroom reality has inspired the development of a collaborative workplace culture that emphasizes the importance of expeditiously disposing of the daily docket over distributing justice.

This informal system of collaboration is designed to meet the personal and professional needs of everyone in the system in terms of clearing the daily docket. Organizational goals may be couched in terms of ‘justice’ and the ‘rule of law’, but the court’s organizational instruments and resources are committed to priorities of efficiency and production (Blumberg 1967a: 206, 310). Though each actor is technically independent, it is in their best interests to work together in a harmonious manner. Utz (1978) suggests that the court is a system of actions based primarily on cooperation, exchange and adaptation, which emphasizes these considerations over adherence to formal rules and defined roles (4). In this way, though there is a clear divergence in
goals in terms of their professional obligations, the court actors are able to agree on the common goal of expediting the conclusion of the working day by processing cases as quickly as possible.

Collectively the research suggests the question is not whether the courtroom workgroup’s relationship is adversarial or co-operative. The research literature leads one to consider the possibility that the workgroup is primarily concerned with getting through the day as quickly and with as few disruptions as possible, rather than with the institutional goal of moving cases towards disposition. What appears is a conflict between the legal framework and the culture and interests of the court actors. In the absence of a functioning bureaucratic structure and an accompanying management mentality, the court has come to operate in a way that is no longer consistent with its legal definition, as courtroom workers are able to construct their own informal culture that rationalizes their behaviour.

There seem to be two sets of expectations. On the one hand there is the legal definition of the court and how the court is supposed to operate. On the other there is the reality of an emergent court culture, in which the interests and values of the courtroom workgroup may conflict with the purposes and mandates of the criminal justice institution. Indeed, what may on its face appear to be a workgroup whose primary objective is the impartial administration of justice, upon closer examination reveals itself to be a veil behind which a ‘culture of adjournment’ and the objective of getting through the list as expeditiously as possible has developed.

This emergent culture is clearly depicted in the bail process. The law describes bail as a process that should normally, in straight-forward cases, take place in one appearance. Despite this, Ontario bail courts are operating in a way that ensures this rarely happens. This study
examines what happens in these Ontario bail courts in an effort to understand a daily reality that is inconsistent with the law on bail as it has developed.

**Methodology**

Observational bail court data were collected from 11 different courts in and around the City of Toronto. Three 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 breaks 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 cases was disposed. Extensive notes were taken on how issues were discussed in court to provide a more detailed understanding of the operation of the bail court. This included notes on conversations that took place in court on and off the record; these were not private conversations as there were still people sitting in the body of the court who could easily hear what was being said. These data were translated into a ‘use of time’ dataset and a ‘case based’ dataset, each of which include the qualitative observations of court personnel’s conversations and interactions. Taken together, these data are used to address the question: what are court actors primarily concerned with- resolving the issue of bail or getting through the day as expeditiously as possible and with minimal conflict, as evidenced by a ‘culture of adjournment’?
The bail courts were observed for a total of 142 days. Each court was observed for a minimum of four days. Some of the larger courts were visited on more than one occasion and thus are over-represented in the dataset. Analyses are presented for individual courts and are then aggregated across the courthouses.

Table 1: Distribution of Bail Court Observations

<table>
<thead>
<tr>
<th>Court</th>
<th>Days Observed</th>
<th>Case Appearances</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court 1</td>
<td>23.9% (n=34)</td>
<td>21.3% (871)</td>
</tr>
<tr>
<td>Court 2</td>
<td>28.2% (n=40)</td>
<td>41.3% (1685)</td>
</tr>
<tr>
<td>Court 3</td>
<td>7.7% (n=11)</td>
<td>8.4% (341)</td>
</tr>
<tr>
<td>Court 4</td>
<td>8.5% (n=12)</td>
<td>2.3% (94)</td>
</tr>
<tr>
<td>Court 5 (WASH)</td>
<td>7.7% (n=11)</td>
<td>3.4% (137)</td>
</tr>
<tr>
<td>Court 6 (WASH)</td>
<td>2.8% (n=4)</td>
<td>4.1% (167)</td>
</tr>
<tr>
<td>Court 7</td>
<td>3.5% (n=5)</td>
<td>3.6% (146)</td>
</tr>
<tr>
<td>Court 8</td>
<td>3.5% (n=5)</td>
<td>3.5% (142)</td>
</tr>
<tr>
<td>Court 9</td>
<td>7.0% (n=10)</td>
<td>8.1% (332)</td>
</tr>
<tr>
<td>Court 10</td>
<td>3.5% (n=5)</td>
<td>2.9% (117)</td>
</tr>
<tr>
<td>Court 11</td>
<td>3.5% (n=5)</td>
<td>1.2% (48)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>100% (n=142)*</td>
<td>100% (4080)*</td>
</tr>
</tbody>
</table>

*Does not add to 100% due to rounding error

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36 Weekend and Statutory Holiday Courts
A Typical Day in Bail Court

For the purposes of these analyses the two weekend courts (“Weekend and Statutory Holiday, or WASH courts as they are described in Ontario) are presented separately.

On an average day in the regular weekday bail court 29.9 cases (accused persons) faced 134.5 charges, for an average of 4.5 charges per case. Below is a snapshot of a typical day in bail court, detailing minute by minute how time was used. This table however, has an important drawback: it makes bail court appear to operate in a relatively orderly fashion. This orderliness however, is an entirely artificial construct, an unavoidable consequence of placing court timings into a table. In actuality bail court often appeared to be a hectic race to get through the list; court only began to resemble an orderly process when the docket was nearing completion.

Each line in the table below represents an accused person before the court. The ‘outcome’ column indicates how the accused’s case was resolved that day. A ‘hold down’ means the accused was brought before the court but his case was not ready to proceed so the accused returned to the holding cells and was recalled at some point later in the day. For cases that were remanded (adjourned to another day without a bail decision having been made), the person requesting the adjournment is also indicated in the ‘outcome’. Where ‘plea’ has been indicated as the case ‘outcome’, the accused was traversed from the bail court (which in Ontario is presided over by a Justice of the Peace (JP)) to the plea court where a provincial court judge presides to enter a plea of guilty to the charge(s). While it is reasonable to expect that being traversed to plead guilty would be the end of the bail case, it was not unusual for an accused to return to the bail court later that day or on their next appearance having decided not to plead guilty once they heard the Crown’s plea position on sentence or after seeing who the judge presiding in the plea court was on that particular day. If the Crown consented to the release of
the accused, the form of release is also indicated under ‘outcome’ (i.e. on their own bail, with the supervision of the bail program, with a surety). For accused who did not wish to apply for bail and instead chose to consent that the Crown could show cause for their detention, the ‘outcome’ is labeled as ‘consent detention’. Finally, in cases in which there was a show cause hearing and thus a decision with respect to bail was made, the ‘outcome’ indicates that the accused was ‘released’ or ‘detained’ after a ‘CSC’ (contested show cause hearing).

Table 2: A Typical Day in Bail Court

<table>
<thead>
<tr>
<th>Dead Time</th>
<th>Start Time</th>
<th>End Time</th>
<th>Total Time</th>
<th>Notes</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>10:06</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10:06</td>
<td>10:08</td>
<td></td>
<td>2 min</td>
<td></td>
<td>Hold Down</td>
</tr>
<tr>
<td>10:08</td>
<td>10:08</td>
<td></td>
<td>30 sec</td>
<td></td>
<td>Plea</td>
</tr>
<tr>
<td>10:08</td>
<td>10:09</td>
<td></td>
<td>1 min</td>
<td></td>
<td>Hold Down</td>
</tr>
<tr>
<td>10:09</td>
<td>10:11</td>
<td></td>
<td>3 min</td>
<td></td>
<td>Hold Down</td>
</tr>
<tr>
<td>10:11</td>
<td>10:13</td>
<td></td>
<td>2 min</td>
<td></td>
<td>Remand- Defence</td>
</tr>
<tr>
<td>10:13</td>
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<td></td>
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</tr>
<tr>
<td>10:17</td>
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<td></td>
<td>1 min</td>
<td></td>
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<td>1 min</td>
<td></td>
<td>Hold Down</td>
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<td></td>
<td>1 min</td>
<td></td>
<td>Hold Down</td>
</tr>
<tr>
<td>10:20</td>
<td>10:21</td>
<td></td>
<td>1 min</td>
<td></td>
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<td>1 min</td>
<td>10:21</td>
<td>10:22</td>
<td>1 min</td>
<td>no one in court</td>
<td></td>
</tr>
<tr>
<td>10:22</td>
<td>10:23</td>
<td></td>
<td>1 min</td>
<td></td>
<td>Remand- Defence</td>
</tr>
</tbody>
</table>

37 Remand defence means - remanded to another day as a result of a request from the defence (directly or indirectly through duty counsel who are state-funded defence counsel who provide legal advice and assistance to accused without private legal representation).
<table>
<thead>
<tr>
<th>Time</th>
<th>Time</th>
<th>Duration</th>
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<td>10:26</td>
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</tr>
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</tr>
<tr>
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</tr>
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</tr>
<tr>
<td>10:46</td>
<td>10:46</td>
<td>30 sec</td>
<td>Interrupted</td>
</tr>
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<td>10:46</td>
<td>10:48</td>
<td>2 min</td>
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<td>10:48</td>
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</tr>
<tr>
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<td>10:51</td>
<td>30 sec</td>
<td>Remand- Defence</td>
</tr>
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<td>11:28</td>
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<td>Detain- CSC</td>
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<td>11:50</td>
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<td>4 min</td>
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</tr>
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<td>1 min</td>
<td>Remand- Plea</td>
</tr>
<tr>
<td>12:04</td>
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<td>Consent Detention- Plea</td>
</tr>
<tr>
<td>12:06</td>
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<td>30 sec</td>
<td>Hold Down</td>
</tr>
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<td>12:07</td>
<td>1 min</td>
<td>Hold Down</td>
</tr>
<tr>
<td>12:07</td>
<td>12:09</td>
<td>2 min</td>
<td>Hold Down</td>
</tr>
<tr>
<td>12:09</td>
<td>12:12</td>
<td>3 min</td>
<td>Consent Detention</td>
</tr>
<tr>
<td>12:12</td>
<td>12:14</td>
<td>2 min</td>
<td>reporter’s machine not working properly</td>
</tr>
<tr>
<td>12:14</td>
<td>12:15</td>
<td>2 min</td>
<td>Remand- JP</td>
</tr>
<tr>
<td>12:15</td>
<td>12:17</td>
<td>2 min</td>
<td>Hold Down</td>
</tr>
<tr>
<td>Time</td>
<td>12:17</td>
<td>12:22</td>
<td>5 min</td>
</tr>
<tr>
<td>-------</td>
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<td>--------</td>
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<tr>
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<td>3 min</td>
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<tr>
<td>Time</td>
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<tr>
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<tr>
<td>Time</td>
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<tr>
<td>Time</td>
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<td>2:16</td>
<td>2 min</td>
</tr>
<tr>
<td>Time</td>
<td>2:16</td>
<td>2:34</td>
<td>18 min</td>
</tr>
<tr>
<td>Time</td>
<td>2:34</td>
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<td>1 min</td>
</tr>
<tr>
<td>Time</td>
<td>2:35</td>
<td>2:36</td>
<td>1 min</td>
</tr>
<tr>
<td>Time</td>
<td>2:36</td>
<td>2:38</td>
<td>2 min</td>
</tr>
<tr>
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<td>2:50</td>
<td>12 min</td>
</tr>
<tr>
<td>Time</td>
<td>2:52</td>
<td>2:52</td>
<td>1 min</td>
</tr>
<tr>
<td>Time</td>
<td>2:52</td>
<td>2:53</td>
<td>1 min</td>
</tr>
<tr>
<td>Time</td>
<td>2:53</td>
<td>2:54</td>
<td>1 min</td>
</tr>
<tr>
<td>Time</td>
<td>2:54</td>
<td>3:00</td>
<td>6 min</td>
</tr>
<tr>
<td>Time</td>
<td>3:00</td>
<td>3:02</td>
<td>2 min</td>
</tr>
<tr>
<td>Time</td>
<td>3:02</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\(^{38}\) OIE- “On in error”- an accused was mistakenly listed on the daily docket and was thus not before the court.
Simply skimming through the event timings makes clear the speed with which cases were approached and dealt with. Speed is often equated with efficiency; however, further examination reveals that very little was being accomplished each time an accused appeared in court, if accomplishments are defined in terms of completing one stage of the criminal justice process and moving on to the next.

To illustrate the emphasis that is placed on speed by court actors some examples are presented below. These examples come from separate observations on a variety of days at different courthouses. They are not exceptional; rather they depict the daily reality in bail court.

For example

1- A consent release was proposed to the court and the proposed surety was to be named. The surety stood up from the body of the court and was proceeding towards the bench when the JP said the following:

   JP- “Bring your ID up here. Get it out, you can walk and get it out of your wallet at the same time! You are able to do two things at once, aren’t you?”

2- After a number of adjournments and consent releases in rapid succession the clerk (who prepares all the required paperwork) turned to the JP and said the following:

   Clerk- “Slow down please, we are getting mixed up. We are tired and we have not had a break”.

3- Defence counsel was speaking to their client, trying to get instructions on how he would like to proceed when the JP interrupted their discussion saying:

   JP- “You are holding up the parade, make up your mind”.

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39 For the purposes of presenting quotes, ‘A’ is the accused, ‘C’ is the Crown, ‘D/DC’ is defense counsel or duty counsel, ‘JP’ is Justice of the Peace.
4- Again, defence counsel was getting instructions from his/her client when the JP interjected saying:

JP- “We have to move on, we cannot take 10 minutes per person”.

5- In the middle of a bail hearing, where the Crown was examining the surety the JP interrupted asking:

JP- “How much longer is this going to take? Honestly!”

6- During defence questioning of the accused during a show cause hearing the JP cuts off the accused, saying:

JP- “Get to the point. Why did your surety pull your bail? I don’t have all day.”

A- “it was too difficult because my surety is friends with my wife and kids…”

JP (interrupting) - “OK ALREADY! After all this time in the country you have no one that can be your surety.”

A- “I don’t want to ask people because it puts them between me and my wife and kids.”

JP- “You are risking staying in jail.”

These quotes demonstrate how courtroom actors try to rush the in-court process. Indeed, the court started to resemble an assembly line process, whereby disruptions to the rapid processing of cases, as depicted in Table 2, were greeted with disdain and a reminder that the court must move on.
An Aggregated Examination of Court Time

As described in Table 3 below, there were two different court start times observed across the courts - some courts were scheduled to open at 9:30 a.m., while others were scheduled to open at 10:00 a.m. For the most part the court opened within a few minutes of the scheduled start time. That said, Court 4 routinely opened an hour late on average, while Court 11 regularly opened 15 minutes late.

On an average day, court was open for operation\textsuperscript{40} for 5 hours and 49 minutes (range: 2:22 to 8:18). The time between this start and end interval, however, was actively used to varying degrees. It was not unusual for there to be time in court when no accused were present (no accused had been brought into court from the holding cells). Hence although the court might have been technically in session, the time did not appear to be used for any useful purpose. This occurred on average eight times a day (range: 0 to 22), consuming a mean of 27 minutes (range: 0:00 to 1:19). Dead time was defined as operational court time which was not being actively used; for the purposes of this research it was calculated as the total amount of time expended on recesses, lunch and time when court was in session but was not being used. This dead time comprised on average 2 hours and 33 minutes a day (range: 0:54 to 3:54). This dead time was then deducted from the operational hours of bail court resulting in a mean of 3 hours and 15 minutes of actual used court time on an average day (range: 0:43 to 5:54). During this “active” time period of 3 hours and 15 minutes, the court heard on average 29.9 cases (range: 2 to 75) with a mean of 134.5 charges (range: 13 to 308). On average, a case spent 6.5 minutes in court on a given day.

\textsuperscript{40} ‘Open for operation’ is defined as the time between court commencing in the morning and adjourning at the end of the day.
### Table 3: Court Operating Time (hours: minutes)

<table>
<thead>
<tr>
<th>Court</th>
<th>Average court start time (9:30 a.m. indicated with * or 10:00 a.m.)</th>
<th>Average court end time</th>
<th>Average Operating (elapsed) Time (from beginning to end of the court day)</th>
<th>Average Dead Time (recesses, no one in court)</th>
<th>Average Active Time Remaining</th>
<th>Average Number/Range of Number of Cases</th>
<th>Average Number/Range of Number of Charges</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court 1</td>
<td>10:05</td>
<td>15:27</td>
<td>5:22</td>
<td>2:49</td>
<td>2:33</td>
<td>25.7</td>
<td>(15-39)</td>
</tr>
<tr>
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<td>10:06</td>
<td>16:17</td>
<td>6:11</td>
<td>2:22</td>
<td>3:50</td>
<td>42.2</td>
<td>(23-75)</td>
</tr>
<tr>
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<td>9:32*</td>
<td>15:35</td>
<td>6:02</td>
<td>2:16</td>
<td>3:47</td>
<td>29.8</td>
<td>(25-37)</td>
</tr>
<tr>
<td>Court 4</td>
<td>10:20*</td>
<td>14:49</td>
<td>4:29</td>
<td>2:17</td>
<td>2:17</td>
<td>8.4</td>
<td>(2-30)</td>
</tr>
<tr>
<td>Court 7</td>
<td>10:02</td>
<td>16:04</td>
<td>6:02</td>
<td>2:40</td>
<td>3:22</td>
<td>29.2</td>
<td>(16-36)</td>
</tr>
<tr>
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<td>9:35*</td>
<td>15:40</td>
<td>6:04</td>
<td>2:03</td>
<td>3:49</td>
<td>33.2</td>
<td>(18-45)</td>
</tr>
<tr>
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<td>15:17</td>
<td>7:03</td>
<td>2:59</td>
<td>4:04</td>
<td>27.8</td>
<td>(15-46)</td>
</tr>
<tr>
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<td>9:43*</td>
<td>16:46</td>
<td>5:13</td>
<td>3:05</td>
<td>2:05</td>
<td>9.8</td>
<td>(3-16)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>--</td>
<td>--</td>
<td>5:49</td>
<td>2:33</td>
<td>3:15</td>
<td>29.9</td>
<td>(2-75)</td>
</tr>
</tbody>
</table>

* Since we are dealing with averages across days, the ‘average dead time’ and ‘average time remaining’ do not exactly equal the average ‘operating time’.

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41 No ‘total’ was calculated as some courts were scheduled to start at 9:30 a.m., while others were scheduled to start at 10:00 a.m.
The amount of time available to the court to address the daily docket was to some extent controlled by court staff, as they determined when the court closed for the day. Indeed, at the direction of court actors, court closed for the day before 5:00 p.m. (91% of observed days) and in many cases before 4:00 p.m. (on 66% of observed days). This finding is consistent with Mack and Anleu’s (2007) observation “that ‘getting through the list’ by a reasonable time, from the point of view of the magistrates and court staff, was generally achieved” (349).

**Hold Downs**

On average accused were held down until later in the day 11.9 times. This however, ranged from zero to 37 hold downs in a single day. This consumed on average 18 minutes of court time with a range of up to one hour. Clearly, holding matters down occurred with considerable regularity; 34.5% of cases were held down at least once, 4.9% twice and 1.0% three or more times in a given day. As presented below in Table 4, there were a variety of reasons for holding matters down. Waiting for the arrival of counsel or sureties were the primary reasons for holding down a case for the first (47.8%), second (32.6%) and third time (36.4%). An accused’s documents not being before the court was the dominant reason the Crown would provide for requesting a hold down until later in the day.
The moment a case did not appear immediately ready to proceed, it was held down. Hold downs do not necessarily involve inefficiency; they only become problematic when they are not used for a productive purpose. For example, cases were often held down for the benefit of accused who were awaiting their counsel or sureties; however, unless duty counsel had the opportunity to call counsel or sureties the hold down did not serve a productive purpose. This is consistent with Mack and Anleu’s (2007) suggestion that hold downs help achieve “two temporal goals: getting through the list and moving the case along” (344). Hold downs were easily requested and granted but no one seemed to be held responsible for pursuing a legitimate productive outcome from the hold down request. For example, while duty counsel may request a hold down for the purposes of contacting private counsel or a surety, they are not held accountable for failing to do so. Of the 1,354 people who were held down at least once, 49.3% resulted in a productive outcome. This productive outcome took the form of a bail decision (release or detention) or a traversal to another court offering assistance (where a bail decision
was likely made) or to plea court to resolve the matter. That said, 50.7% of those held down at least once were later adjourned to another day. The court, however, did not seem concerned with whether or not a hold down request facilitated a bail decision or resulted in an adjournment. Hold downs occurred quickly and postponed the case until later in the day which allowed the court to carry on with other matters.

Conversely, the court was also often reluctant to grant a hold down request, instead preferring to adjourn the matter to another day if it was not ready to proceed. It is understandable that at some point in the day the court has to make a decision about how to dispose of the case. However, it was not unusual for an accused or duty counsel to request that a matter be held down and for the court to deny this request. In denying a hold down request the court was conveying the message that even the process of returning to an accused’s matter later in the day was too time intensive. In most instances in which ‘hold down’ requests were refused, the court adjourned before 5:00 p.m., and in many instances before 4:00 p.m., meaning that it would have been extremely likely that there would have been time to hear the case at the end of the day.

For example at 10:08 a.m.

A- “My counsel and surety are supposed to be here”.

DC- “I have a message from counsel requesting that the matter be held down”.

JP “We do not have the luxury of holding matters down in this court, we are too busy. Court starts at 9:30; when would you like to return?”

The court spent three hours of active court time on breaks that day and then adjourned for the day at 3:10 p.m.
On another day at 9:45 a.m.

JP- “I am not holding down any matters today. We have a very heavy list”.

On this day the court spent two hours of active court time on breaks and the court adjourned for the day at 4:45 p.m.

It should be remembered that there are considerable costs to the accused and to the justice system of bringing a case back for another day (e.g., transportation, correctional, and security costs related to sending the accused to a correctional facility, costs of getting the paperwork to the right court, etc.).

The refusal to hold matters down, especially so early in the day demonstrates that the Justice of the Peace placed more ‘value’ on getting through the day early than on disposing cases. This also suggests more significance was placed on the interests of those denying the request or arguing against it- typically the permanent court actors- than on the requests of accused and their counsel or on other parts of the justice system (court staff to get the paperwork to the right place for the next appearance, correctional and security costs, etc). It appears the regular court actors did not recognize defence counsel as full members of the courtroom workgroup. Rather defence counsel seemed to be conceptualized as occasional members who did not exert the same level of influence over how cases were processed.

Interestingly, hold downs were also routinely requested by the Crown or Justice of the Peace when defence counsel indicated they were ready to proceed with a show cause hearing early in the day. The Crown or Justice of the Peace would request that the matter be held down until the court had finished going through everyone on the docket. It was also not unusual to hear justices indicate they wanted to address all of the adjournment requests and consent releases
before they would entertain a show cause hearing. Managing the docket in this way further demonstrates how the courtroom workgroup did not conceptualize defence counsel as ‘full’ members of the group as they were not typically regular players and may indeed be disruptive to the routine ordering of the court.

For example at 10:10 a.m.

D- “We are ready for a show cause hearing. The accused has been up several times and he is the priority today.”

C- “I have brought up the priorities and the remands.”

JP- “We will deal with all the remands first.”

On another day at 1:10 p.m.

JP- “We have a very long list today and we still have people who want a show cause hearing and new accused coming in from the division. We will start with the remands, traversals and consent releases and then do show causes if there is time. I will not hold any more matters down and we will not start any show cause hearings after 3:30 p.m.”.

At 4:08 p.m. the Crown indicated that all outstanding matters were to be adjourned. In other words, even though accused and their lawyers had been waiting all day, no attempt was made to complete these cases in the bail court or to find other courts that could handle the show cause hearings.

On this day the court lost two hours of active court time to breaks and then adjourned for the day at 4:35 p.m. On average, show cause hearings take 50 minutes to complete.

It may make sense to address consent releases first so the paperwork can be processed and the accused released. This logic however does not extend to matters that are being adjourned. By addressing remands early in the day and leaving show cause hearing until later in
the day, there was the possibility that the court may ‘run out of time’ to hold the hearings that were ready to proceed. This means priority was being given to those cases with quick outcomes (adjournments) rather than those that required a more lengthy process (hearings) and perhaps civilian witnesses (e.g. sureties) but in the end would result in a bail decision being made. Indeed, those who were being remanded were in custody at the time that the remand was ordered and were going to return to a custodial facility whether they were remanded early or late in the day. What is more, it is unclear how court actors were able to predict whether or not there would be time to hear a case early in the day; leaving adjournments until later in the day would ensure accused are not being remanded prematurely. Equally important, of course, is the fact that the ‘bail court’ is not the only court that can deal with bail matters. All of these court locations had other criminal courts operating. It is almost completely certain that in every court location there were courts presided over by provincial court judges that were finishing for the day in the early afternoon (if not earlier) and could, in theory hear bail matters.

The ‘Culture of Adjournment’

When looking at the manner in which cases were disposed of, a clear pattern emerges across all of the courts observed—close to half of all cases observed were adjourned to another day. This is rather remarkable given the law governing bail is comprised of a number of elements that suggest the bail decision is supposed to be made relatively quickly after an accused is arrested. Specifically, according to s. 503(1) of the Criminal Code, accused detained by the police are required to be brought before a justice within 24 hours of arrest without delay, or as soon as possible if a justice is not available. Further, according to s. 516(1) the justice may, on application by the Crown adjourn the bail proceedings for a maximum of three clear days. This
may be done without the consent of the accused for the purposes of further investigation or to gather the necessary information for a s.524(3) application to revoke the accused’s outstanding bail(s). Trotter (2010) notes “that with time being such a monumental concern when it comes to bail, it is essential that a hearing is conducted as soon as possible” (199). While the law does not state that bail is supposed to be decided in one appearance, repeated adjournments and multiple appearances clearly were not envisioned by the legislation. It seems that rather than being a court that makes release and detention decisions, the bail court specializes in granting remand requests.
**Table 5: Daily Case Outcomes**

<table>
<thead>
<tr>
<th>Court</th>
<th>Detain</th>
<th>Release</th>
<th>Adjourn</th>
<th>Traverse</th>
<th>Plea</th>
<th>Bail Variation/Set Date/Error/Withdrawn</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court 1</td>
<td>10.2% (89)</td>
<td>18.4% (160)</td>
<td>46.7% (407)</td>
<td>7.1% (62)</td>
<td>14.4% (125)</td>
<td>3.2% (28)</td>
<td>100% (871)</td>
</tr>
<tr>
<td>Court 2</td>
<td>5.9% (100)</td>
<td>14.1% (238)</td>
<td>59.5% (1002)</td>
<td>10.6% (179)</td>
<td>9.1% (153)</td>
<td>0.8% (13)</td>
<td>100% (1685)</td>
</tr>
<tr>
<td>Court 3</td>
<td>2.6% (9)</td>
<td>31.4% (107)</td>
<td>52.8% (180)</td>
<td>5.9% (20)</td>
<td>4.7% (16)</td>
<td>2.6% (9)</td>
<td>100% (341)</td>
</tr>
<tr>
<td>Court 4</td>
<td>9.6% (9)</td>
<td>31.9% (30)</td>
<td>45.7% (43)</td>
<td>5.3% (5)</td>
<td>7.4% (7)</td>
<td>--</td>
<td>100% (94)</td>
</tr>
<tr>
<td>Court 7</td>
<td>6.2% (9)</td>
<td>18.5% (27)</td>
<td>54.8% (80)</td>
<td>13.7% (20)</td>
<td>6.2% (9)</td>
<td>0.7% (1)</td>
<td>100% (146)</td>
</tr>
<tr>
<td>Court 8</td>
<td>5.6% (8)</td>
<td>19.0% (27)</td>
<td>59.9% (85)</td>
<td>14.1% (20)</td>
<td>--</td>
<td>1.4% (2)</td>
<td>100% (142)</td>
</tr>
<tr>
<td>Court 9</td>
<td>5.7% (19)</td>
<td>14.2% (47)</td>
<td>40.7% (135)</td>
<td>33.1% (110)</td>
<td>6.0% (20)</td>
<td>0.3% (1)</td>
<td>100% (332)</td>
</tr>
<tr>
<td>Court 10</td>
<td>6.0% (7)</td>
<td>26.5% (31)</td>
<td>43.6% (51)</td>
<td>23.1% (27)</td>
<td>0.9% (1)</td>
<td>--</td>
<td>100% (117)</td>
</tr>
<tr>
<td>Court 11</td>
<td>8.3% (4)</td>
<td>33.3% (16)</td>
<td>52.1% (25)</td>
<td>--</td>
<td>6.3% (3)</td>
<td>--</td>
<td>100% (48)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>6.7% (254)</td>
<td>18.1% (683)</td>
<td>53.2% (2008)</td>
<td>11.7% (443)</td>
<td>8.8% (334)</td>
<td>1.4% (54)</td>
<td>100% (3776)</td>
</tr>
</tbody>
</table>
Interestingly Court 9 had the fewest adjournments, with approximately 41% of its caseload being adjourned to another day. This seems to be related to the large proportion (33%) of its caseload being traversed to another court. These traversals were the result of offers of assistance from other courts; the matters sent to these courts were generally for consent releases or show cause hearings, thus a formal bail decision was likely made for these cases on this day. Court 9 was anomalous in terms of the level of assistance received from other courts. It seems to have become part of that courthouse’s operating culture that courts assist other courts in getting through their lists.

Conversely, Court 4 exemplified the culture of adjournment that seems to have hijacked the bail process. Court 4 operated as an extra bail court; matters in this court had already been in the regular bail court (Court 3) and had been scheduled for a show cause hearing in this court. The assumption was that once a case was scheduled into Court 4 it would proceed with a bail hearing on that date. Remarkably, despite all matters in this court being scheduled to be there for a bail hearing, 45.7% of cases were still adjourned to another day.

To further demonstrate the pervasiveness of adjournment requests Table 6 below looks at the relationship between the appearance that was observed and the proportion of cases adjourned to another day. For example, in Court 1 41.8% of cases seen on their first appearance, 48.4% of cases seen on their second appearance and 51.7% of cases seen on their third appearance were remanded to another day. In a number of cases, the accused was seen on several occasions and Table 6 includes the result of their case on each day seen; overall the appearance number observed was known for 85% of the sample. It is interesting to note that the case outcome on a

42 Appearance data were unavailable for all of Court 3 and Court 4.
given day did not appear to vary considerably with the number of the appearance observed. Said differently, the likelihood of an accused being remanded on the first appearance, for example, was not dramatically different from the likelihood of the case being adjourned on its fifth or subsequent appearance.\(^{43}\)

\(^{43}\)Court 10 stands out as the exception to this rule, however, this is not surprising given this court remands fewer cases overall than the other courts. Interestingly, this pattern of lower adjournments only holds true until the accused is in court for their fifth or subsequent appearance.
Table 6: The Proportion of Cases Remanded by the Bail Appearance Number Observed

<table>
<thead>
<tr>
<th>Court</th>
<th>First</th>
<th>Second</th>
<th>Third</th>
<th>Fourth</th>
<th>Fifth or more</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court 1</td>
<td>41.8% (147/352)</td>
<td>48.4% (109/225)</td>
<td>51.7% (60/116)</td>
<td>55.9% (38/68)</td>
<td>52.3% (45/86)</td>
<td>47.1% (399/847)</td>
</tr>
<tr>
<td>Court 2</td>
<td>63.8% (361/566)</td>
<td>59.6% (255/428)</td>
<td>59.9% (148/247)</td>
<td>53.5% (76/142)</td>
<td>65.0% (145/223)</td>
<td>61.3% (985/1606)</td>
</tr>
<tr>
<td>Court 7</td>
<td>46.0% (23/50)</td>
<td>63.3% (19/30)</td>
<td>68.0% (17/25)</td>
<td>50.0% (7/14)</td>
<td>55.6% (10/18)</td>
<td>55.5% (76/137)</td>
</tr>
<tr>
<td>Court 8</td>
<td>55.0% (22/40)</td>
<td>44.8% (13/29)</td>
<td>61.9% (13/21)</td>
<td>66.7% (8/12)</td>
<td>75.0% (21/28)</td>
<td>59.2% (77/130)</td>
</tr>
<tr>
<td>Court 9</td>
<td>34.6% (44/127)</td>
<td>48.6% (34/70)</td>
<td>44.8% (26/58)</td>
<td>42.9% (12/28)</td>
<td>45.9% (17/37)</td>
<td>41.6% (133/320)</td>
</tr>
<tr>
<td>Court 10</td>
<td>32.1% (9/28)</td>
<td>27.3% (9/33)</td>
<td>26.7% (4/15)</td>
<td>61.5% (8/13)</td>
<td>81.8% (18/22)</td>
<td>43.2% (48/111)</td>
</tr>
<tr>
<td>Court 11</td>
<td>63.2% (12/19)</td>
<td>38.5% (5/13)</td>
<td>33.3% (2/6)</td>
<td>--</td>
<td>83.3% (5/6)</td>
<td>53.3% (24/45)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>52.3% (618/1182)</td>
<td>53.6% (444)</td>
<td>55.3% (270/488)</td>
<td>53.6% (149/278)</td>
<td>62.1% (261/420)</td>
<td>54.5% (1742/3196)</td>
</tr>
</tbody>
</table>

Though some fluctuations can be seen, looking across courts, there does not appear to be any specific pattern emerging, with the exception that the probability of a case being remanded to another day remains relatively constant regardless of the appearance number observed. The

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44 It should be recalled that cases were not ‘tracked’ through the system. The data presented here are collapsed across days of observations. Hence those seen on, for example, their second appearance were not necessarily observed on their first appearance. The totals, then, for each row include all case-appearances. It is likely that some cases were seen more than once.
lack of logical pattern has considerable implications, in that it suggests each day that a case was in bail court was considered in relative isolation; there appeared to be no case history or consideration of what happened on prior appearances. This means that, for the most part, regardless of how many times an accused appeared, the probability of the case being remanded to another date was the same. This suggests each appearance was regarded as though it was the first, which resulted in a multitude of unproductive, practically indistinguishable, appearances. It seems no one was held accountable for adjournment requests or for having the business of each appearance build on the previous appearance. Failure to consider the case history and failing to ensure adjournments were being used for a legitimate productive purpose increased the number of bail appearances. Indeed, what seemed to be happening is that the focus was on getting through the day. With that as the primary goal, an adjournment was the fastest way to dispose of a case for that day. Since adjourning a matter removes it quickly from that day’s docket, the case had effectively been made someone else’s problem to be addressed on another day. Indeed, the heavy caseload confronting those in bail court was the product of the shared value of getting through the day; most of the cases on each day’s docket had been adjourned from another day. Said differently, bail courts face long dockets not because a large number of new accused are brought to bail court by the police day after day, but because many accused people are adjourned to another day.

**Who Requests the Adjournments?**

As suggested by prior research, looking across courts, most requests for an adjournment were from the accused or their defence counsel acting on their behalf. In this way perhaps the court cannot be faulted with the number of adjournments, as defence counsel’s wishes were
beyond the court’s control. Nevertheless, the sheer volume of cases remanded at the request of the defence indicates the presence of a systemic issue. Since the defence is apparently not required to provide a reason for an adjournment and thus is not held accountable for fulfilling the purpose of the adjournment at subsequent appearances, the defence can typically request adjournments without risk of reprisal. This is consistent with Leverick and Duff’s (2002) findings that in courts where adjournment requests were not challenged a culture developed whereby adjournments were the most accepted and expected outcome. However, when the judiciary took a proactive role in challenging adjournment requests and only granted adjournments in exceptional circumstances, court actors came to expect that the case would be moved forward towards resolution at each court appearance.
Table 7: Who Requests an Adjournment?

<table>
<thead>
<tr>
<th>Court</th>
<th>Defense/Accused</th>
<th>Crown</th>
<th>JP/Unknown</th>
<th>Total</th>
<th>Left a Message to Adjourn 45</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court 1</td>
<td>80.3% (327)</td>
<td>13.8% (56)</td>
<td>5.9% (24)</td>
<td>100% (407)</td>
<td>4.4% (18)</td>
</tr>
<tr>
<td>Court 2</td>
<td>75.1% (753)</td>
<td>11.7% (117)</td>
<td>13.2% (132)</td>
<td>100% (1,002)</td>
<td>13.9% (139)</td>
</tr>
<tr>
<td>Court 3</td>
<td>95.6% (172)</td>
<td>1.7% (3)</td>
<td>2.8% (5)</td>
<td>100% (180)</td>
<td>22.8% (41)</td>
</tr>
<tr>
<td>Court 4</td>
<td>100% (43)</td>
<td>--</td>
<td>--</td>
<td>100% (43)</td>
<td>32.6% (14)</td>
</tr>
<tr>
<td>Court 7</td>
<td>90.0% (72)</td>
<td>7.5% (6)</td>
<td>2.5% (2)</td>
<td>100% (80)</td>
<td>20.0% (16)</td>
</tr>
<tr>
<td>Court 8</td>
<td>88.2% (75)</td>
<td>--</td>
<td>11.8% (10)</td>
<td>100% (85)</td>
<td>12.9% (11)</td>
</tr>
<tr>
<td>Court 9</td>
<td>77.0% (104)</td>
<td>4.4% (6)</td>
<td>18.5% (25)</td>
<td>100% (135)</td>
<td>11.1% (15)</td>
</tr>
<tr>
<td>Court 10</td>
<td>92.2% (47)</td>
<td>3.9% (2)</td>
<td>3.9% (2)</td>
<td>100% (51)</td>
<td>33.3% (17)</td>
</tr>
<tr>
<td>Court 11</td>
<td>96.0% (24)</td>
<td>4.0% (1)</td>
<td>--</td>
<td>100% (25)</td>
<td>--</td>
</tr>
<tr>
<td>TOTAL</td>
<td>80.5% (1,617)</td>
<td>9.5% (191)</td>
<td>9.9% (200)</td>
<td>100% (2,008)</td>
<td>13.5% (271)</td>
</tr>
</tbody>
</table>

45 These are a subset of the ‘request from the defence/accused’; the percents relate to the proportion of requests for an adjournment from defence/accused that were relayed to the court through a message from private counsel to duty counsel.
Leaving a message with the court to adjourn a matter presented an interesting situation, whereby accused who wished to employ the services of private counsel rather than use duty counsel provided by the court, ended up waiting in custody for counsel to appear in court on their behalf. It seems that in a non-trivial proportion of cases, private counsel did not appear in court, opting to relay a message to the court through duty counsel. This message generally requested an alternate date on which counsel was available to precede; however, it was not an unusual occurrence at the subsequent appearance for there to be another note from counsel, sometimes unbeknownst to the accused, requesting a further adjournment. This practice would sometimes continue until the accused opted to use duty counsel for their show cause hearing.

For example, a clearly frustrated accused indicated the following to the court:

A- “I have retained counsel with legal aid but he keeps not showing up so I would like to proceed today with duty counsel”.

In another case the accused’s counsel instructed duty counsel to run the hearing for them:

DC “The accused wants his bail hearing, he has appeared several time. Counsel left me a message saying ‘you do it’ ”.

From the Crown’s perspective, there was rarely a need to challenge adjournment requests because the accused would remain in custody until their next appearance and the adjournment expeditiously disposed of the matter for the day. Blame for delays in proceedings must, however be allocated with caution, as it may not be the accused themselves, but their lawyers, who had their own agendas. An adjournment may not have been requested for the benefit of the accused
nor did it serve a legitimate function for the bail hearing; rather it was to reschedule an appearance for a day in which it was convenient for counsel to show up in court.

For example at 11:35 a.m.

DC “I have a message from counsel requesting an adjournment.”

C- “This matter has appeared in this court 12 times and counsel continues to ask for an adjournment. I requested on the last appearance that we proceed today but we are always waiting for a surety.”

DC- “There have been some continuing problems with the surety; I will contact counsel and tell them to attend at the next appearance”.

By simply sending a message to the court to adjourn the matter, defence counsel effectively avoided having to answer to their clients and the court; they were isolating themselves from and deflecting responsibility for adjournments and not being ready for a show cause hearing.

**Reasons for Adjournment Requests**

The court was offered a variety of reasons for adjournment requests. Table 8 below indicates the first explanation given for the adjournment request\(^{46}\). The two most common

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\(^{46}\) In some cases multiple reasons were provided. For example, a matter may be adjourned for the accused to obtain counsel and to find a surety. In these cases the first reason provided to the court was the reason counted in this analysis.
reasons were for the purposes of counsels’ (16.7%) or suretys’ (16.3%) attendance at court. The overall average for these provided reasons across the courts is being pulled down by Court 3 and Court 4\textsuperscript{47}.

\textsuperscript{47} In the particular courthouse where these two courts are located, all criminal matters in the city are heard in this court. This means that counsel are generally present in the building and can be paged into bail court. This court is also an anomaly in terms of its use of sureties. In this court, unlike in the other bail courts, there does not seem to be a presumption that a surety is required in order for an accused to secure release.
<table>
<thead>
<tr>
<th>Court</th>
<th>Counsel</th>
<th>Surety</th>
<th>Court service</th>
<th>Court administration</th>
<th>Out of time/Will not reach</th>
<th>Plea</th>
<th>Misc.</th>
<th>No reason given</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court 1</td>
<td>26.0% (106)</td>
<td>15.7% (64)</td>
<td>11.3% (46)</td>
<td>12.3% (50)</td>
<td>0.5% (2)</td>
<td>5.9% (24)</td>
<td>5.2% (21)</td>
<td>23.1% (94)</td>
</tr>
<tr>
<td>Court 2</td>
<td>14.3% (143)</td>
<td>16.9% (169)</td>
<td>9.2% (92)</td>
<td>9.9% (99)</td>
<td>11.4% (114)</td>
<td>7.3% (73)</td>
<td>4.1% (41)</td>
<td>27.0% (271)</td>
</tr>
<tr>
<td>Court 3</td>
<td>1.1% (2)</td>
<td>5.6% (10)</td>
<td>16.7% (30)</td>
<td>5.6% (10)</td>
<td>2.2% (4)</td>
<td>10.6% (19)</td>
<td>37.2% (67)</td>
<td>21.1% (38)</td>
</tr>
<tr>
<td>Court 4</td>
<td>2.3% (1)</td>
<td>2.3% (1)</td>
<td>16.3% (7)</td>
<td>7.0% (3)</td>
<td>2.3% (1)</td>
<td>18.6% (8)</td>
<td>27.9% (12)</td>
<td>23.3% (10)</td>
</tr>
<tr>
<td>Court 7</td>
<td>30.0% (24)</td>
<td>18.8% (15)</td>
<td>3.8% (3)</td>
<td>7.5% (6)</td>
<td>1.3% (1)</td>
<td>2.5% (2)</td>
<td>11.3% (9)</td>
<td>25.0% (20)</td>
</tr>
<tr>
<td>Court 8</td>
<td>24.7% (21)</td>
<td>25.9% (22)</td>
<td>5.9% (5)</td>
<td>4.7% (4)</td>
<td>8.2% (7)</td>
<td>3.5% (3)</td>
<td>14.1% (12)</td>
<td>12.9% (11)</td>
</tr>
<tr>
<td>Court 9</td>
<td>22.2% (30)</td>
<td>20.0% (27)</td>
<td>19.3% (26)</td>
<td>8.1% (11)</td>
<td>0.7% (1)</td>
<td>4.4% (6)</td>
<td>5.2% (7)</td>
<td>20.0% (27)</td>
</tr>
<tr>
<td>Court 10</td>
<td>7.8% (4)</td>
<td>29.4% (15)</td>
<td>17.6% (9)</td>
<td>13.7% (7)</td>
<td>3.9% (2)</td>
<td>7.8% (4)</td>
<td>7.8% (4)</td>
<td>11.8% (6)</td>
</tr>
<tr>
<td>Court 11</td>
<td>20.0% (5)</td>
<td>20.0% (5)</td>
<td>8.0% (2)</td>
<td>4.0% (1)</td>
<td>--</td>
<td>4.0% (1)</td>
<td>36.0% (9)</td>
<td>8.0% (2)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>16.7% (336)</td>
<td>16.3% (328)</td>
<td>11.0% (220)</td>
<td>9.5% (191)</td>
<td>6.6% (132)</td>
<td>7.0% (140)</td>
<td>9.1% (182)</td>
<td>23.9% (479)</td>
</tr>
</tbody>
</table>
Overall, in almost a quarter of the cases, no reason was offered for the adjournment. In these cases the court did not inquire as to the purpose of the adjournment, rather they simply granted the request. It is quite likely that a number of these adjournments were for purposes related to defence counsel and sureties but the more important point is that a reason did not have to be offered to the court. This makes adjournments even faster; counsel does not need to have a reason for the request. Indeed, there was little incentive to provide a reason for the request as the court did not seem too concerned about why a matter was not ready to proceed, they only seemed to care that the matter had been addressed for that day.

The proportion of cases adjourned because the matter could not be reached is noteworthy. In these cases the accused was ready to proceed with the bail hearing, their counsel and surety were present, and the court decided there simply was not enough time to hear the case. Remember, on most days in most courts, the court opened within a few minutes of the scheduled start time and on 91% of days observed the court closed for the day before 5:00 p.m. and in 66% of days observed before 4:00 p.m. This seems fundamentally at odds with the purposes of bail court—to decide the pre-trial liberty of an accused. Adjourning matters that were ready to proceed because the court was out of time seems to ignore the challenges remanded accused have in ensuring both their counsel and surety are in court at the same time. As was seen above, cases were routinely adjourned for the purposes of counsel and surety’s attendance. This begs the question why the court would adjourn a matter that was ready to proceed with a bail hearing?

____________________

48 In the courts observed the scheduled start time was 9:30 a.m. or 10:00 a.m.
For example at 4:12 p.m.

D- “I have been here with the two sureties all day; we would like a show cause hearing.

JP- “We are out of time today. We went in order of priority and there were other people ahead of this accused”.

Surety- “I wish we had been told this at the beginning of the day”.

On this date the court started on time at 10:00 a.m., lost two hours and 43 minutes to ‘dead time’, actively used four hours and 29 minutes addressing cases and adjourned for the day at 5:12 p.m.

In another case at 3:10 p.m.

DC- “We are ready for a show cause hearing.”

JP- “Today? At 3:10 p.m. on a Friday afternoon? How long will this take?”

C- “There are two sureties.”

JP- “I am not prepared to deal with this today.”

DC- “The sureties have been here all day”.

C- “This is his first appearance today, other cases have priority”.

DC- “The sureties took the day off of work and they cannot come back on Monday.”

JP- “When can they take time off? We are out of time today.”

On this date the court started at 10:05 a.m., lost two hours to ‘dead time’, actively used three hours and 12 minutes addressing cases and adjourned for the day at 3:18 p.m.
The arbitrariness of having the bail court close when there were accused ready for their bail hearing was further aggravated by comments such as the following (from different days and different courts):

At 10:14 a.m.

JP- “I am not sitting late today; I have a retirement party to attend.”

The court lost two hours and 15 minutes to recesses and closed for the day at 3:15 p.m.

At 2:21 p.m.

JP- “Let’s be sure we take advantage of offers of assistance because I have to end early today for medical reasons.”

The court lost over three hours to recesses and closed for the day at 3:05 p.m.

At 3:26 p.m.

C- “The accused wants his bail hearing but it is not possible today”.

D- “I just want to confirm with the court, you are only doing one more hearing today?”

A- “I am going to lose my job!”

JP- “We are not addressing that now, make arrangements with your employer. This matter is adjourned.”

The court lost over two hours to recesses, three accused were told they could not have their bail hearing because the court was out of time and the court adjourned for the day at 4:26 p.m.
At 4:45 p.m.

C- “It is too late in the day to proceed with a hearing. I appreciate that the surety was here all day and the second interpreter has been waiting but I must leave by 5:00 p.m.”

JP- “Adjourned”

The court lost over two hours to recesses, eight accused were told they could not have their bail hearing because the court was out of time and the court adjourned for the day at 4:48 p.m.

At 3:14 p.m.

C- “I will consent to the accused’s release with another surety”.

D- “There are no other sureties available; bail program is willing to supervise the accused.”

JP- “I will not run any more show cause hearings today.”

The court lost over three and a half hours to recesses, two accused were told they could not have their bail hearing because the court was out of time and the court adjourned for the day at 3:54 p.m.

At 12:26 p.m.

C- “We are trying to clear the list, it is Friday after all. We don’t want to be here all day.”

The court lost over three hours to recesses and adjourned for the day at 3:13 p.m.
An adjournment to an accused means they must spend another night in jail (or in the case of a Friday afternoon adjournment, as described above, three additional nights in jail) and for sureties this means another day off of work to attend court. The court’s decision impacts the liberty of accused and the time of sureties, but it seems the court actors were more concerned with ending the day at a time that was convenient for them.

**What about Release Decisions?**

Despite bail court’s mandate to decide whether an accused will be released or detained until trial or until the case is resolved in some other way, the court made remarkably few of these decisions on any given day. Over 127 days of weekday court observation there were 515 consent releases, 46 releases on the same bail as had been set previously and 12 whose bail had already been set on a previous appearance. There were also 233 show cause hearings and two judgments delivered for a show cause hearing from a previous date. This translates into an average of only 1.6 bail hearings a day. Of the 235 show cause hearings/judgments, 124 or 52.8% resulted in a release order. What is clear from this is the dominance of consent releases. This is not entirely surprising when one considers either the general presumption of release or the court’s imperative to get through the day as quickly and with as little conflict as possible. Consent releases can be completed considerably faster than full bail hearing. On average consent releases took seven minutes and 36 seconds (range: 30 seconds to 30 minutes) whereas show cause hearings took on average 50 minutes and 30 seconds (range: nine minutes to four hours)^49^.

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^49^ For this analysis the 14 show cause hearings that were adjourned before the hearing was completed were excluded.
In addition to being time consuming, bail hearings introduced an element of uncertainty that court actors seemed to want to avoid. Indeed, it was not uncommon for cases to be repeatedly adjourned for the purpose of finding a surety deemed appropriate by the Crown. In this way a consent release could be assured without risk of detention rather than having the matter proceed with a full show cause hearing, the outcome of which involved a fair amount of uncertainty.

For example

C- “I can consent to the release of this accused if there is a surety available”.

D- “I ask that we adjourn this matter for the purposes of finding a surety”.

When a consent release was presented to the court the conditions of release had already been agreed to and all the actors, including the accused knew what to expect. As soon as a bail hearing commences, predictability is forfeited by everyone as witnesses are called to the stand to give evidence. Since the rules of questioning and evidence are more relaxed at a bail hearing it was hard to predict what will be revealed during evidence and cross-examination.

**WASH Courts**

The Weekend and Statutory Holiday (WASH) courts are supposed to function as regular bail courts with a few deviations. For example, in Toronto there is only one WASH court operating for the whole city, whereas on normal days, five bail courts operate around the city. WASH courts in Ontario only hear first appearance bail matters, though there is no legal reason
for this restriction. This means cases that have appeared on ordinary days can only be remanded to ordinary weekday courts. This also means that accused appearing in WASH court on a Saturday, for example, are adjourned to the first ordinary work day rather than to Sunday even though sureties may be more conveniently available on Sundays than weekdays.

WASH courts present an extreme example of how the courtroom workgroup operates in a manner consistent with completing the daily dockets as expeditiously as possible. While the regular weekday bail courts demonstrate this desire on the part of court actors, it seems all the challenges of the weekday bail court are amplified on the weekend.

For example at 11:02 a.m.

JP “Are all the accused in the building? Keep them coming in please. We do not want to be here all day. Do we want to take a lunch today? (staff answers ‘no’). Ok, we will take a break at 11:30 a.m. and then we will work right through”.

WASH court was observed in two large metropolitan areas, one location was observed for 11 days and the other for 4 days for a total of 304 case appearances observed. Looking at Table 9 below there were some clear differences between the courts in terms of operating time. Court 5 opened for an average of 46 minutes, while Court 6 was open for three hours and 54 minutes. However, when one considers the difference in caseload size this difference in operating time makes sense. If we look at the average active time used in these two courts and divide that by the average number of cases heard each day, Court 5 spent approximately 3.4

50 It is my understanding that court personnel, including Crown Attorneys are paid for a full day’s work at WASH court.
minutes per accused while Court 6 spent 3.9 minutes; therefore despite the dramatic difference in operating time, these two courts were operating in a similar fashion.

Table 9: WASH Court Operating Time

<table>
<thead>
<tr>
<th>Court</th>
<th>Average court start time (9:00 a.m. indicated with * or 10:00 a.m.)</th>
<th>Average court end time</th>
<th>Average Dead Time</th>
<th>Average Active Time Remaining</th>
<th>Average Number/Range of Cases</th>
<th>Average Number/Range of Charges</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court 5</td>
<td>9:02*</td>
<td>9:48</td>
<td>0:02</td>
<td>0:44</td>
<td>13 (8-21)</td>
<td>53 (19-84)</td>
</tr>
<tr>
<td>Court 6</td>
<td>10:10</td>
<td>14:04</td>
<td>1:05</td>
<td>2:46</td>
<td>42 (30-53)</td>
<td>125 (78-179)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>--</td>
<td>--</td>
<td>0:19</td>
<td>1:16</td>
<td>20 (8-53)</td>
<td>72 (19-179)</td>
</tr>
</tbody>
</table>

While the regular weekday bail courts adjourned approximately 50% of their caseload on any given day, WASH courts adjourned 70% of their caseload. As a court charged with making release decisions, this court was only making an actual bail decision in 25% of the cases before the court. This court, even more than the regular bail court, seemed to specialize in granting adjournments rather than making bail decisions. The speed with which the court moved through the WASH court docket, coupled with the large majority of cases being adjourned to another

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51 No ‘total’ was calculated as one court was scheduled to start at 9:00 a.m. and the other was scheduled to start at 10:00 a.m.
day, suggests court actors were even more anxious to move cases off the docket than they were during the regular work week.

Table 10: WASH Court Daily Case Outcomes

<table>
<thead>
<tr>
<th>Court</th>
<th>Detain</th>
<th>Release</th>
<th>Adjourn</th>
<th>Traverse</th>
<th>Plea</th>
<th>Bail Variation</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court 5</td>
<td>--</td>
<td>23.4%</td>
<td>73.7%</td>
<td>--</td>
<td>--</td>
<td>2.9%</td>
<td>100%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(32)</td>
<td>(101)</td>
<td></td>
<td></td>
<td>(4)</td>
<td>(137)</td>
</tr>
<tr>
<td>Court 6</td>
<td>0.6%</td>
<td>26.3%</td>
<td>67.7%</td>
<td>4.2%</td>
<td>--</td>
<td>1.2%</td>
<td>100%</td>
</tr>
<tr>
<td></td>
<td>(1)</td>
<td>(44)</td>
<td>(113)</td>
<td>(7)</td>
<td></td>
<td>(2)</td>
<td>(167)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>0.3%</td>
<td>25.0%</td>
<td>70.4%</td>
<td>2.3%</td>
<td>--</td>
<td>2.0%</td>
<td>100%</td>
</tr>
<tr>
<td></td>
<td>(1)</td>
<td>(76)</td>
<td>(214)</td>
<td>(7)</td>
<td></td>
<td>(6)</td>
<td>(304)</td>
</tr>
</tbody>
</table>

Unlike the regular bail court the Crown in Court 6 asked for a considerable proportion of the adjournments. If we look at the reasons for the adjournment in this court, court administration was the dominant reason provided for the adjournment request. This suggests the Crown had some difficulties getting the necessary paperwork in order on the weekend. In these instances the Crown was often seeking to revoke the accused’s prior bail(s) through a s.524(3) application. This means the accused had other charges they were facing and the Crown wanted to bring together all of the informations. It was possible that the Crown would seek to cancel their previous bail(s) and have them detained on all charges. Even in cases where the Crown was consenting to the accused’s release, there could be a s.524(3) application because the Crown wanted to be sure the new conditions of release were consistent with other conditions that had been imposed on previous bail(s) in order to ensure the accused was not in automatic breach of
his or her bail due to contradictory conditions. To do so the Crown needed to have all the paperwork together for these previous charges. The challenge in this particular city was that accused were brought in from all over the city to one central location for WASH court. This meant the paperwork for their previous charges was often at another courthouse and apparently on the weekend this paperwork could not be forwarded to the WASH court. Electronic records of such matters do not exist or were not available.

It is also interesting to note that in Court 5, where the court was only operational for 46 minutes on average, close to 45% of adjournments were requested by counsel through a message to the court. In this court it seems counsel simply did not bother attending court on the weekend in person. This ‘easy’ way of securing an adjournment was also reflected in the 41% of cases in this court that were adjourned without a reason provided to the court. Adjournments were the fastest way to address a matter and a request via a message with no reason provided further expedited this process.

Table 11 WASH Court-Who Requests an Adjournment?

<table>
<thead>
<tr>
<th>Court</th>
<th>Defense/Accused</th>
<th>Crown</th>
<th>JP/Unknown</th>
<th>Left a Message to Adjourn52</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court 5</td>
<td>78.2% (79)</td>
<td>9.9% (10)</td>
<td>11.9% (12)</td>
<td>44.8% (43)</td>
</tr>
<tr>
<td>Court 6</td>
<td>48.7% (55)</td>
<td>38.1% (43)</td>
<td>13.2% (15)</td>
<td>0.8% (1)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>62.6% (134)</td>
<td>24.8% (53)</td>
<td>12.6% (27)</td>
<td>20.6% (44)</td>
</tr>
</tbody>
</table>

52 These are a subset of the ‘request from the defence/accused’; the percents relate to the proportion of request for an adjournment from defence/accused that were relayed to the court through a message from private counsel to duty counsel.
Perhaps the most obvious indication that the dominant (shared) goal of these courts was ‘getting through the list’ as early in the day as possible is, as seen in Table 12 below, the fact that five accused in Court 6 were adjourned because the court ‘ran out of time’ to hear their bail hearing. It is unclear how a court that is open for an average of less than four hours runs out of time to hear an accused who would like to have their bail hearing that day. Indeed, in this particular WASH court, on the two separate occasions where accused were remanded because the court was ‘out of time’, the court then adjourned for the day at 2:20 p.m. (after actively addressing cases for two hours and 47 minutes and remanding three accused for lack of time) and 2:47 p.m. (after actively addressing cases for three hours and three minutes and remanding two accused for lack of time). Since show cause hearings tend to be lengthy (average of 50 minutes each) and in the interests of expediting the end of the day, the court had informally established an arbitrary presumptive court closing time.

**Table 12: WASH Court- Reason Provided to the Court for the Adjournment Request**

<table>
<thead>
<tr>
<th>Court</th>
<th>Counsel</th>
<th>Surety</th>
<th>Court service</th>
<th>Court administration</th>
<th>Out of time/Will not reach</th>
<th>Plea</th>
<th>Misc.</th>
<th>No reason given</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court 5</td>
<td>4.0% (4)</td>
<td>6.9% (7)</td>
<td>21.8% (22)</td>
<td>7.9% (8)</td>
<td>--</td>
<td>3.0% (3)</td>
<td>15.8% (16)</td>
<td>40.6% (41)</td>
</tr>
<tr>
<td>Court 6</td>
<td>2.7% (3)</td>
<td>14.2% (16)</td>
<td>12.4% (14)</td>
<td>35.4% (40)</td>
<td>4.4% (5)</td>
<td>7.1% (8)</td>
<td>7.1% (8)</td>
<td>16.8% (19)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>3.3% (7)</td>
<td>10.7% (23)</td>
<td>12.1% (26)</td>
<td>22.4% (48)</td>
<td>2.3% (5)</td>
<td>5.1% (11)</td>
<td>11.2% (24)</td>
<td>28.0% (60)</td>
</tr>
</tbody>
</table>
Over the 15 days of WASH court observation there were 72 consent releases and three releases on the same bail. There were a total of seven show cause hearings; this means on half of the days observed the court did not run a single bail hearing. Of these seven, three were ultimately released and the remaining four were adjourned to another day without a decision. This court seems have developed practices that allow them to successfully avoid hearing contested bail hearings (which tend to be time intensive) on the weekend.

The fact that 70% of the court’s caseload was simply adjourned to another day coupled with the relatively brief period of time these courts were actively working, challenges the legitimacy of the WASH court’s purpose. Opening a court, even for a short period of time, is resource intensive.53

Conclusion

The law on bail is comprised of a number of elements that suggest the bail decision is to be made relatively quickly. However, due to the number of adjournments in individual cases, the bail decision has come to take considerably longer. It is not unusual for a case to appear in bail court on multiple occasions before a decision with respect to release is made. It has been suggested that this delay in decision making can be accredited to remand requests being the fastest way to process the daily docket. By remanding a case to another day, the case has effectively been removed from the day’s workload and postponed to another day. This is

53 Perhaps a more efficient way to operate this court and a way of saving resources would be to run WASH courts the way they operate in Edmonton, Alberta; where the Justice of the Peace is available from 9:00 a.m. to 3:00 a.m. using a video-bail system, whereby the accused appears on closed circuit TV from police cells.
evidenced, not only in the high proportion of cases disposed of by way of an adjournment, but by the very small number of show cause bail hearings held each day, despite this being the legislated function of the bail court.

Consistent with the notion that court actors share non-legal, non-justice related goals and values, the remanding phenomenon seems to be the product of a ‘culture of adjournment’, where not only is an adjournment the most common way to deal with a case, it is also the most accepted. This can be seen by the ease with which an adjournment was granted. The request for an adjournment was seldom questioned or challenged; consequently, there was rarely a reason provided to the court for the remand request. It seems adjournments have come to be the normative means by which a case is disposed and this is accepted by workgroup members as an appropriate and expeditious way of dealing with the case.

The adjournment rate, the cooperativeness of consent releases and the avoidance of time-consuming bail hearings, are all consistent with the conclusion that in the end, it was the convenience of certain privileged actors that was dominant rather than making pre-trial bail release decisions. The bail court reality is rather unsurprising when the court is conceptualized as an organization, rather than a state-operated distributor of justice. Within an organizational context, the workgroup’s behaviour is rationally connected to the attainment of their shared goals. The cultivation of a collective sense of purpose -- one that is binding on all participants--is the most critical ingredient for a successful organization. The only goal that seems to be shared amongst courtroom participants is the desire to get through the work day as quickly, efficiently and in as uneventful a manner as possible. Rather than coming at each other as adversaries, the actors put their differences aside and agree to pursue their common goal together. In so doing,
all actors reap the benefits associated with courtroom cooperation; everyone’s day goes faster and in a much smoother fashion than if they pursued cases in a truly adversarial manner.

There are strong similarities between the realities of the courtroom workgroup and the ‘organization’, though this connection is incongruent with conceptualizations of the court as an institution charged with upholding fundamental principles of justice. This disjuncture can be seen when one considers that the Crown Attorney, justice of the peace and defence counsel (private or publically funded) come from independent sponsoring agencies with relatively different mandates. However, they often appear to operate as a single organization. The difference between the court and other organizations is that in the court – with its power to put work over to another day (and perhaps to another Crown or Justice of the Peace) workers can accomplish their immediate goals by delaying work. Said differently, the challenge of bail court is that bail court is working efficiently and effectively if the goal is defined solely as getting through the day.
Chapter 4
Shift Risk: Bail and the Use of Sureties⁶⁴

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Introduction

Not only are those responsible for making decisions about pre-trial release concerned about accused people committing serious offences while on bail, they are probably also concerned about the repercussions this offending may have on the legitimacy and authority of the court as a criminal justice institution. In the context of those released, this risk aversion leads, I believe, to an off-loading of responsibility by those who have the authority to release on bail those who are charged with an offence. Moreover, this leads, I suggest, to more people being detained by the police for a bail hearing, fewer people being released on consent by the Crown Attorney (the prosecutor), and more stringent conditions being placed on those who are released.

Webster, Doob and Myers (2009) have presented evidence that an increasing proportion of prison space in Canada is being used to hold remand prisoners. Over the past 20 years the rate and proportion of Canadian prisoners who are not sentenced has been slowly increasing, even though the overall imprisonment rate has not changed much and, at least in the past 15 years or so, crime has apparently been decreasing (also see Chapter 1). One factor that might be contributing to this shift is that Canadian courts and criminal justice officials have become risk averse and are thus reluctant to release offenders because of the possibility that the accused

person will commit an offence while on bail.\textsuperscript{55} This article will suggest that ‘risk aversion’ in the bail courts is evident even in cases in which an accused person is released. The suggestion is made that courts, and criminal justice officials, avoid possible responsibility for offending by accused people who are waiting for trial by displacing responsibility onto others – in this case ordinary people in the community who agree to ‘guarantee’ the good behaviour of an accused person.\textsuperscript{56}

After being arrested, an accused person, under Canadian law, must be brought before a justice of the peace or judge to determine whether detention is necessary unless he or she has been released by the police beforehand. Although there is a growing list of exceptions, the rule in law is that the Crown must ‘show cause’ (s.515(1) of the Canadian Criminal Code) why the accused should not be released. If the justice is not convinced that the accused should be detained, the accused is to be released. Five types of release are listed in s.515(2) starting with the accused ‘giving an undertaking with such conditions as the justice directs’ (subsection (a)). Subsection (c) of the five subsections involves the accused ‘entering into a recognizance … with sureties … without the deposit of money’. Perhaps the most important symbolic aspect of this list is that s.515(3) states that ‘[t]he justice shall not make an order under any of the paragraphs 2(b) to (e) unless the prosecution shows cause why an order under the immediately preceding paragraph should not be made’. Said differently, there is a presumption in favour of less onerous conditions of release in cases in which release is justified.

\textsuperscript{55} See Webster, Doob and Myers (2009) for further discussion of factors that are contributing to the remand problem

\textsuperscript{56} This is consistent with what Garland (1996) calls ‘responsibilisation’ – a practice that involves the government devolving responsibility for crime prevention on to private organisations and citizens. In this context, private citizens are increasingly being called upon to take responsibility for their own personal safety and for general crime prevention, as the state looks to redefine the security it can reasonably be expected to provide.
This chapter argues that the formal law bears little resemblance to how the criminal law is practiced on a day-to-day basis. Despite enumerated instructions concerning how courts are to approach the release decision of accused persons, the court appears to disregard the legislated (ordered) approach to bail as outlined in the Criminal Code. Indeed, it seems courts apply their own interpretations of the Criminal Code, interpretations that are consistent with a court’s culture of risk aversion. Data, amassed from 148 days of bail court observation and 4,085 court case appearances, suggest that courts regularly disregard the formal way in which the ‘judicial interim release’ provisions are prescribed by law. This article focuses on the use of sureties in Ontario courts – the most onerous form of release available in law short of the deposit of actual ‘money or other security’ (s.515(2)(d) and (e)). It argues that, in many courts, release under the ‘supervision’ of a surety has come to be considered the standard for securing release. Given the absence of any indication in law that a surety release should be the presumptive form of release, it is argued that this practice is intimately intertwined with the court’s risk adverse culture.

**Organisational Risk Avoidance**

The bail decision involves an assessment of what Power (2004) conceptualises as both primary and secondary risk. Primary risk is risk posed by accused persons if they are released into the community, while secondary risk is the risk to the reputation of the criminal justice system if an accused offends while on bail. Together, these two concerns have created a culture whereby actors are increasingly reluctant to make the decision with respect to release. Hutter and Power (2005) suggest that ‘risk management routines may have more to do with a certain kind of organisational legitimacy and responsibility framing than with having the organisational capacity to encounter risk inventively and intelligently’ (18). This implies that concern for organisational
legitimacy may be the governing force behind bail decision-making, and, as such, is preventing the system from addressing other means of negotiating the risk posed by accused people.

Concerns about the consequences of a decision may generate feelings of unease among criminal justice actors, who may then become reluctant to make decisions for which they are solely responsible for fear of occupational and reputational repercussions. What then happens, according to Power (2004), is a displacement of valuable, yet vulnerable, professional judgments in favour of defendable processes (11). Concern and a hyper-awareness of uncertainty have made risk the modelling ideology of organisations; where a ‘good’ organisation has come to be equated with a being a good risk manager.

**Accountability and Blame-ability**

Society has become caught up in what Douglas (1992) terms a ‘blame system’ in which every misfortune is turned into a risk which was potentially preventable, and for which someone is to be found culpable (15). Implicit in this system is the belief that someone is at fault, somehow negligent and thus blameworthy for every misfortune. There is an expectation of perfect security and an expectation that the government is somehow capable of providing this and it is desirable that they do so. What has developed is a prosecution-seeking, compensation-oriented society, where certain risks are no longer seen as inevitable, but rather are seen as the result of wrongdoings of individuals (Hudson 2003: 52).

Despite an exaggerated level of fear, the public tends not to accept the idea that security measures are not, and cannot be infallible. The public does not seem to accept the reality that the correct decision made on the basis of all available evidence may not turn out to be a happy one. This intolerance of imperfection in assessing risk deconstructs defensible decision-making, as the
decision is no longer defensible in a culture addicted to the allocation of blame. When precautionary measures and security systems fail the public looks to assign culpability rather than assessing whether the decision was a reasonable one to make. In times of crisis, cues indicative of danger are easily identified in retrospect, but at the time of the decision their significance may not have been immediately evident. ‘Thus, the reflexive luxury of the observer looking back at critical events is not available to the organizational participants who must make decisions and who need to decide now which piece of information should alert them of a potential risk event’ (Hutter and Power 2005: 12). The public, however, especially in the wake of a crisis, is not necessarily sympathetic to this logic.

In a culture of accountability and transparency, it has become progressively more risky to venture any judgment or to take any responsibility for a risky decision. The ensuing disinclination has resulted in avoidance or prolonging of the bail decision-making process. The fear and hyper-defensiveness that makes actors reluctant to make decisions can be understood as a ‘defensive orientation towards the need to justify decisions in retrospect’ (Power 2004: 47). In holding officials accountable for decisions that go wrong, they are more preoccupied with managing their own risk; they have become so focused and absorbed in a risk minimisation mentality that they are fearful of making a decision. Power (2004) contends that ‘where this “risk game” is closely bound up with a “blame game” the effect can be highly defensive reactions from organizational participants’ (46). In this way the bail decision gets passed farther up the chain of authority.

The consequences of this type of defensive risk management may be catastrophic for professional judgment. Professionals embody “a culture which accepts and understands that such specialized judgements may turn out in retrospect to be wrong, but which if made consciously and responsibly are not necessarily blameworthy” (Power 2004: 47). This professional culture,
however, is being deconstructed in an environment that has unrealistic notions of accountability. Regardless of the defensibility of a decision, actors, aware that they are being monitored will prefer to make the more conservative decision to avoid blame. This trend results in a dangerous flight from judgment and creates a culture of defensiveness (Power 2004: 14).

Evaluating Risk in the Bail Court

Criminal courts have the ultimate responsibility for determining the guilt or innocence of an accused. This determination is based on a stringent standard of proof; the court must be convinced, beyond a reasonable doubt, of the guilt of an accused in order to find him or her guilty. The bail court, however, does not and cannot operate on this standard, since its decisions involve preventive detention based on an assessment of future risk, not the determination of past behaviour. The bail court is in the business of estimating and weighing risks. In this assessment, the court must determine if the accused poses an inappropriate risk such that they cannot be released back into the community. What is more, the admissibility of evidence submitted to the bail court, as dictated by s.518(1)(e), is assessed on the basis of whether or not it is considered to be ‘credible and trustworthy’. This lower standard of proof is designed to ensure bail hearings proceeds as expeditiously as possible. The necessary informality that flows from this need for expediency means that the prosecution does not bear the same burden of proof when arguing for the detention of an accused. As the ‘trier of risk’ rather than the ‘trier of fact’, the court only has
to be satisfied, according to established case law, that on the ‘balance of probability’ the accused will fail to return to court or commit another offence, to justify their detention.\footnote{57} 

Hannah-Moffat and O’Malley (2007) suggest that the prediction of risk has shifted away from focusing on specific individuals to targeting entire categories of individuals who share ‘risk factors’ (17). What is interesting about this shift is that actuarial techniques of risk assessment are not used in the bail court. There are no objective predictive instruments available for routine cases such as there are for release decisions made by parole boards. Instead, assessments of risk are based almost entirely on personal, subjective judgments of an accused’s risk. The only semi-structured measures that are used are the accused’s criminal record and the number of times, if any, the accused has ‘failed to comply’ with previous court orders or has ‘failed to appear’ for court hearings. The other factors that may possibly influence the bail decision are subjective interpretations and assignments of cultural meaning to a variety of personal factors such as employment, housing, income, neighbourhood, immigration status, age and the availability of a suitable surety. Although these variables can only be subjectively assessed, they are used in a manner that suggests they are objective criteria with predictive capabilities. Said differently, an assertion might be made about an accused person’s immigration status as if it was ‘known’ or ‘well established’ that something flowed from a particular immigration status. It should be noted that formal risk assessments are often used not so much because they are capable of creating accurate predictions but to ensure that the decision is defensible if something should go wrong (Rose 1997: 18).

\footnote{57}{A third justification for refusing to release an accused person – that releasing the accused will bring the administration of justice into disrepute – is only rarely raised in court. Typically the two grounds listed above are the focus of the decision.}
Valverde (1999) suggests that a government’s involvement and intervention, through ideas around risk, is more likely to occur in situations where statistics are not readily available (190). Risk language facilitates an extension of judicial involvement because, “while ‘actual harm’ requires empirical proof, virtually anything can be considered under the category of ‘risk’”. The bail decision is not one in which the probable risk an accused presents is quantified. Instead, the assessment is based on perceptions of potential ‘riskiness’. As techniques of uncertainty, judicial evaluations are necessarily speculative estimations of a possibility rather than an objectively calculated probability. This vagueness lends considerable scope to factors considered in the risk assessment; when coupled with the more relaxed evidentiary standards of admissibility, most evaluations, even the most subjective interpretations, are considered relevant at the bail hearing.

The Law on the Books

Until 1972, Canada had what is best described as a ‘cash bail’ system (see Friedland 1965 for an empirical analysis of the operation of bail at that time). A number of amendments to the Criminal Code introduced by the Bail Reform Act in 1972 suggest the guiding philosophy of the Act was to be changed to one aimed at encouraging the release of accused into the community pending trial. Promoted as a rights protecting reform, this Act bestowed vast powers of release upon police officers, a power designed with the goal of avoiding a continuation of unnecessary arrests and detention. The Act also created new forms of release for courts, so as to encourage and facilitate an increased use of release orders. It also placed the onus of justifying detention on the Crown, restricted the use of cash deposits and stipulated criteria for the determination of release, which included a new secondary ground ‘in the public interest’, intended to prevent
further offending (Trotter 2010: 12). Together, these amendments were hoped to rectify the inefficiency and unfairness that characterised the former bail system. However, within four years of its implementation, a number of ‘housekeeping’ amendments were integrated into the newly formulated Act. Of primary interest and concern was the shifting of the onus, in relation to certain offences, from the Crown justifying why detention is necessary to the accused justifying why he or she should be released. These ‘reverse onus’ provisions started with charges for offences allegedly committed while the accused was on bail pending the hearing of other charges, but since then the list of situations in which the accused must justify release has become considerably longer (Trotter 2010: 13).

Hence the importance, symbolically (and one would presume practically), of the original legislation is that it represented a shift from a presumption of detention to a presumption of release. The overall provision would suggest that ‘bail’ decisions are governed by an underlying presumption that the accused should be released from custody into the community until trial (Criminal Code s.515(1)). This means that, absent exceptional circumstances surrounding the offence and the offender, the police officer and subsequently the court is to presume the accused should be released on bail pending their trial, unless the Crown can show just cause why the detention of the accused is justified. This, Trotter (2010) asserts, mandates a ‘ladder’ approach to the decision about the appropriate form a release order should take (224). Each possible form of release is to be considered and ruled out in turn, until the court comes to the least onerous form of release that would be appropriate in the circumstances, while being mindful of the necessity of exercising restraint in the use of detention and imposing conditions of release. The mandated ladder approach is consistent with the notion of a presumption of release. Trotter (2010) does suggest, however, that the ladder approach does not appear to be absolute (245). Indeed, it appears to be inapplicable in cases where the accused is required to demonstrate why release is
justified. In these cases it would appear to be the responsibility of the accused to demonstrate why the most onerous form of release should not be imposed.

Sureties

One of the more onerous conditions is the requirement that the accused be released under the control of a surety. The theory behind sureties is interesting in itself. A surety is someone who indicates a willingness to pay the court a specified amount of money if the accused person fails to appear in court or violates a condition of their release. Historically, the role of the surety was to relieve the jail of its responsibility for ensuring the accused appeared in court. The state’s responsibility for custody and control of accused persons was effectively transferred to an independent third party. Over time, however, the obligations of the surety have been extended and intensified with the introduction of additional conditions of release. While the surety is still charged with ensuring the accused’s attendance in court (primary grounds), sureties are also expected to ensure the accused does not commit any further criminal offences and that the accused complies with the conditions placed on their release by the court (secondary grounds), as well as refraining from interfering with the administration of justice. Sureties are thus charged with a quasi-policing function. They are jailors in the community in that they are expected to monitor accused persons’ actions, make sure that accused persons comply with the conditions of their release, and that they are present for all of their court appearances. In other words, the surety takes on an onerous responsibility – and a responsibility in which a failure can,
potentially, cost an identifiable amount of money. In effect, a surety’s undertaking removes from the state the sole obligation to supervise accused. It is worth noting that the use of sureties is so institutionalized in most courts that they were routinely suggested both by the Crown and the defence as potential conditions of release.

Since s.515(2) stipulates a ladder approach should be used to select the appropriate type of release, an accused should be released without conditions, without a monetary component and without a surety unless the Crown shows cause as to why a more onerous type of release is warranted (Trotter 2010: 244-245). However, rather than being an exceptional requirement, having a surety in order to secure release has become common practice in some Ontario courts, a convention that was, arguably, not envisioned by the legislation and is almost certainly not consistent with it.

Methodology

Data from 148 days of court observation, conducted in eight different Ontario courthouses and concentrated in southern Ontario, are used as the basis for this study. These courts were selected primarily as a result of the needs of an Ontario government project interested in understanding the operation of the court along with the proximity of the court to the researcher. The initial court was observed in April 2006 and the final court observation was conducted in December 2008. Both Court 1 and 2 were initially observed for 20 days each. Both

58 Unfortunately, there are no data on how often sureties are, in fact, required to pay the amount promised if an accused violates a condition of release. The belief in Ontario is that in most cases the province does not attempt to recover the surety amount, though some jurisdictions use this process more than others. What we do know is the ‘estreatment process’ is discretionary, whereby the judge can decide to collect only a small portion of the money promised by a surety.
of these courts have since been revisited for subsequent observational periods of five consecutive
days. All observations were made by me with the exception of Court 3 which was the subject of
a coordinated study by another researcher. Data from this court (based on 39 days of
observations) have been made available to me. All other courts were observed for five days.
Over the course of 148 days of court observation, 4,085 cases were observed. The number of
cases observed varied between courts and by day from two to 75 cases, with a mean of 30 cases
observed each day. The large range is attributable to some extent to the organization of bail
courts in each jurisdiction. In some locations, bail is centralized in one location. In other
locations multiple courts are run. As can be seen in Table 1, the most common outcome on a
given day for a case was that a decision was not made in bail court (the last of the ‘outcomes’
listed in Table 1). This non-decision with respect to bail generally took the form of an
adjournment request, which invariably across courts came from the defence.\textsuperscript{59}

\textsuperscript{59} See Webster, Doob and Myers (2009) for further discussion of this issue.
Table 1: Outcome of Case on the Date Observed

<table>
<thead>
<tr>
<th></th>
<th>Released with the consent of the Crown</th>
<th>Contested release (after a show cause hearing)</th>
<th>Detention order (contested or not)</th>
<th>Other (no decision made with respect to bail or various other relatively rare case outcomes)</th>
<th>Total (number of cases seen in which the outcome was known)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court 1</td>
<td>14.7% (128)</td>
<td>3.7% (32)</td>
<td>10.2% (89)</td>
<td>71.4% (622)</td>
<td>100% (871)</td>
</tr>
<tr>
<td>Court 2</td>
<td>12.5% (216)</td>
<td>2.4% (41)</td>
<td>5.6% (97)</td>
<td>79.5% (1369)</td>
<td>100% (1723)</td>
</tr>
<tr>
<td>Court 3</td>
<td>19.6% (148)</td>
<td>2.8% (21)</td>
<td>2.4% (18)</td>
<td>75.2% (566)</td>
<td>100% (753)</td>
</tr>
<tr>
<td>Court 4</td>
<td>15.8% (23)</td>
<td>2.7% (4)</td>
<td>6.2% (9)</td>
<td>75.3% (110)</td>
<td>100% (146)</td>
</tr>
<tr>
<td>Court 5</td>
<td>15.5% (22)</td>
<td>3.5% (5)</td>
<td>5.6% (8)</td>
<td>75.4% (107)</td>
<td>100% (142)</td>
</tr>
<tr>
<td>Court 6</td>
<td>10.5% (20)</td>
<td>4.2% (8)</td>
<td>4.7% (9)</td>
<td>80.5% (153)</td>
<td>100% (190)</td>
</tr>
<tr>
<td>Court 7</td>
<td>20.9% (29)</td>
<td>1.4% (2)</td>
<td>5.0% (7)</td>
<td>72.7% (101)</td>
<td>100% (139)</td>
</tr>
<tr>
<td>Court 8</td>
<td>22.5% (11)</td>
<td>12.2% (6)</td>
<td>8.2% (4)</td>
<td>57.1% (28)</td>
<td>100% (49)</td>
</tr>
</tbody>
</table>

It is worth noting that most releases were with the consent of the Crown rather than as a result of a contested hearing. The uncontested nature of bail hearings is consistent with the uncontested nature of the outcome of criminal cases more generally. What is notable, however, about these ‘consent releases’ is the frequency with which sureties were made responsible for the good behaviour of the accused.
‘Is Your Surety Present?’

There are two different types of bail hearings with two different decision-makers. In a consent release, the Crown recommends the release of the accused to the court and the justice of the peace generally accepts, without challenge, the Crown’s judgment on the type of release required. However, in a ‘show cause’ hearing, the decision to release the accused and the form this release will take rests solely with the justice of the peace. As is demonstrated below, both decision-makers regularly require sureties for release.

Notwithstanding the codified ladder approach to the release decision, some bail courts in Ontario seem to skip over the first two rungs on the ladder, going directly to a surety release, apparently without considering each individual form of release in turn. Sureties, it would appear, have become the norm in many Ontario courts. As Webster, Doob and Myers (2009) have noted, accused persons in Ontario are becoming more likely to be detained for a bail hearing (rather than released by the police) with the proportion of cases with bail hearings increasing from about 39% to about 50% in a six year period. Although detailed information about the conditions of release across the province do not exist, we can see in Table 2 that, in the vast majority of cases, the Crown or the court requires a surety for the accused to secure a release order.

Accused in court were routinely asked if they had a surety present in court and if they did not, the legal aid lawyer in the court (known as ‘duty counsel’) would typically attempt to contact someone on their behalf. This appeared to be done independent of the nature of the case. It was not unusual for accused who were hoping to be released on consent by the Crown or who wanted to have a full ‘show cause’ hearing to be counseled by duty counsel that it was in their best interests to delay the proceedings in order for them to secure and have present an appropriate surety.
Table 2 clearly indicates that in most cases in which the Crown consented to the release of the accused from custody, a surety, suitable to the court, was required. An alternative to a surety in some courts was for an accused to be supervised by a ‘bail supervision’ program (offered by a not-for-profit organisation). It is clear that sureties have become the norm, rather than the exception, in most courts. Though there appears to be relative consistency amongst the courts observed in terms of the proportion of cases in which a surety is required, Court 3 stands in stark contrast. In this court, sureties are rarely required for a consent release. There is no obvious reason for this difference (in terms of the nature of cases, etc.). It would appear that in this court, the expectation that sureties are required simply does not exist.

Table 2: Was a Surety Required for a Release as a Result of Consent by the Crown?

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No – Release under supervision of bail program</th>
<th>No (release without a surety on their own recognizance)</th>
<th>Not known, or, in the case of those already on bail – ‘same’ (unspecified) conditions</th>
<th>Total (number of cases – with a release on Crown’s consent as the outcome)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court 1</td>
<td>60.6% (77)</td>
<td>11.0% (14)</td>
<td>11.8% (15)</td>
<td>16.5% (21)</td>
<td>100% (127)</td>
</tr>
<tr>
<td>Court 2</td>
<td>63.6% (140)</td>
<td>12.3% (27)</td>
<td>14.1% (31)</td>
<td>10.0% (22)</td>
<td>100% (220)</td>
</tr>
<tr>
<td>Court 3</td>
<td>23.2% (36)</td>
<td>12.3% (19)</td>
<td>52.9% (82)</td>
<td>11.6% (17)</td>
<td>100% (154)</td>
</tr>
<tr>
<td>Court 4</td>
<td>69.6% (16)</td>
<td>8.7% (2)</td>
<td>13.0% (2)</td>
<td>8.7% (2)</td>
<td>100% (23)</td>
</tr>
<tr>
<td>Court 5</td>
<td>61.9% (13)</td>
<td>4.8% (1)</td>
<td>33.3% (7)</td>
<td>--</td>
<td>100% (21)</td>
</tr>
<tr>
<td>Court 6</td>
<td>70.0% (14)</td>
<td>5.0% (1)</td>
<td>15.0% (3)</td>
<td>10.0% (2)</td>
<td>100% (20)</td>
</tr>
<tr>
<td>Court 7</td>
<td>89.7% (26)</td>
<td>--</td>
<td>10.3% (3)</td>
<td>--</td>
<td>100% (29)</td>
</tr>
<tr>
<td>Court 8</td>
<td>60.0% (6)</td>
<td>--</td>
<td>40.0% (4)</td>
<td>--</td>
<td>100% (10)</td>
</tr>
</tbody>
</table>
The Crown’s inquiry regarding the availability of a surety (which was often observed) suggests that the Crown might be willing to consent to the release of the accused if they have an appropriate surety willing to take them into their care. Indeed, it was not unusual for the Crown to insist the surety be physically present in court so that the Crown could personally assess the surety. Since there are justices of the peace available to interview and approve sureties outside of court once bail conditions have been set, bail can be determined in the absence of a surety. However, it appears to be standard practice for courts to want the surety to be physically present in the courtroom so they can be assessed and approved of in court. This practice seems to have grown out of the desire of Crowns and justices of the peace to have the surety present to hear and be fully aware of the allegations and the conditions of release.

As can be seen in Table 3, in a non-trivial number of cases where the Crown is consenting to the release of the accused, the surety is called forward to give evidence. While this is sometimes done informally in court, in most cases sureties are asked to give sworn testimony on their assets, relationship with the accused, knowledge of the allegations and plan of supervision. Admittedly, this is done in some cases so the surety can be named, thus doing away with the necessity to be re-interviewed by a justice of the peace.
Table 3: Was a Surety Interviewed in Court for a Release Consented to by the Crown?

<table>
<thead>
<tr>
<th>Court</th>
<th>Yes</th>
<th>No</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court 1</td>
<td>20.8% (16)</td>
<td>79.2% (61)</td>
<td>100% (77)</td>
</tr>
<tr>
<td>Court 2</td>
<td>11.4% (16)</td>
<td>88.6% (124)</td>
<td>100% (140)</td>
</tr>
<tr>
<td>Court 3</td>
<td>Unavailable</td>
<td>Unavailable</td>
<td>Unavailable</td>
</tr>
<tr>
<td>Court 4</td>
<td>93.8% (15)</td>
<td>6.2% (1)</td>
<td>100% (16)</td>
</tr>
<tr>
<td>Court 5</td>
<td>46.2% (6)</td>
<td>53.8% (7)</td>
<td>100% (13)</td>
</tr>
<tr>
<td>Court 6</td>
<td>100% (14)</td>
<td>--</td>
<td>100% (14)</td>
</tr>
<tr>
<td>Court 7</td>
<td>65.4% (17)</td>
<td>34.6% (9)</td>
<td>100% (26)</td>
</tr>
<tr>
<td>Court 8</td>
<td>33.3% (2)</td>
<td>66.7% (4)</td>
<td>100% (6)</td>
</tr>
</tbody>
</table>

In those cases in which an accused’s release is contested and there is a full ‘show cause’ bail hearing, in all eight courts an even higher proportion of cases required a surety for release. It is noteworthy that, despite Court 3 rarely requiring a surety for a consent release, in most cases in which there was a ‘show cause’ hearing a surety was required.
Table 4: Was a Surety Required for a Release Contested by the Crown after a Show Cause Hearing?

<table>
<thead>
<tr>
<th>Court</th>
<th>Yes (%)</th>
<th>No – Release under supervision of bail program (%)</th>
<th>No (release without a surety) (%)</th>
<th>Total (number of cases – with a release after a show cause hearing)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court 1</td>
<td>87.5% (49)</td>
<td>8.9% (5)</td>
<td>3.6% (2)</td>
<td>100% (56)</td>
</tr>
<tr>
<td>Court 2</td>
<td>80.5% (62)</td>
<td>18.2% (14)</td>
<td>1.3% (1)</td>
<td>100% (77)</td>
</tr>
<tr>
<td>Court 3</td>
<td>67.7% (21)</td>
<td>12.9% (4)</td>
<td>19.4% (6)</td>
<td>100% (31)</td>
</tr>
<tr>
<td>Court 4</td>
<td>100% (10)</td>
<td>--</td>
<td>--</td>
<td>100% (10)</td>
</tr>
<tr>
<td>Court 5</td>
<td>62.5% (5)</td>
<td>12.5% (1)</td>
<td>25.0% (2)</td>
<td>100% (8)</td>
</tr>
<tr>
<td>Court 6</td>
<td>90.0% (9)</td>
<td>--</td>
<td>10.0% (1)</td>
<td>100% (10)</td>
</tr>
<tr>
<td>Court 7</td>
<td>100% (6)</td>
<td>--</td>
<td>--</td>
<td>100% (6)</td>
</tr>
<tr>
<td>Court 8</td>
<td>63.6% (7)</td>
<td>27.3% (3)</td>
<td>9.1% (1)</td>
<td>100% (11)</td>
</tr>
</tbody>
</table>

As indicated in Table 5, in nearly all of the cases in which a surety was required, the surety took the stand to give evidence during the hearing. This is not surprising since it is through the surety’s testimony that defence counsel introduces to the court the plan of release and supervision for the accused. The surety’s testimony typically made up most of defence counsel’s evidence. It is also through this evidence that the Crown tests the character of the surety, the surety’s relationship with the accused and level of supervision that the surety is able to provide.
Table 5: Was a Surety Interviewed in Court during the Show Cause Hearing?

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court 1</td>
<td>83.7% (41)</td>
<td>16.3% (8)</td>
<td>100% (49)</td>
</tr>
<tr>
<td>Court 2</td>
<td>88.7% (55)</td>
<td>11.3% (7)</td>
<td>100% (62)</td>
</tr>
<tr>
<td>Court 3</td>
<td>100% (21)</td>
<td>--</td>
<td>100% (21)</td>
</tr>
<tr>
<td>Court 4</td>
<td>90.0% (9)</td>
<td>10.0% (1)</td>
<td>100% (10)</td>
</tr>
<tr>
<td>Court 5</td>
<td>100% (5)</td>
<td>--</td>
<td>100% (5)</td>
</tr>
<tr>
<td>Court 6</td>
<td>100% (9)</td>
<td>--</td>
<td>100% (9)</td>
</tr>
<tr>
<td>Court 7</td>
<td>100% (6)</td>
<td>--</td>
<td>100% (6)</td>
</tr>
<tr>
<td>Court 8</td>
<td>85.7% (6)</td>
<td>14.3% (1)</td>
<td>100% (7)</td>
</tr>
</tbody>
</table>

Court Efficiency and Sureties

Under s.516(1) of the Criminal Code, a justice may, before or at any time during the course of any proceedings, and upon application by the Crown or the accused, adjourn the proceedings and remand the accused in custody. The Crown is permitted to request an adjournment of the bail hearing for the purposes of making further inquiries or obtaining further documents pertaining to the accused and the alleged offence. In addition, the accused can request and be granted an adjournment for the purposes of retaining counsel, procuring a surety and for formulating a release plan. All bail adjournments, by law, however, cannot exceed three clear days unless the accused consents to it being longer (s.516(1)).
Most requests for an adjournment of the bail proceedings come from the defence.\(^6\) As can be seen below in Table 6, adjournments are regularly requested for the purposes of securing a suitable surety. In addition to the cases that were adjourned for the explicit purpose of locating a surety, adjournments for a ‘show cause’ hearing are often requested because the accused is not ready to proceed in the absence of their counsel or surety. The non-trivial number of cases adjourned with ‘no reason given’ to the court is also noteworthy. It is quite likely that a number of these adjournments are for the purposes of arranging a surety’s attendance in court.

<table>
<thead>
<tr>
<th>Reason Provided to the Court for the Adjournment Request</th>
</tr>
</thead>
<tbody>
<tr>
<td>Surety related</td>
</tr>
<tr>
<td>Court 1</td>
</tr>
<tr>
<td>Court 2</td>
</tr>
<tr>
<td>Court 3</td>
</tr>
<tr>
<td>Court 4</td>
</tr>
<tr>
<td>Court 5</td>
</tr>
<tr>
<td>Court 6</td>
</tr>
<tr>
<td>Court 7</td>
</tr>
<tr>
<td>Court 8</td>
</tr>
</tbody>
</table>

\(^6\) See Webster, Doob and Myers (2009) for further discussion of this issue.
Sureties must not only have sufficient assets and commit to an intensive level of supervision, they must be seen as being of strong moral character and demonstrate a solid relationship of trust and respect with and for the accused. Procuring a suitable surety, consequently, takes the concerted effort of both the accused and private or duty counsel, and it often takes considerable time to locate a person who is both suitable to the court and willing and able to take on this responsibility. This is further complicated by the apparent requirement or practice in some courts that sureties be present in court prior to court starting and must remain in court until their case is reached. This means that cases are often held down until later in the day or adjourned to another day for the accused to locate a suitable surety. The case may also be delayed until a date can be found when both counsel and the surety are able to be present for the consent release or show cause hearing.

‘How Much Can You Afford?’

Sureties are required to promise the court a sum of money in the event the accused fails to comply with their conditions. This financial promise is meant to act as an incentive to the surety to ensure the accused returns to court, complies with their conditions of release and does not re-offend while at large in the community. Should the surety fail in his or her responsibility to supervise the accused and fail to report non-compliance to the police, they stand to lose the money they promised the court. Practice suggests that sureties should be evaluated in terms of their character, the nature of their relationship with the accused, along with their ability to
supervise and control the accused and not so much on their financial assets.\(^{61}\) Accordingly, the value of the required bail is supposed to be set in relation to their means, not the alleged offence of the accused (King 1971; Koza and Doob 1975a; Koza and Doob 1975b). While this may be the way the law has been formally interpreted, it appears that the financial ability of a surety remains a primary consideration in deciding the surety’s suitability to act in a supervisory capacity, a practice reminiscent of Canada’s former cash bail system.\(^{62}\) This would, then, effectively discriminate against people without well-to-do friends or family. However, it would appear that caution must be exercised in setting the quantum of bail; under s.11(e) of the Canadian Charter of Rights and Freedoms, accused have the right to reasonable bail and not to be denied bail without just cause. Should bail be set at a level that is not available to a proposed surety, it is tantamount to a detention order, which is arguably a violation of the Charter.

As can be seen in Tables 7 and 8 below, sureties are required to promise considerable assets in their commitment to the court. There does, however, appear to be considerable variability between the courts in terms of the amounts required. In a number of courts, approximately 50\% of consent release cases required more than $1,000 to be promised on behalf of the accused.

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\(^{61}\) Though the Criminal Code does not enumerate criteria, Trotter (2010) suggests a wide range of factors have always been considered relevant to ascertaining the suitability of a surety. The following are categorically excluded from acting as a surety: accomplices, counsel for the accused, persons in custody or awaiting trial on a criminal offence, infants, someone who is already acting as a surety for someone else and non-residents of the province. While having a criminal record is considered indicative of moral character and will often preclude an individual from acting as a surety, this alone does not automatically disqualify a surety. In these cases the court considers both the type of conviction(s) on the proposed surety’s record and how long ago the offence(s) occurred.

\(^{62}\) See Friedland (1965), Bottomley (1970), King (1971).
Table 7: Amount Surety Required to Promise the Court for a Consent Release

<table>
<thead>
<tr>
<th>Amount Surety Required to Promise the Court for a Consent Release</th>
<th>Total (number consent releases in which the amount of bail was known)</th>
</tr>
</thead>
<tbody>
<tr>
<td>$1000 or less</td>
<td>$1001 to $5000</td>
</tr>
<tr>
<td>Court 1</td>
<td>59.6% (62)</td>
</tr>
<tr>
<td>Court 2</td>
<td>54.3% (108)</td>
</tr>
<tr>
<td>Court 3</td>
<td>86.3% (101)</td>
</tr>
<tr>
<td>Court 4</td>
<td>47.6% (10)</td>
</tr>
<tr>
<td>Court 5</td>
<td>42.9% (9)</td>
</tr>
<tr>
<td>Court 6</td>
<td>33.3% (6)</td>
</tr>
<tr>
<td>Court 7</td>
<td>13.8% (4)</td>
</tr>
<tr>
<td>Court 8</td>
<td>30.0% (3)</td>
</tr>
</tbody>
</table>

The amounts required by the court are generally higher for ‘show cause’ hearings than for consent releases. This makes intuitive sense, given it is more likely that those cases which are perceived as presenting a higher risk of absconding or of misbehaviour will have show cause hearings. Court 3, however, continues to be an anomaly in its practices around bail, where 71% of ‘show cause’ cases require a promise of $1,000 or less.
Table 8: Amount Surety Required to Promise the Court after a Show Cause Hearing

<table>
<thead>
<tr>
<th>Amount Surety Required to Promise the Court after a Show Cause Hearing</th>
<th>$1,000 or less</th>
<th>$1,001 to $5,000</th>
<th>$5,001 to $10,000</th>
<th>$10,001 or more</th>
<th>Total (number releases after a show in which the amount of bail was known)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court 1</td>
<td>33.3% (11)</td>
<td>39.4% (13)</td>
<td>21.2% (7)</td>
<td>6.1% (2)</td>
<td>100% (33)</td>
</tr>
<tr>
<td>Court 2</td>
<td>29.3% (12)</td>
<td>31.7% (13)</td>
<td>17.1% (7)</td>
<td>22.0% (9)</td>
<td>100% (41)</td>
</tr>
<tr>
<td>Court 3</td>
<td>70.6% (12)</td>
<td>23.5% (4)</td>
<td>5.9% (1)</td>
<td>--</td>
<td>100% (17)</td>
</tr>
<tr>
<td>Court 4</td>
<td>25.0% (1)</td>
<td>75.0% (3)</td>
<td>--</td>
<td>--</td>
<td>100% (4)</td>
</tr>
<tr>
<td>Court 5</td>
<td>50.0% (3)</td>
<td>33.3% (2)</td>
<td>16.7% (1)</td>
<td>--</td>
<td>100% (6)</td>
</tr>
<tr>
<td>Court 6</td>
<td>37.5% (3)</td>
<td>62.5% (5)</td>
<td>--</td>
<td>--</td>
<td>100% (8)</td>
</tr>
<tr>
<td>Court 7</td>
<td>--</td>
<td>50.0% (1)</td>
<td>--</td>
<td>50.0% (1)</td>
<td>100% (2)</td>
</tr>
<tr>
<td>Court 8</td>
<td>57.1% (4)</td>
<td>42.9% (3)</td>
<td>--</td>
<td>--</td>
<td>100% (7)</td>
</tr>
</tbody>
</table>

Note: Because ‘show cause’ hearings are relatively rare, these numbers, especially for Courts 4-8, are based on relatively small numbers of cases.

Conditions of Release

To be released, accused persons must consent to the conditions imposed on them by the court. In this way, an accused’s ‘liberty is truly conditional’; should the accused object to any of the conditions, he or she will be detained (Trotter 2010: 240). Sureties must also be made aware of the conditions, as it is their role to ensure ‘their’ accused’s compliance. This can be an onerous responsibility for sureties as it is not unusual for the accused to be subject to multiple conditions and even to be required to reside with their surety. As indicated in Tables 9 and 10 below, nearly all consent releases and in virtually all releases following a ‘show cause’ hearing conditions were attached to the accused’s release.
Table 9: Were Conditions Required for Release Consented to by the Crown?

<table>
<thead>
<tr>
<th>Court</th>
<th>Yes</th>
<th>No</th>
<th>Released on the Same Bail as in a Prior Pending Case (conditions not read out in court)</th>
<th>Total (number of consent releases in which the number of conditions attached were known)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court 1</td>
<td>88.3% (106)</td>
<td>4.2% (5)</td>
<td>7.5% (9)</td>
<td>100% (120)</td>
</tr>
<tr>
<td>Court 2</td>
<td>91.6% (196)</td>
<td>0.9% (2)</td>
<td>7.5% (16)</td>
<td>100% (214)</td>
</tr>
<tr>
<td>Court 3</td>
<td>91.3% (136)</td>
<td>0.7% (1)</td>
<td>8.1% (12)</td>
<td>100% (149)</td>
</tr>
<tr>
<td>Court 4</td>
<td>91.3% (21)</td>
<td>--</td>
<td>8.7% (2)</td>
<td>100% (23)</td>
</tr>
<tr>
<td>Court 5</td>
<td>100% (21)</td>
<td>--</td>
<td>--</td>
<td>100% (21)</td>
</tr>
<tr>
<td>Court 6</td>
<td>90.0% (18)</td>
<td>--</td>
<td>10.0% (2)</td>
<td>100% (20)</td>
</tr>
<tr>
<td>Court 7</td>
<td>96.6% (28)</td>
<td>3.4% (1)</td>
<td>--</td>
<td>100% (29)</td>
</tr>
<tr>
<td>Court 8</td>
<td>100% (10)</td>
<td>--</td>
<td>--</td>
<td>100% (10)</td>
</tr>
</tbody>
</table>
Table 10: Were Conditions Required for Release Contested by the Crown?

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
<th>Released on the Same Bail (conditions not read out in court)</th>
<th>Total (number of show cause hearings)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court 1</td>
<td>100% (33)</td>
<td>--</td>
<td>--</td>
<td>100% (33)</td>
</tr>
<tr>
<td>Court 2</td>
<td>97.6% (41)</td>
<td>2.4% (1)</td>
<td>--</td>
<td>100% (42)</td>
</tr>
<tr>
<td>Court 3</td>
<td>100% (21)</td>
<td>--</td>
<td>--</td>
<td>100% (21)</td>
</tr>
<tr>
<td>Court 4</td>
<td>100% (4)</td>
<td>--</td>
<td>--</td>
<td>100% (4)</td>
</tr>
<tr>
<td>Court 5</td>
<td>100% (6)</td>
<td>--</td>
<td>--</td>
<td>100% (6)</td>
</tr>
<tr>
<td>Court 6</td>
<td>100% (8)</td>
<td>--</td>
<td>--</td>
<td>100% (8)</td>
</tr>
<tr>
<td>Court 7</td>
<td>100% (2)</td>
<td>--</td>
<td>--</td>
<td>100% (2)</td>
</tr>
<tr>
<td>Court 8</td>
<td>100% (7)</td>
<td>--</td>
<td>--</td>
<td>100% (7)</td>
</tr>
</tbody>
</table>

Although the Criminal Code guides justices to exercise restraint in the ascertainment of an accused’s suitability for release and the imposition of conditions, as depicted below in Tables 11 and 12, a considerable number of conditions are being placed on accused person’s liberty. Indeed, in consent release cases, across almost all the courts 50% of accused have more than five conditions placed on their release. This percentage balloons for accused released after a show cause hearing. These conditions have a considerable impact on the quality of life of both the accused and their surety. Furthermore, given the chronic backlog of cases in the criminal courts, accused are subject to these conditions for significant periods of time (Trotter 2010: 240).
Table 11: Number of Conditions Imposed on a Release Consented to by the Crown

<table>
<thead>
<tr>
<th>Number of Conditions Imposed on a Release Consented to by the Crown</th>
<th>5 or fewer</th>
<th>6 to 10</th>
<th>More than 10</th>
<th>Total (number of consent releases where the number of conditions was known)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court 1</td>
<td>46.2% (49)</td>
<td>53.8% (57)</td>
<td>--</td>
<td>100% (106)</td>
</tr>
<tr>
<td>Court 2</td>
<td>43.4% (85)</td>
<td>47.4% (93)</td>
<td>9.2% (18)</td>
<td>100% (196)</td>
</tr>
<tr>
<td>Court 3</td>
<td>45.9% (61)</td>
<td>45.9% (61)</td>
<td>8.3% (11)</td>
<td>100% (133)</td>
</tr>
<tr>
<td>Court 4</td>
<td>23.8% (5)</td>
<td>66.7% (14)</td>
<td>9.5% (2)</td>
<td>100% (21)</td>
</tr>
<tr>
<td>Court 5</td>
<td>19.0% (4)</td>
<td>42.9% (9)</td>
<td>38.1% (8)</td>
<td>100% (21)</td>
</tr>
<tr>
<td>Court 6</td>
<td>44.4% (8)</td>
<td>44.4% (8)</td>
<td>11.1% (2)</td>
<td>100% (18)</td>
</tr>
<tr>
<td>Court 7</td>
<td>25.0% (7)</td>
<td>37.5% (10)</td>
<td>39.3% (11)</td>
<td>100% (28)</td>
</tr>
<tr>
<td>Court 8</td>
<td>40.0% (4)</td>
<td>50.0% (5)</td>
<td>10.0% (1)</td>
<td>100% (10)</td>
</tr>
</tbody>
</table>
### Table 12: Number of Conditions Imposed on a Release Contested by the Crown

<table>
<thead>
<tr>
<th>Court</th>
<th>5 or fewer</th>
<th>6 to 10</th>
<th>More than 10</th>
<th>Total (number of show cause hearings where the number of conditions was known)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court 1</td>
<td>15.2% (5)</td>
<td>63.6% (21)</td>
<td>21.2% (7)</td>
<td>100% (33)</td>
</tr>
<tr>
<td>Court 2</td>
<td>7.3% (3)</td>
<td>61.0% (25)</td>
<td>31.7% (13)</td>
<td>100% (41)</td>
</tr>
<tr>
<td>Court 3</td>
<td>4.8% (1)</td>
<td>76.2% (16)</td>
<td>19.0% (4)</td>
<td>100% (21)</td>
</tr>
<tr>
<td>Court 4</td>
<td>--</td>
<td>50.0% (2)</td>
<td>50.0% (2)</td>
<td>100% (4)</td>
</tr>
<tr>
<td>Court 5</td>
<td>16.7% (1)</td>
<td>--</td>
<td>83.3% (5)</td>
<td>100% (6)</td>
</tr>
<tr>
<td>Court 6</td>
<td>50.0% (4)</td>
<td>37.5% (3)</td>
<td>12.5% (1)</td>
<td>100% (8)</td>
</tr>
<tr>
<td>Court 7</td>
<td>50.0% (1)</td>
<td>--</td>
<td>50.0% (1)</td>
<td>100% (2)</td>
</tr>
<tr>
<td>Court 8</td>
<td>14.3% (1)</td>
<td>71.4% (5)</td>
<td>14.3% (1)</td>
<td>100% (7)</td>
</tr>
</tbody>
</table>

Although the ‘crime control’ logic of the conditions typically could be discerned, in many cases the conditions appeared to be somewhat broader than one might conclude related directly to the concerns about release (that is, appearing in court and avoiding committing serious offences). For example, in one case of theft under $5,000, the accused was charged with taking $223 worth of items from a Highland Farms store (a supermarket chain in Ontario). The accused was released on a $2500 surety bail with the following conditions: keep the peace and be of good behavior; attend court as required; do not enter the geographic region except for the purposes of attending court; reside at an addressed approved of by the surety; do not attend any Highland Farms stores in the province of Ontario; and do not communicate directly or indirectly with the co-accused in this matter. The prohibition placed on the accused not to enter the region is
particularly interesting since the region has a population of over 1.1 million people and is 1242 square kilometers in size. Furthermore, it is hard to see the relevance of banning the accused from all Highland Farms stores in the province, while allowing him to visit any of the other hundreds of supermarkets.

In another case involving a charge of simple assault, the accused was released on a $15,000 surety bail (the accused was required to produce two suitable sureties who were each required to promise $7,500) and was required to comply with the following conditions: keep the peace and be of good behavior; attend court as required; reside with one of the sureties; be under ‘house arrest’ 24 hours a day and do not leave the house except in the company of one or more of the sureties; be amenable to the rules and discipline of the home; do not communicate directly or indirectly with the victim; do not be within 100 metres of the victim’s address; do not purchase, possess, or consume any alcohol; do not purchase, possess or consume any non-medically prescribed drugs; do not possess any weapons as defined by the Criminal Code; do not possess or apply for a firearms acquisition certificate; and see a doctor for a mental health and substance abuse assessment. Though the family and police had some concerns about the accused’s mental health, he was not under the influence of alcohol or drugs at the time of the alleged offence. What is especially interesting was that the court was putting ‘assessment’ conditions on him and controls (house arrest and putting the accused under complete control of the sureties by requiring him to follow the rules and discipline of his family (his sureties)). Once again, the ‘crime control’ logic is fairly clear; while in the home or with a surety, he would be unlikely to assault anyone. But given that the accused’s trial would be, given the average, at least 6 months away, the opportunities for ‘offending’ (by breaking one of these ‘control’ conditions) would be numerous.
Notwithstanding the reality that the vast majority of conditions placed on accused are simple restrictions on their lives (e.g. not to visit a shopping mall where the offence is alleged to have taken place, not to associate with certain named people or those with criminal records, to stay within certain geographic boundaries), as Trotter (2010) points out, all conditions of bail in Canada are susceptible to criminal sanctions if they are violated (438). If accused persons fail to comply with conditions, they may be rearrested, charged with ‘failing to comply with a court order’, and put in a reverse onus position at the bail hearing, making it more difficult for them to be granted future release. Moreover, their surety may wish to be relieved of their responsibility, given the risk they face if the accused fails to comply.

**Shifting Risk: Excessive Caution and the Defensible Decision**

The bail processes generally, and the use of sureties in particular, are consistent with what Power (2004) says about the management of operational and reputational risk. While the bail decision involves a personal risk assessment of the accused, it also involves an assessment of the risk posed to the criminal justice system. The new risk management exacerbates the process and creates a culture of defensiveness, leaving actors reluctant to make decisions out of a fear they will be held accountable. By outsourcing control of the accused to a private controller – the surety – the organization is relieved of much of the risk to its reputation. Thus instead of the state absorbing the risk associated with releasing an accused, it is looking to ‘responsibilize’ individuals for the care, custody and supervision of accused people in the community pending trial. This risk aversion and offloading of responsibility has manifested itself 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. It seems likely that a major function of sureties is not, in fact, simply to enforce conditions, but rather to reduce the responsibility of justices and the Crown if the accused violates conditions of release.

Despite the time consuming nature of bail hearings, prosecutors, perhaps in large part to avoid the potential negative consequences of release, tend to oppose the release of most accused. Even in those cases where they consent to the release of the accused, the Crown will typically require a surety. In so doing, prosecutors are shielding themselves from criticism for making the ‘wrong’ release decision and absolving themselves of responsibility by passing the release decision onto the justice of the peace. As the final arbiter, the justice often imposes strict conditions of release and requires strong sureties, to respond to potential concerns about the riskiness of accused and their suitability for release. Absent any legislated presumption that a surety is required for release, this requirement seems to be a function of the individual court’s culture and court actors’ fear of being the one to make a risky decision, as it is assumed that the safest decision is to require a surety for release.

Hannah-Moffat and O’Malley (2007) term this neo-liberal notion of responsibilization ‘individualization’, whereby individuals are being made increasingly responsible for managing risks that the state once took care of (11). Risk, then, is being returned to those the state used to protect through an assurance of security. Rose (1997) contends that through the notion of risk, care and custody have become inextricably linked to the community (4). Sureties, in this framework, can be seen as being forced to take over the state’s function. Furthermore, the system has come to accept that regulation is more effective and acceptable if it works with private control systems.
The bail risk assessment is focused solely on the individual’s risk; it is looking at the risk the individual poses to the system and its image. This has resulted in the creation of internal control mechanisms; policy directives that guide behaviour and dictate expectations.

The orientation of the Crown prosecutor is, perhaps, best illustrated by quoting from the publicly available\textsuperscript{63} Crown Policy Manual’s section on bail hearings:

In exercising discretion in this area, Crown counsel has the task of weighing conflicting interests. While all of the factors [listed earlier in the document] must be accorded serious consideration, given the potential for tragedy at the bail hearing stage of the process, protection of the public including victims must be the primary concern in any bail decision made by Crown counsel.

The May/Iles, Hadley and Yeo Inquests arose out of situations where accused persons were released on bail and subsequently committed murder/suicide. In the course of these inquests, issues surrounding bail hearings, including the conduct of Crown counsel and the exercise of Crown discretion, came under careful scrutiny.

Crown counsel should seek the detention of the accused where either the circumstances of the accused or the allegations raise serious concerns about risk of harm to the public or to specific people in the event that the accused is released. Crown counsel should not consent to the release of an accused where there are serious safety concerns unless the Crown is satisfied that terms of release address those concerns.

To understand the full message of this document (dated 21 March 2005) one should consider the three inquests mentioned in the second paragraph. The first related to a homicide that took place in March 1996; the second a homicide that took place in June 2000; and the third relates to a murder that took place in August 1991. The message to a worried prosecutor is clear: these are events that are remembered for a long time. The risks mentioned in the third paragraph that is quoted above are easily avoidable either through opposing release or in requiring conditions in which the risk is shifted to another person – in this case, the surety.

Thus it has become standard in some courts to require a surety in almost all cases in order for a release order to be fashioned. It is suspected that the demand for surety supervision is

increasing, which can be understood as an intensification of strategies of process to give the impression of manageability and to avoid blame. In requiring a surety, the court is able to manage the risk and is provided with an assurance of risk minimisation. The release decision is defensible because the accused is being released into the custody of a surety who is responsible for monitoring and supervising the accused. The surety functions as an insurance strategy; sureties minimise the risk posed by the accused and insulate the court and the prosecutor from criticism and culpability.

It seems that a heightened awareness of the risk of harm an accused poses to the community, a perception amplified by the media’s intervention and interpretation of the situation, has made criminal justice professionals increasingly nervous about making release decisions. Hutter and Power (2005) suggest sensationalized events such as those mentioned in the Crown Manual tend to amplify risk frameworks, which leads to substantive institutional consequences (13). When widely publicised, these shocking events galvanize fear and rouse public officials’ anxiety about releasing accused persons into the community pending trial. This nervousness has been articulated through a general aversion to being the person to make the release decision.

Though the Bail Reform Act came into effect (in 1972) before the rise of neo-liberalism in Canada, its objectives can be conceptualised as neo-liberal in their orientation. The legislation signals the state’s interest in withdrawing from the governing and control of individuals through the presumption of release. The prevailing risk mentality (and specifically the aversion to risk), however, appears to have usurped the legislated intent of the Act. Instead of the state withdrawing, it seems to be increasing the magnitude and scale of its control over individuals, a fact demonstrated by the rising number of people being held in remand. That being said, while more people are being held and the bail process is taking longer, there seems to be an increase in
the use of sureties, the most onerous form of release short of a cash deposit. Releasing an accused into the custody of a surety is indicative of efforts to ‘responsibilize’ individuals by having them take over the control that would otherwise have been exercised by the state. Despite the appearance of increased intervention, the state is looking to responsibilize individuals and off-load the responsibility of regulating and surveilling accused in the community onto private citizens.

Rose (1997) argues that since we are bad at making accurate and reliable predications about future behaviour, we are erring on the side of excessive caution (3). This hyper-vigilance and concern leads to overly cautious decision making and intrusive interventions into people’s lives for the sake of pursuing an unattainable assurance of safety. In the quest for security, the managing of the potentially risky has become the cornerstone of risk reduction strategies. In such a world, calculations of what may happen tomorrow inform all decisions made today. In this way, risk thinking in the context of bail is not merely an option, it is an obligation. Rose (1997) suggests imperfect predictions of risk are conceptualized as a failure of the assessment and management of risky people and jeopardise the safety of the community (9). In this context it is understandable that risks to the community are prioritised over the rights of accused to reasonable bail. The imperative of risk minimisation heightens the fear of making an inaccurate prediction and putting the public at risk. This translates into an increased use of remand detention as each actor shies away from making the release decision and increases the use of ordinary citizens to reduce institutional risk related to those who are released.
Conclusion

There is an overwhelming tendency for a culture of risk management to exacerbate process (Power 2004: 13). In the context of bail, risk management has come to prolong the bail court process. The assessment of primary risk, the risk the individual poses to the community, is the legitimate, legislated function of the bail court. Secondary risk management, however, appears to have contaminated the bail process. The fixation with managing risks posed to the criminal justice system and the over-cautiousness of criminal justice professionals has significantly impacted the efficient and proper functioning of the bail court. In being concerned about the risk to their reputation, each actor along the process has become increasingly uneasy about making the bail decision. This reluctance has increased the number of bail appearances it takes to process a case, which has resulted in an appreciable increase in the remand population.
Chapter 5
The Criminal Offence of Entering Any Shoppers Drug Mart in Ontario: Criminalizing Ordinary Behaviour with Youth Bail Conditions

Introduction

This paper examines the disjuncture between the bail provisions that apply to youths (that are contained in the Criminal Code of Canada and the Youth Criminal Justice Act (YCJA)) and the manner in which bail is being used for youths and imposed by justices of the peace in Ontario. It presents evidence supporting the conclusion that conditions of release that are routinely imposed are often inconsistent with the relevant legislation.

Legislative Framework

Consistent with the presumption of innocence is the presumption that accused young persons should be released on bail prior to their trial. After being arrested, an accused young person who is not released by the police must, under Canadian law, be brought before a justice to

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65 In Ontario, unlike some other provinces in Canada, bail hearings are generally heard by justices of the peace rather than youth justice court judges. In Ontario, justices of the peace are not necessarily legally trained. It has been noted that the YCJA is a complex Act, which sought a shift in the way youth justice was approached in Canada. While supported by the social science research, this shift may run counter to the views of many untrained adults, making the Act difficult to apply. It has been suggested that the lack of legal training, coupled with the Act’s complexities, may make it difficult for justices of the peace to apply the legislation as intended.
determine whether detention is necessary. Although there is a specific list of exceptions, the rule in law is that the Crown must ‘show cause’ (s. 515(1) of the Criminal Code) why the accused young person should not be released. If the justice is not convinced that the accused young person should be detained, the young person is to be released without a surety and without conditions. Five types of release are listed in s. 515(2) starting with the accused young person ‘giving an undertaking with such conditions as the justice directs’ (s.515(2)(a)). Section 515(2)(c) involves the accused young person ‘entering into a recognizance … with sureties … without the deposit of money’. Perhaps the most important symbolic aspect of this list is that s.515(3) states that “[t]he justice shall not make an order under any of the paragraphs 2(b) to 2(e) unless the prosecution shows cause why an order under the immediately preceding paragraph should not be made”. Said differently, there is a presumption in favour of less onerous conditions of release in cases in which release is justified.

Hence, the Criminal Code clearly stipulates a ladder approach be used when determining the form a bail release order will take. This means the least onerous form of release is to be presumed appropriate—a release on an undertaking without conditions—unless the Crown can show cause as to why a more onerous form of release is warranted (s.515(1))

67. According to this approach the justice is to consider the next rung on the ladder only after the previous form of release has been deemed inappropriate (s.515(3))

68. For example, the justice must decide that a release on the accused’s own recognizance without deposit and without a surety is not sufficient

66. A surety is generally a family member, who indicates a willingness to pay the court a specified amount of money if the accused young person fails to appear in court or violates a condition of his or her release.

67. See s. 515(2) for the possible forms a bail release can take.

68. The exception to this approach occurs in those circumstances which are referred to as ‘reverse onus’ in which the legislation indicates that the accused young person must show cause why he or she should be released. However, under the soon to be in force new s.29(3) of the YCJA, the onus of proof will now always be on the Crown to justify pre-trial detention.
to ensure the accused will return to court and not commit further offences before considering a recognizance with a surety.

The principles and provisions of the YCJA override those found in the *Criminal Code*. Though the basic principles and procedures of youth bail are governed by s.515 of the *Criminal Code*, additional protections and considerations are stipulated within the YCJA that supersede any sections of the *Criminal Code* that are inconsistent with them (s.28 of the YCJA). Indeed the Preamble of the YCJA outlines the Act’s guiding principles and indicates youths have “special guarantees of their rights and freedoms” and stipulates that the criminal justice system is to exercise restraint in the use of custody by reserving “its most serious intervention for the most serious crimes and reduc[ing] the over-reliance on incarceration for non-violent young persons”.

One limitation on the use of pre-sentence detention for youths is contained in, s. 29(1) which establishes that “A youth justice court judge or a justice shall not detain a young person in custody prior to being sentenced as a substitute for appropriate child protection, mental health or other social measures”. Section 29(2) states that “In considering whether the detention of a young person is necessary for the protection or safety of the public...a justice shall presume that detention is not necessary...if the young person could not, on being found guilty, be committed to custody”. 69 The legislation also provides an additional option for fashioning a release for youths who may otherwise be detained; s.31(1) states “A young person who has been arrested may be placed in the care of a responsible person instead of being detained in custody...”. 70

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69 See s. 39(1) of the YCJA for limitations on the use of custodial sentences for youths. The Nunn Commission (2006) was established to inquire into the circumstances surrounding the release decision of a young person who, while on bail, was responsible for a fatal car crash. In addition to raising concerns about the ability of the court to detain a young person in pre-trial detention due to the restrictions in s.39 of the YCJA, the Commission also raised concerns about young people committing offences while subject to a bail order.

70 A responsible person is someone who according to s.31(1)(b) is willing and able to take care of and exercise control over the youth. Section 31(3)(a) further stipulates that the responsible person must undertake in writing to
Together, these sections of the YCJA suggest custody for youths must be employed with restraint and additional efforts are to be made to ensure youths are not detained unnecessarily in pre-trial custody.

Despite the legally mandated ladder approach outlined in the *Criminal Code* along with the presumption against detention and the additional protections provided for youths in the YCJA, being released on bail without a surety and without conditions is, as we will see, a relatively rare occurrence in the courtrooms observed for this study. Having a surety in order to secure release has become common practice for adults in some Ontario courts, a convention that was, arguably, not envisioned by the *Criminal Code* and is almost certainly not consistent with it (Myers 2009). Most youths released on bail—at least in Toronto—have conditions they must comply with while they are in the community. Conditions of release are often recommended by the Crown and imposed by the justice of the peace to constrain youths’ behaviour while they are on bail. However, considering the relevant sections of the *Criminal Code* (s.515(10)) any condition imposed should address the ground(s) in relation to which youths might have otherwise been detained. This means conditions are supposed to be designed to ensure youths appear in court, do not commit any further offences or do not interfere with the administration of justice. Indeed, Trotter (2010) suggests that care must be taken in the selection of conditions to ensure they fulfill these stated purposes. Consistent with the presumption of innocence, bail is “take care of and to be responsible for the attendance of the young person in court when required and to comply with any other conditions” the court specifies.

71 With a few exceptions, the *Criminal Code* ‘bail’ sections apply to youths in the same way that they apply to adults.

72 Youths and adults in Toronto are relatively rarely released without a named surety. This is also true for adults elsewhere in Ontario (Myers 2009). It seems likely that on this dimension youths and adults are treated in a similar fashion, at least in Ontario where Myers (2009) has data. This, however, may not be the case in other provinces.
designed to be as burden-free as possible while also ensuring youths appear in court and do not continue offending. This means conditions “ought to be approached with restraint and should only be imposed to the extent that they are necessary to give effect to the criteria for release” (Trotter 2010: 241).

Accused young people may be subject to release conditions for a considerable period of time, a reality that is inconsistent with one of the principles of the YCJA. Section 3(b)(iv) of the YCJA emphasizes the importance of “timely intervention that reinforces the link between the offending behaviour and its consequences”. Across Canada in 2008/2009 the median time to process a youth case (from the first court appearance to sentencing) was 119 days (Milligan 2010). Though 52% of cases were processed in four months or less, eight percent took longer than a year to reach case completion and only nine percent of cases were completed on their first appearance (Milligan 2010). In addition, research in one Toronto courtroom revealed youths had an average of six bail conditions placed on them, with the vast majority receiving relatively broad conditions such as “obey the rules of the house”, curfews, requirements to live at a specific location and non-communication orders (Sprott and Doob 2010). As found by Sprott and Myers (2011) the combination of many conditions placed on youths and being on bail for a long period of time contributes to youths’ likelihood of breaching a court order.

Although conditions of release should infringe on the liberty of young people as minimally as possible while serving the functions we have just described, Section 515(4) of the Criminal Code provides little explicit guidance on the number and type of conditions that can be

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73 Section 515(10) of the Criminal Code outlines three grounds on which detention may be justified: the primary grounds involves ensuring the accused young person returns to court, the secondary grounds considers the safety of the public and likelihood the accused young person will commit further offences if released and the less frequently used tertiary grounds focuses on maintaining confidence in the administration of justice.
attached to release orders. While some standard conditions are enumerated in the *Criminal Code*, such as remaining in the jurisdiction, not communicating with the victim and notifying police of any change in address, most conditions that are routinely imposed fall under the rather vague provision that directs accused to “comply with such other reasonable conditions specified in the order as the justice considers desirable” (s.515(4)(f)). This broad discretion means a wide range of conditions can be justified under this paragraph. The difficulty is that bail conditions put youths in jeopardy of being charged with a criminal offence for doing something that is criminal only because it is prohibited by the bail conditions. Though not the legislated or perhaps the intended purpose, conditions of release are likely experienced as punishment since youths are prohibited from engaging in legal activities that are available to other youths. As Ontario Court of Appeal Justice Marc Rosenberg noted in *R. v. McDonald* with respect to pre-sentence imprisonment, “[T]o pretend that pre-sentence imprisonment does not occasion a severe deprivation and that it is not punitive would result in a triumph of form over substance….” One could equally argue we believe that conditions of release have this same characteristic, though one presumes that conditions of release are generally less punitive than custodial sentences.

Bail violations comprise a non-trivial proportion of the most serious charges in cases going to Canadian youth courts. In Canada in 2009 12.2% of all youths charged with an offence were charged with failing to comply with an order (most of the orders that were violated were bail orders since there is another offence stipulated in s.137 of the YCJA that involves failure to comply with a sentence). Furthermore, in 2009 89% of youths accused of failure to comply were criminally charged rather than dealt with by way of a formal or informal diversionary measure.

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74 While the conditions may be able to be justified they may not in fact be legal, as s.515(4)(f) should be interpreted in context. See *R. v. Shoker* (2006) 2 S.C.R. 399, 2006 SCC 44.
75 *R. v. McDonald* (1998) 40 Ontario Reports (ed) 641, 127 CCC (3d) 57 (Ont. C.A.)
In contrast, only 43% of youths recorded as being apprehended by the police for any offence were formally charged that year (Statistics Canada, Cansim, Uniform Crime Reporting Survey 2010). Repeatedly violating a condition of release “may justify detention, even if the original charge could not result in a custodial sentence” (Bala and Anand 2009: 302). Indeed, failure to comply with a condition of release almost certainly constitutes a major justification for placing youths in remand, since in 2008/2009 24% of all youth admissions to pre-sentence custody across Canada involve an administration of justice charge\(^76\) as the most significant charge\(^77\) (Porter and Calverley 2011).

Thus bail conditions are important since they are ultimately the basis of a non-trivial number of youth court cases. Though the YCJA includes a number of sections (sections 28-31) that are designed to limit the use of pre-trial detention, these provisions do not appear to have achieved this as there were more youths in custody awaiting sentencing than there were serving sentences; on an average day in 2009/2010, 957 youths were in remand in Canada while only 836 youths were in custody serving a sentence (Porter and Calverley 2011).

\(^76\) Generally speaking this charge, as well as failure to comply with a disposition (typically a breach of a probation condition), constitute the two main administration of justice charges in Canada.

\(^77\) Section 39(1) of the YCJA identifies restrictions on the use of custody for youths. Interestingly, the YCJA prohibits detention on the secondary grounds for breaching a court order alone, but it could be used as evidence, perhaps, justifying detention on the primary grounds. That said multiple convictions for breaches of a court order may result in detention if the youth were also charged with an offence for which an adult could be given a sentence of more than 2 years. It is unclear what factors outside of the charge(s) before the court contributed to these youths being detained.
Previous Research

There is relatively little research that explores issues surrounding bail for youths and most of what does exists focuses on how the release decision was made and what factors predicted detention under the Young Offenders Act (e.g. Gandy 1992; Kellough and Wortley 2002; Varma 2002; Moyer and Basic 2004; Moyer 2005).

We know from a detailed study of bail conditions imposed by justices of the peace presiding in a large Toronto courthouse that large numbers of separate conditions were imposed on youths in almost all cases (Sprott and Doob 2010). Sprott and Doob (2010) found that most youths (73%) were released with a surety and youths had an average of six conditions attached to their release. The most common conditions imposed were residence requirements (90.7%), being required to obey the rules of the home (86.7%), not communicate with certain specified individuals (71.3%), not possess any weapons (66.3%), abide by a curfew (58.8%), not attend at certain locations (57.0%), and being required to attend school (41.9%) (433-436). Some of the conditions placed on youths appeared to have a logical link to the alleged offence and to plausibly reducing danger to the public, given the nature of the alleged offence. Though Sprott and Doob (2010) looked at the relationship between conditions and the actual charges, the bail orders they had access to did not contain the details of the cases. Hence in terms of understanding what the relationship is between a condition (e.g. a curfew) and the actual offence, this cannot be done by looking at the bail orders alone. Since bail orders typically contain only the original charge and the conditions associated with the release, one cannot determine if the logic behind the condition makes sense. For example, on the surface, it may seem strange to see curfews put on youths charged with minor thefts committed during the day, but perhaps the logic would be stronger if the youth showed a clear pattern of stealing at night. Furthermore, we know
almost nothing about the manner in which conditions are imposed—are they routinely imposed with the consent of the Crown (which can be problematic in these circumstances since accused youths may believe, correctly or not, that if they do not consent they will be detained) or as a result of a show cause hearing?

This paper examines the exact nature of the conditions of release imposed on youths by justices of the peace in four Toronto area courts, in relation to the actual facts of the case, as made available to the justice of the peace imposing the conditions. The question being addressed is a simple one: do the bail conditions imposed on youths relate, logically, to the goal of the bail process— to ensure that the youth appears in court and does not, while on release, commit further offences?

Methodology

Court observations were carried out in four Toronto-area courtrooms presided over by justices of the peace. The findings of this study are limited to the four courts observed. The authors caution against generalizing these findings to other courts in Ontario or elsewhere in Canada as this study only looked at bail decisions made by justices of the peace, not youth justice court judges; it is unclear how widespread the use of justices of the peace is for youth bail decisions elsewhere in the country.

Attending court was the only method through which this type of information could be obtained, as official documents contain little more than formal decisions and the charge or charges that the youth was facing. However, courtroom observation had an important advantage over other forms of data collection: we had access to the same information about the offence that
the justices of the peace had when they imposed these conditions on youths. We used a uniform data sheet for routine data collection on such variables as the type of counsel present, the onus, the details of the charges and criminal record as discussed in open court, the case outcome for the day and if a parent was present. The authors were unable to attain access to the docket that listed the charges before the court, the youth’s criminal records, or their bail orders. Thus the data collected comprised only that which was read aloud in court; this may or may not include the information listed above. The authors acknowledge the importance of a criminal record in making the bail release decision and the impact the presence of a record may have on the types 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 of the peace to accept the proposed release (including the conditions of release) or to release youths after a show cause hearing. The Crown may discuss the details of the criminal record in consent releases; however the criminal record was rarely reviewed by the justice of the peace. It was, however more common in show cause hearings for the youth and the justice of the peace to review the details of the criminal record. The details of the criminal record were only available to the researcher to the extent that 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.

We also took extensive notes on the way in which issues were discussed in court to provide a more detailed understanding of the how youth bail was approached. 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 youth 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 were documented.

After all of the data were collected for the study, we coded each individual condition as having a ‘clear connection’, an ‘ambiguous connection’ or as having ‘no apparent connection’ to the facts of the case and/or grounds for detention. The guiding principles of the analysis was the assumption that conditions of release should normally relate to the facts of the alleged offence and they should address the risk of the youth not returning to court or committing a further offence. We defined a ‘clear connection’ as the condition being clearly related to the offence or grounds for detention, an ‘ambiguous connection’ as a condition for which one could make a reasonable argument in support of there being a connection to the offence or the grounds for detention and ‘no apparent connection’ as having no clear connection to the offence or grounds for detention. We also created rules to be used when coding the most common conditions; these are listed in Table 1. We discussed any unusual conditions until agreement was reached on the most suitable way to code the conditions so as to ensure consistency in coding.
<table>
<thead>
<tr>
<th>Condition</th>
<th>Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td>Residence conditions</td>
<td>Ambiguous connection- legitimate for the court to want to know where the youth is living, assists with surety supervision</td>
</tr>
<tr>
<td>Be amenable to the rules of the home</td>
<td>No apparent connection- overly vague in that rules of the house could include behaviours that had nothing to do with court concerns regarding showing up for court, not committing further offences, etc.</td>
</tr>
<tr>
<td>No drugs/alcohol</td>
<td>Clear connection-if drugs/alcohol were involved in the offence. No apparent connection - if otherwise.</td>
</tr>
<tr>
<td>Weapons prohibition</td>
<td>Clear connection- if weapons were involved in the offence. Ambiguous connection- if the case involved violence or the threat of violence without the use of a weapon. No apparent connection- if otherwise.</td>
</tr>
<tr>
<td>Attend school</td>
<td>Ambiguous connection- if repeatedly committing offences during school hours and the youth is not in school. No apparent connection- if otherwise</td>
</tr>
<tr>
<td>Attend counselling</td>
<td>No apparent connection – in large part because courts had no expertise to determine that counselling was needed and had, at that point, no expert assessment of the youth.</td>
</tr>
<tr>
<td>Curfew</td>
<td>Ambiguous connection - if the offence occurs at night. Clear connection- if repeatedly committing at night No apparent connection -if there was no evidence that the offence took place in the evening.</td>
</tr>
<tr>
<td>Boundary Conditions</td>
<td>Clear connection- if condition prohibits attendance at the address of the offence or not to be 100m of the address. Ambiguous connection- if boundary is in excess of 100m</td>
</tr>
<tr>
<td>Not apply for a firearms acquisition certificate (FAC)</td>
<td>No apparent connection -unless a firearm was involved in the offence</td>
</tr>
<tr>
<td>Not possess break and enter instruments</td>
<td>Clear connection- if found with instruments on arrest. Ambiguous connection- otherwise since this condition is overly vague</td>
</tr>
</tbody>
</table>
| Not possess any cell phone                    | Ambiguous connection- in offences involving drug dealing or
<table>
<thead>
<tr>
<th>etc.</th>
<th>computer based offences.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No apparent connection- if otherwise</td>
</tr>
<tr>
<td>Notify change of address</td>
<td>Clear connection- if there is a curfew or house arrest condition.</td>
</tr>
<tr>
<td></td>
<td>No apparent connection- if there is not a curfew or house arrest condition.</td>
</tr>
<tr>
<td>Keep the peace</td>
<td>No apparent connection- overly vague (see ‘rules of the home’ above)</td>
</tr>
<tr>
<td>Carry bail papers</td>
<td>No apparent connection</td>
</tr>
<tr>
<td>House arrest</td>
<td>Ambiguous connection- if there are a number of serious offences or the offence involved a firearm</td>
</tr>
</tbody>
</table>

**Results**

We observed a total of 199 youth bail cases across the four courts that determined bail in the Toronto area; all of these courts were presided over by a justice of the peace. As can be seen in Table 2, these cases were fairly equally distributed across the four courts. The 199 cases we observed were not necessarily unique cases; it is possible that some youths were seen on more than one occasion. Half of the cases we saw were simply adjourned to another day. Another 42% were released on the date that we saw them. Only a small proportion (3.0%) of the cases we observed had their bail denied. The remaining cases were traversed to another courtroom\(^78\), had an existing bail order modified or in one case the outcome was not clear.

\(^{78}\) This might be done for a range of different reasons, the most common being to plead guilty or in some cases, for a full (contested) ‘show cause’ hearing to determine whether the youth should be released.
Table 2: Descriptive Statistics

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases observed</td>
<td>199</td>
</tr>
<tr>
<td>Days of court observation</td>
<td>32 (mostly full days)</td>
</tr>
<tr>
<td>Proportion of cases from each court house</td>
<td></td>
</tr>
<tr>
<td>Court 1</td>
<td>24.1%</td>
</tr>
<tr>
<td>Court 2</td>
<td>20.1%</td>
</tr>
<tr>
<td>Court 3</td>
<td>31.2%</td>
</tr>
<tr>
<td>Court 4</td>
<td>24.6%</td>
</tr>
<tr>
<td>Daily Outcome for all cases observed</td>
<td></td>
</tr>
<tr>
<td>Adjourned</td>
<td>49.2%</td>
</tr>
<tr>
<td>Released</td>
<td>41.7%</td>
</tr>
<tr>
<td>Detained</td>
<td>3.0%</td>
</tr>
<tr>
<td>Traverse/bail variation/missing</td>
<td>6.0%</td>
</tr>
<tr>
<td>Type of defence counsel</td>
<td></td>
</tr>
<tr>
<td>Duty counsel</td>
<td>69.8%</td>
</tr>
<tr>
<td>Private counsel</td>
<td>29.6%</td>
</tr>
<tr>
<td>Released with the consent of the Crown</td>
<td>80.7%</td>
</tr>
<tr>
<td>(n=67 of the 83 who were released)</td>
<td></td>
</tr>
<tr>
<td>Number of show cause hearings</td>
<td>n= 23</td>
</tr>
<tr>
<td>(11.6% of cases observed)</td>
<td></td>
</tr>
<tr>
<td>Result of show cause hearing</td>
<td></td>
</tr>
<tr>
<td>Released (n=16)</td>
<td>69.6%</td>
</tr>
<tr>
<td>Detained (n=4)</td>
<td>17.4%</td>
</tr>
<tr>
<td>Adjourned (n=3)</td>
<td>13.0%</td>
</tr>
</tbody>
</table>

To determine if there was a significant difference in the way the courts resolved cases on an average day, we re-coded the outcomes so as to compare ‘release’ with all other outcomes\textsuperscript{81}.

\textsuperscript{79} In these cases the youth’s release was (unsuccessfully) contested by the Crown in a show cause hearing (in which the Crown attempted to show cause as to why the youths should be detained rather than released on bail. In some cases the onus is on the accused young person to demonstrate why he or she should be released on bail; this is known as a reverse onus bail hearing. The onus is on accused young people if they were already on a bail release when they committed the alleged offence. The onus is also reversed in certain specified offences.

\textsuperscript{80} In three of these four cases the issue of a responsible person was raised.
Though there was some variability in the proportion of cases that were released across the four courts this difference was not statistically significant (chi square= 6.316, df= 3, p= .097). Said differently, the courts we observed were relatively consistent in how they resolved youth bail cases.

**Form of Release**

Once a release decision is made, the justice has options on the form the release order will take. Youths can be released on their own undertaking or recognizance, a promise to the court that they will return to court with an acknowledged indebtedness to the Crown for failure to appear, and a promise to comply with any conditions that are imposed. Youths can also be released to a surety or a responsible person\(^82\) or to a bail supervision or verification program (in the four Toronto-area courtrooms these were run by a not-for-profit community organization).\(^83\)

A surety release was, in this study, the most common form of release: 86.7\% (n=72) of the youths released were released to a surety. This finding is consistent with what has been seen in the adult courts in and around the City of Toronto (Myers 2009). While releasing most youths

\(^81\) Note that this analysis includes the 12 cases in which the outcome was “miscellaneous”.  
\(^82\) See footnote 7 for further explanation of the ‘responsible person’.  
\(^83\) In four Toronto-area courts, the bail programs offer supervision in the community for youths who do not have a surety available and may otherwise have been detained. Typically recommendations to the court on conditions that should be imposed are made by those responsible for the bail program; these conditions are generally imposed in addition to other conditions the court deems necessary. Bail programs are unable to provide direct supervision in the same way a surety can. However, the programs typically do require youths to report regularly and they work with youths to ensure they attend their court dates and comply with their conditions of release. Bail programs are also in a position to connect youth with services in the community and can make arrangements for programs and counseling as required.
is consistent with the *Criminal Code’s* presumption of release, the YCJA’s Declaration of Principles and s. 29(1) and s.29(2)\(^84\), the vast majority were released to a surety, one of the more onerous conditions that can be placed on a release order. It seems that a court culture or convention has developed that routinely presumes the need for a surety in these four courts. An examination of a few case examples makes it is clear that neither the Crown nor justice of the peace – at least visibly in court – went through the exercise of considering the less onerous forms of release before deciding that a surety with conditions was required for the youths to secure release.

**Case 1:** Three male youths were co-acused. The Crown indicated they had no record or outstanding offences. The Crown then indicated that their sureties were in court and this was a consent release.

**Case 2:** Duty Counsel requested an adjournment of the case so that the accused’s own defence counsel could attend. The justice of the peace (JP) asked the youth if he knew of anyone who could be his surety and to let duty counsel know so that the accused or the accused’s lawyer could call these potential sureties. The youth asked if he could have his bail hearing today. The

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\(^84\) In considering whether the detention of a young person is necessary for the protection or safety of the public under paragraph 515(10)(b) (is there a substantial likelihood that the accused will commit an offence or interfere with the administration of justice) of the *Criminal Code*, a youth justice court or a justice shall presume that detention is not necessary under that paragraph if the young person could not, on being found guilty, be committed to custody on the grounds set out in paragraphs 39(1)(a) to (c) (restrictions on committal to custody).
JP said “no, your counsel wants to be here and besides, you have no one here to be your surety”. Note that no evidence had been called and the ‘need’ for a surety had not been established\(^{85}\).

*Case 3*: Male youth, first appearance. Justice of the peace (JP) asked if this was a surety bail (before any evidence was called). Defence counsel indicated that it was. The Crown noted the accused had no record and was on release for an outstanding offence. The Crown indicated this was a consent release with a named surety.

In most of the observed consent releases the Crown proposed a surety release to the justice of the peace without any mention of the appropriateness of releasing the youth on his or her own recognizance. This would appear to be contrary to s. 515(3) which states that “The justice shall not make an order under any of paragraphs (2)(b) to (e) unless the prosecution shows cause why an order under the immediately preceding paragraph should not be made.” Releasing an accused with a surety is paragraph (c). The same can be seen in some show cause hearings where immediately following the reading in of the allegations defence counsel calls the proposed surety to the stand to give evidence on the plan of release and his or her ability to supervise the accused.

There seems to be an assumption that a surety is required in order for youths to secure a release order. In addition to the burden this creates for youths in the community, requiring a

\(^{85}\) Unfortunately in this case the onus and charges were not mentioned. The authors realize this information may be guiding the justice of the peace’s comments. That said, this example still demonstrates how quickly the court assumes a surety is required even before *any* evidence has been called.
surety may create other issues in the home since parents are the most likely people to step forward to act as a surety. Recall that 86.7% (n=72) of youths released were released to a surety. Almost 67% of proposed sureties were the youths’ mothers, and an additional 22% were their fathers. The remaining youths had other familial relations offer themselves as sureties, with the exception of one whose spiritual leader acted as the surety.

Since sureties can recuse themselves (ask to be removed) at any time and for any reason, the surety effectively has the power to have the youth re-arrested. Conditions of release are often crafted in such a way so as to give even broader powers to sureties. For example, the rather vague and far-reaching condition requiring youths to “obey the rules of the home” was routinely imposed. The commonality of this condition was particularly interesting in light of court decisions that have, in the context of a probation order, found this condition to be an unlawful delegation of authority as well as unreasonably and unnecessarily vague. In R. v. F. (A.)86 Justice Nasmith in dismissing the charges against the youth stated at paragraph 12 that this condition “…attempts to give a third party the authority to determine the type of punishment as well as the extent of punishment. At the same time the third party is, of course, being authorised to define what type of behaviour will be considered criminal conduct in the future- what will constitute chargeable criminal behaviour”87. This condition while clearly intended to assist sureties (e.g., parents) in controlling youths, also has broad potential to be abused. The wording is vague enough that if youths fail to make their beds when told to do so they could be re-arrested and charged with a criminal offence. This is supported by Justice Nasmith in paragraph 26 where he questioned “…the wisdom of softening the boundaries of criminality in the hope of

87 There is, however, conflicting authority on this issue, see R. v. D. (J.A.), [1998] S.J. No. 862 (Saskatchewan Provincial Court) and R. v. K.(C.), [2006] O.J. No. 4477 (Ontario Superior Court.).
bolstering the effectiveness of parenting….I would fear that to bring generalized and vague ideas of youth disobedience (unspecified house rules, etc.) into the realm of criminal procedure, is to trivialize and dilute a procedure that is designed for defined offences”.

*Conditions of Release*

Returning to the 83 cases in which a release order was granted we now consider the number and type of conditions that were imposed. Of the 83 cases that were released, we do not know the number of conditions imposed in eight cases. For the remaining 75 cases, on average 9.4 conditions were imposed (median of nine) with a range of zero to 23 conditions. There was significant (F= 14.2, df=3, p< .001) variation in the average number of conditions across the four courts. Though most youths were released with fewer than 10 conditions, over 41% had more than 10 conditions attached to their release.

In an effort to understand the factors that were related to the number of conditions imposed, we considered the most serious offence in the case, the number of charges in the case, whether or not the youth was subject to a previous release and whether or not the youth had a criminal record. As can be seen in Table 3 below, the number of conditions imposed on the youth was related to the most serious offence in the case and the number of charges in the case.

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88 Also see *R. v. F.(P.F.)*, [1987] W.D.F.L. 814 (Ontario Provincial Court) and *R. v. Doiron* [1973], 9 C.C.C (2d) 137 B.C.S.C.
The number of conditions imposed on the youth was not related to whether youths had a previous release order in place or had a criminal record.\textsuperscript{89}

\textsuperscript{89} That said, the criminal record would indicate the number of times an undertaking, recognizance or sentence order was breached. This information may influence the decision to release and the number of conditions imposed; unfortunately we did not have detailed information about the content of the criminal record.
**Table 3: Predictors of the Number of Conditions Imposed**

<table>
<thead>
<tr>
<th>Independent Measure</th>
<th>Independent Variable</th>
<th>Mean Number of Conditions Imposed</th>
<th>Statistical Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Most serious offence (n=68)</td>
<td>More serious violence (n=22)</td>
<td>10.95</td>
<td>F=3.11 df=4, 63, p=.021</td>
</tr>
<tr>
<td></td>
<td>Less serious violence (n=18)</td>
<td>7.17</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Property (n=7)</td>
<td>9.00</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Drugs (n=5)</td>
<td>7.40</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Administration (n=16)</td>
<td>6.38</td>
<td></td>
</tr>
<tr>
<td>Number of charges (n=56)</td>
<td>1 (n=27)</td>
<td>5.74</td>
<td>F= 9.09, df=3, 52, p&lt;.001</td>
</tr>
<tr>
<td></td>
<td>2 (n=14)</td>
<td>7.71</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3 (n=7)</td>
<td>8.42</td>
<td></td>
</tr>
<tr>
<td></td>
<td>4 or more (n=8)</td>
<td>14.00</td>
<td></td>
</tr>
<tr>
<td>Previous release order in place (n=70)</td>
<td>Currently on release (n=36)</td>
<td>8.89</td>
<td>F=0.95, df=2, 67, p=.391</td>
</tr>
<tr>
<td></td>
<td>Not currently subject to any court order (n=31)</td>
<td>10.77</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Currently subject to a peace bond (n=3)</td>
<td>10.67</td>
<td></td>
</tr>
<tr>
<td>Criminal record (n=56)</td>
<td>Had a criminal record (n=14)</td>
<td>7.79</td>
<td>F=2.17, df=1, 54 p=.147</td>
</tr>
<tr>
<td></td>
<td>Did not have a criminal record (n=42)</td>
<td>10.45</td>
<td></td>
</tr>
</tbody>
</table>

*the above 'n' represent the number of youth for whom the independent variable was known as well as the total number of conditions imposed.*
Types of Conditions

Section 515(4) of the Criminal Code addresses the conditions that may be placed on release orders. Most of the enumerated conditions deal directly with ensuring accused return to court. For example, accused people may be required to report to a peace officer, remain in the jurisdiction and deposit their passports. There are two enumerated conditions that specifically address the secondary grounds. Section 515(4)(d) allows the justice to order that the accused abstain from communicating with the victim and s.515(4)(e.1) stipulates accused must comply with any condition the justice imposes to “ensure the safety and security of any victim or witness to the offence”. However, the Criminal Code then specifies under s. 515(4)(f), that the justice may impose any other reasonable conditions they consider desirable. What is ‘reasonable’ is not defined by the legislation 90.

The most commonly imposed conditions are listed in Table 4. For this analysis we had to exclude seven youths because they were released with the same conditions as their previous bail and one youth for whom we did not know the total number of conditions imposed. When youths were released on the same bail the justice of the peace generally did not read out the conditions, rather they simply indicated the conditions were to remain the same 91. This left us with a sample of 75 youths who were released on the date of observation. Most youths were required to live with their surety, be amenable to the rules of the home and not possess any weapons or a firearms acquisition certificate (FAC). A sizeable proportion were also required to attend school, avoid certain areas, abide by a house arrest or curfew and attend counseling.

90 See R. v. Bielefeld [1981], 64 C.C.C. (2d) 216 (B.C.S.C) where the court held “reasonable conditions” include conditions designed to prevent the commission of offences.
91 This is a peculiar practice since it may be useful to remind youths and their sureties what the conditions are, reiterate the importance of compliance and the consequences of non-compliance. In effect, it turns the court appearance into an apparently clerical or meaningless exercise.
Table 4: The Most Commonly Imposed Conditions

<table>
<thead>
<tr>
<th>Condition</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reside with surety</td>
<td>76.0% (57)</td>
</tr>
<tr>
<td>Be amenable to the rules of the home</td>
<td>84.0% (63)</td>
</tr>
<tr>
<td>Not posses any weapons or FAC</td>
<td>78.7% (59)</td>
</tr>
<tr>
<td>Attend school</td>
<td>38.7% (29)</td>
</tr>
<tr>
<td>Not attend a specified address</td>
<td>37.3% (28)</td>
</tr>
<tr>
<td>Not enter a specified boundary around a specified address</td>
<td>36.0% (27)</td>
</tr>
<tr>
<td>Curfew</td>
<td>33.3% (25)</td>
</tr>
<tr>
<td>House arrest</td>
<td>30.7% (23)</td>
</tr>
<tr>
<td>Attend counselling</td>
<td>29.3% (22)</td>
</tr>
</tbody>
</table>

Note: For this analysis we needed to exclude 7 youths who were released with the same conditions as their previous bail as their conditions often were not read out in court in full and 1 youth for whom we did not know the total number of conditions imposed. Hence the total N (of cases) on which these percents are based is 75.

We then considered the relationship of each condition to the three grounds for detention and the facts of the alleged offence. We coded each condition as having a ‘clear connection’, an ‘ambiguous connection’ or as having ‘no apparent connection’. This analysis considered the same 75 youths included in the previous analysis.

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92 To ensure inter-rater reliability we took a sample of 10 cases and separately coded all the conditions in each case and compared our ratings. On the first round we had full agreement on 70% of the conditions. We discussed the discrepancies and took another sample of 10 cases, this time we achieved 97% agreement. To ensure we maintained this level of reliability we formulated rules to follow when coding the conditions we had initially disagreed on.
Table 5: Relationship of Each Bail Condition to the Grounds for Detention and the Facts of the Case

<table>
<thead>
<tr>
<th></th>
<th>Clear Connection</th>
<th>Ambiguous Connection</th>
<th>No Apparent Connection</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reside with surety</td>
<td>0% (0)</td>
<td>100% (57)</td>
<td>0% (0)</td>
<td>100% (57)</td>
</tr>
<tr>
<td>Reside at an address approved of by the surety</td>
<td>0% (0)</td>
<td>100% (7)</td>
<td>0% (0)</td>
<td>100% (7)</td>
</tr>
<tr>
<td>Be amenable to the rules of the home</td>
<td>0% (0)</td>
<td>0% (0)</td>
<td>100% (63)</td>
<td>100% (63)</td>
</tr>
<tr>
<td>House arrest</td>
<td>4.5% (1)</td>
<td>31.8% (7)</td>
<td>63.6% (14)</td>
<td>100% (22)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>*1 missing</td>
</tr>
<tr>
<td>Curfew</td>
<td>21.1% (4)</td>
<td>21.0% (4)</td>
<td>57.9% (11)</td>
<td>100% (19)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>*6 missing</td>
</tr>
<tr>
<td>Attend at front door at police request</td>
<td>0% (0)</td>
<td>0% (0)</td>
<td>100% (5)</td>
<td>100% (5)</td>
</tr>
<tr>
<td>Not attend address</td>
<td>96.4% (27)</td>
<td>3.6% (1)</td>
<td>0% (0)</td>
<td>100% (28)</td>
</tr>
<tr>
<td>Not enter boundary around location</td>
<td>55.6% (15)</td>
<td>40.7% (11)</td>
<td>3.7% (1)</td>
<td>100% (27)</td>
</tr>
<tr>
<td>Not be in the city limits</td>
<td>0% (0)</td>
<td>0% (0)</td>
<td>100% (2)</td>
<td>100% (2)</td>
</tr>
<tr>
<td>Not attend at any [named] store in the province</td>
<td>0% (0)</td>
<td>100% (3)</td>
<td>0% (0)</td>
<td>100% (3)</td>
</tr>
<tr>
<td>Not be where victim works, lives or happens to be</td>
<td>77.3% (17)</td>
<td>22.7% (5)</td>
<td>0% (0)</td>
<td>100% (22)</td>
</tr>
</tbody>
</table>

This condition is placed on bail orders to facilitate police bail compliance checks with curfews and house arrest conditions. For these 5 youths the house arrest condition was unrelated to the facts of the case and grounds for detention, therefore the condition requiring that they attend at the front door of their residence on police request was coded as unrelated.
<table>
<thead>
<tr>
<th>Condition</th>
<th>Yes (%)</th>
<th>No (%)</th>
<th>Partial (%)</th>
<th>Total (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not be where co-acused lives, works or happens to be</td>
<td>100% (3)</td>
<td>0% (0)</td>
<td>0% (0)</td>
<td>100% (3)</td>
</tr>
<tr>
<td>Attend school</td>
<td>3.4% (1)</td>
<td>0% (0)</td>
<td>96.6% (28)</td>
<td>100% (29)</td>
</tr>
<tr>
<td>Provide surety with school schedule</td>
<td>0% (0)</td>
<td>0% (0)</td>
<td>100% (5)</td>
<td>100% (5)</td>
</tr>
<tr>
<td>Attend counselling</td>
<td>0% (0)</td>
<td>0% (0)</td>
<td>100% (22)</td>
<td>100% (22)</td>
</tr>
<tr>
<td>Take treatment/medication/see doctor</td>
<td>0% (0)</td>
<td>0% (0)</td>
<td>100% (12)</td>
<td>100% (12)</td>
</tr>
<tr>
<td>Sign medical releases to release all medical records to a surety*94</td>
<td>0% (0)</td>
<td>0% (0)</td>
<td>100% (21)</td>
<td>100% (21)</td>
</tr>
<tr>
<td>Not communicate with victim</td>
<td>100% (50)</td>
<td>0% (0)</td>
<td>0% (0)</td>
<td>100% (50)</td>
</tr>
<tr>
<td>Not communicate with co-acused</td>
<td>100% (34)</td>
<td>0% (0)</td>
<td>0% (0)</td>
<td>100% (34)</td>
</tr>
<tr>
<td>Not communicate with anyone with a criminal record/from school</td>
<td>0% (0)</td>
<td>0% (0)</td>
<td>100% (7)</td>
<td>100% (7)</td>
</tr>
<tr>
<td>Not possess drugs/alcohol</td>
<td>68.8% (11)</td>
<td>18.8% (3)</td>
<td>12.5% (2)</td>
<td>100% (16)</td>
</tr>
<tr>
<td>Not possess cell phone, internet, computer etc.</td>
<td>0% (0)</td>
<td>75% (3)</td>
<td>25% (1)</td>
<td>100% (4)</td>
</tr>
<tr>
<td>Not possess weapons or FAC</td>
<td>60.3% (35)</td>
<td>25.9% (15)</td>
<td>13.8% (8)</td>
<td>100% (58)</td>
</tr>
<tr>
<td>Keep the peace</td>
<td>0% (0)</td>
<td>0% (0)</td>
<td>100% (12)</td>
<td>100% (12)</td>
</tr>
</tbody>
</table>

*94 This would be done, for example, if counseling had been required.
Overall, 40.7% of conditions imposed had no apparent connection, 21.5% had an ambiguous connection and 37.8% had a clear connection to the allegations or grounds for detention. This indicates a tendency for the justice of the peace to impose conditions without considering the relationship between the condition and the grounds for detention and facts of the case. This is interesting given that conditions necessarily involve restrictions on the accused and, as a consequence, are likely in many instances experienced as punishment. If conditions were conceptualized as punishment the judge would be required to justify their purpose and relevance as is the case at sentencing. For example, issues of proportionality (of the punishment to the offence) would arise. In the case of conditions connected to bail orders, one can envision the possibility that there might be a requirement that the intrusion into a person’s liberty be the least restrictive necessary to accomplish a legitimate purpose (e.g., appearing in court and not committing offences). In reality, however, no one was required to justify the suitability of
conditions or the infringement of liberty they involve. This was particularly so given that 81% (n=67 of 83) of the youths who were released were released with the consent of the Crown, rather than after a contested show cause hearing.

It could be argued that because the conditions were consented to by the accused, other principles do not apply. Such a position ignores two points: these conditions are, in fact, imposed by a justice of the peace who is not required to accept the Crown’s recommendations and accused young people may well accept conditions because the alternative – not being released at all – is a risk they are unwilling to take. Also, as mentioned above, there is also some question about the legality or jurisdiction to order some of the conditions, for example ‘obey the house rules’.

The justice of the peace did not appear to exercise much restraint in the number and scope of conditions routinely imposed. Indeed, it seems the justices were making liberal use of the Criminal Code provision that allows justices to impose any condition that they deem reasonable and justified. The only conditions that routinely had a ‘clear connection’ to the grounds for detention and the facts of the alleged offence were those that dealt with prohibiting contact with the victim or the co-accused.

While it is clearly understandable why the justice of the peace would take measures to protect the victim, prohibiting contact with the co-accused is more problematic. The argument could easily be made that prohibiting contact is related to preventing the accused from offending since we know that youths tend to commit offences with their friends. It can also be argued that prohibiting contact prevents co-accused from arranging their stories prior to trial. That said, prohibiting youths from associating with their best friends because they got in trouble once together is liable to result in a breach. An additional problem arises when one considers that
youths were on bail for an average of four months, a lengthy period of time to have to comply with such restrictive conditions. A single failure to comply with a single condition could lead to another criminal charge even though a youth may have generally complied with the conditions of release. This leads to a greater concern expressed by Bala and Anand (2009) who caution that “While a failure to comply with the conditions may not pose any threat to the safety of society, if there are breaches of conditions of release and charges laid for these, there may be a spiralling of charges” (311).

Conditions coded as having an ‘ambiguous connection’ provide a very conservative estimate of the relevance of the imposed condition; if one could have made a reasonable argument for the condition it was coded as such. The difficulty is it was exceedingly rare for anyone to argue against a condition in court; the justice of the peace simply accepted the recommendation of conditions from the Crown. There was seldom a discussion of the proposed conditions and their relation to the grounds for detention and the facts of the alleged offence. This means that youths were not provided with any justification for the conditions by the justice; all they were told was they were required to comply with them. Given the choice for an accused youth is to accept the conditions or take the chances of being detained until trial after a show cause hearing, it is not surprising that questions about the appropriateness of conditions would not be raised. It seems defence counsel and the accused young person (on advice from counsel) did not want to gamble an accused’s liberty by challenging proposed conditions when the Crown had already consented to his or her release95.

95 The YCJA does provide youths with the option of having a release order imposed by a justice of the peace reviewed by a youth justice court judge. According to Section 33(1) If an order is made under section 515 (judicial interim release) of the Criminal Code in respect of a young person by a justice who is not a youth justice court judge, an application may, at any time after the order is made, be made to a youth justice court for the release from
A number of conditions attached to release orders had no ‘apparent connection’ to the grounds for detention or the allegations of the offence. As can be seen in Table 5 the justice of the peace often imposed conditions that required youths to attend school, attend counselling, be under house arrest or a curfew and abide by the rules of the home. It seems the Crown and justice of the peace were using conditions to control conduct they saw as undesirable rather than reducing the likelihood of future criminal behaviour. In effect, the justice was attempting to arm sureties (typically parents) with tools to constrain youths’ behaviour with the threat of criminal sanction for non-compliance. Indeed, it was not uncommon for the Crown, justice of the peace or defence counsel to ask sureties if there were any other conditions they would like to have the court impose to help them control the behaviour of the youth.

Case Examples

To more clearly demonstrate the disjuncture between the conditions imposed and the legitimate purpose(s) conditions might play, it is useful to consider some examples of cases we observed.

Case 1: It was alleged that at 11:00 a.m. the accused, accompanied by friends, robbed the victim by punching him in the face a number of times and demanding his iPod (value $150) and school chain (value $100). There was no mention of a criminal record but the youth was on release for or detention in custody of the young person, as the case may be, and the youth justice court shall hear the matter as an original application.
a robbery charge for attempting to rob another youth of one dollar and for an assault charge stemming from a school yard fight. Both outstanding charges were over one year old. During defence questioning, the youth’s father requested that the court impose conditions that he enroll in anger management, attend guidance counselling, get a job, attend school, attend church more frequently and enroll in Freedom Village (a home for troubled teens). After a show cause hearing the youth was released on a $3,000 surety bail with his father to act as his surety. The conditions were as follows: reside with surety; abide by the rules of the home; not communicate with the victims (of the two separate offences); not communicate with three co-accused; not attend at two separate park locations; attend school with the consent of the principal; see a physician for a recommendation for anger management; attend school each and every day each and every class; contact the Children Centre for family counselling; contact the African Canadian Youth Program; and not possess any firearms.

Case 2: The 15 year old accused was charged with two counts of robbery and two counts of failing to comply with his probation order (keep the peace). It was alleged that at 11:15 a.m. at school the 15 year old accused along with six friends surrounded two youths, demanded that they empty their pockets (twenty cents and membership cards were obtained) and told them not to step into the accused’s neighbourhood. At the time of the offence the youth was not subject to any release orders but did have a criminal record. The youth had been given a conditional discharge with one year probation for possessing property obtained by crime four months earlier. After a show cause hearing, the youth was released on a $1,000 surety bail with his mother to act as his surety. The conditions were as follows: house arrest except for school, attending programming, or in the company of his surety or father; not communicate with the two victims;
not to possess any weapons; be amenable to the rules of the home; reside with his surety; attend
counselling and assessments as directed by his surety; sign any medical releases so that his
surety can monitor his progress.

Case 3: The 16 year old accused was charged with one count of theft under. It was alleged the
accused stole products worth $14.19 from a Shoppers Drug Mart. At the time of the alleged
offence, he was on release for theft and robbery; no information was put before the court
regarding a criminal record. The Crown consented to a $1,000 surety bail with his father to act
as the surety. The conditions were as follows: reside with surety; abide by the house rules; abide
by a curfew of 8:00 p.m. to 6:00 a.m. except when in the company of his surety; not possess any
weapons; not attend at the Shoppers Drug Mart location; not communicate with the victim; not
be within 100 meters of where the victim lives, works or happens to be; not attend at the school
address.

Case 4: The 16 year old accused was charged with robbery and failing to comply with his
recognizance from a common law peace bond. It was alleged he stole a bottle of vodka from the
LCBO (liquor store) and shoved the security guard. The youth was subject to a peace bond that
had been imposed one month previous for a robbery charge but did not have any outstanding
charges or a criminal record. The Crown consented to a $1,000 surety bail with his mother
acting as his surety. The conditions were the following: keep the peace and be of good
behaviour; reside with surety; abide by the rules of the home; house arrest except for school,
court or when with his surety; attend school each and every day, each and every class; sign a
release so that his mother could monitor his school attendance; not be within 100 meters of the address where the offence took place; not enter any LCBO in the province of Ontario; not possess any weapons; not possess any alcohol; and not communicate with the victim (the security guard).

Case 5: The 17 year old accused was charged with failing to comply with a condition of a YCJA sentence that he not attend at a specified mall address. The youth had one set of convictions for a number of counts but it was not specified what offences were on his criminal record. It was alleged the youth was found at the mall though he was not causing any trouble. The Crown consented to a $500 surety bail with his aunt to act as his surety with the following conditions: reside with the surety; be amenable to the rules of the home; keep the peace and be of good behaviour; not attend at the mall address; attend school each and every day, each and every class. The Crown then asked if the aunt would like any other conditions. Defence counsel suggested to the aunt that she may want a curfew. The aunt asked what this would mean if the youth wanted to go out to which the Crown replied ‘he can be with you’. The aunt then said ‘okay’ and the Crown announced to the justice that the surety would like a curfew imposed. The justice then imposed a curfew of 9:00 p.m. to 6:00 a.m. and cautioned the youth that he must comply with any other conditions his surety imposed and if he did not listen he would return to jail.

A number of conditions justices of the peace routinely imposed may be difficult to comply with for the time it takes for a case to be completed. Some conditions were overly vague or far reaching, in that they could encompass a wide range of different behaviours. These
conditions were often coded as having ‘no apparent connection’ for this very reason. For example, ‘be amenable to the rules and discipline of the home’ could result in youths being charged with the criminal offence of failing to comply with a court order if they did not take out the garbage or do the dishes when asked. Still other conditions such as ‘attend school each and every day’ generally seemed entirely unrelated to the alleged offence or the grounds for detention unless the youth regularly committed offences off school property during school hours. While it is understandable to want youths to be in school, the condition generally appeared to have no connection to appearing in court as required or to preventing further offending. Despite the social welfare arguments in favour of such conditions and the justice’s ultimate acceptance and imposition of these conditions, in some circumstances these conditions appear to be inconsistent with the spirit of s. 29(1) of the YCJA which prohibits social welfare considerations as justifications for detention.

In other cases, some of the conditions imposed prohibited behaviour that was already illegal. For example, possessing drugs is already a criminal offence. By making this a condition of their bail the youth was placed in a position where if they were found in possession of drugs they could be charged with both offences (under the Controlled Drugs and Substances Act and under the Criminal Code for failing to comply with a court order). Given the seriousness of ‘administration of justice’ offences in determining whether a youth can be given a custodial sentence under s. 39 of the YCJA, a finding of guilt on the administration of justice offence may, indeed, be more serious than a finding of guilt on the substantive offence (e.g., possession of a
small amount of marijuana). It is subject to question in what cases it is necessary to add this condition when there is already a law that states this behaviour is illegal\textsuperscript{96}.

**Conclusion**

The vast majority of youths released from these four courts were required to produce a suitable surety to whom they could be released. In addition to the surety, youths were required to consent to and agree to comply with an average of 9.3 conditions while they were on release or face the possibility of detention in custody before trial as a result of a show cause hearing. Each condition, by virtue of its attachment to the release order created the possibility of a new criminal offence. The net effect of this, as suggested by the title of this paper, is that after allegedly stealing from a single Shoppers Drug Mart, a youth whose case was observed in this study was prohibited from entering any Shoppers Drug Mart store in the entire province. This condition was not only overly restrictive, but if there had been special concern about the youth stealing from pharmacies, this condition only protects Shoppers Drug Marts while disadvantaging other pharmacies by putting these other pharmacies “at risk” if the youth decided to enter them.

Sprott and Myers (2011) cite evidence suggesting that failing to comply with a court order (typically bail conditions) is the most serious offence in about one in 12 youth court cases and that the number and rate of bringing these administration of justice cases to court has been

\textsuperscript{96} Despite the author’s concern with this condition it was coded as having a clear connection if it was involved in the offence and as having no apparent connection if drugs were not involved in the offence.
relatively steady in the past decade even though there has been an overall reduction in the number of cases going to youth court. Bail conditions, when imposed on youths in large numbers for long periods of time are often violated, leading to additional charges. Rather than a mechanism for ensuring youths return to court and do not commit further offences, bail conditions seem to have developed into a tool that has little to do with their legal purpose.
Chapter 6
A Comparison of the Bail Process for Adults and Youths

Introduction

Canada has had a separate youth justice system since the introduction of the Juvenile Delinquents Act (JDA) in 1908. While Canada has since replaced the JDA with the Young Offenders Act (YOA) in 1984 and then the Youth Criminal Justice Act (YCJA) in 2003, the premise for a separate youth justice system has not changed - youths are understood to be fundamentally different from adults and thus must be treated differently by the criminal justice system. In recognition of this, the YCJA contains a number of provisions that guarantee enhanced procedural rights for youths and provide additional barriers to the use of custody. Despite these additional legislated protections, the proportion of the youth custodial population that is being held in detention on remand is remarkably similar to that seen in the adult custodial population. Today, there are more adults and youths in custody on remand in provincial/territorial institutions awaiting the determination of their bail or the outcome of their trial than there are serving actual custodial sentences that have been imposed by the court as a sentence for an offence in Canada.

On an average day in 2010, the most recent year for which there is available data, there were 13,086 adults being held on remand and 24,674 adults in sentenced custody in Canada’s provincial/territorial and federal institutions (CANSIM). The proportion of the custodial population in remand, however, changes rather dramatically when we look only at adults who were in provincial/territorial correctional institutions. In 2005 the population of adults in remand exceeded that in the sentenced population in provincial/territorial institutions in Canada for the first time and this trend has continued to develop each year. On an average day in 2010 in
Canada there were 13,086 adults in remand and 10,916 in custody serving a sentence in a provincial/territorial institution (CANSIM). A similar trend is seen amongst the youth custodial population, where the number of youths in remand has exceeded the number in the sentenced custodial population since 2006. On an average day in 2009/2010, 957 youths were in remand in Canada while only 836 youths were in custody serving a sentence (Porter and Calverley 2011). This means that in 2010 in Canada 34.6% of the total adult custodial population and 54.5% of the provincial/territorial adult custodial population was in remand and 53% of the youth custodial population was in remand.

While Canada as a whole seems to have a remand problem, it is not equally distributed across the provinces. Indeed, as seen in Table 1 below in 2009/2010, 69% of Manitoba’s and 62% of Alberta’s adult provincial custodial population was in remand, while ‘only’ 18% of Prince Edward Island and 30% of Newfoundland’s adult provincial custodial population was in remand (Porter and Calverley 2011). Interestingly, with the exception of Newfoundland and Labrador and Nova Scotia, the provinces/territories appear to have similar proportions of their adult and youth custodial population on remand. Indeed, those provinces/territories with low proportions of adults in remand have similarly low proportions of youths in remand, while provinces/territories with high proportions of their adult custodial population on remand have similarly high proportions of youths on remand (Spearman Rank Order Correlation = +.88).

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97 Almost all youths sentenced to a term of imprisonment serve their sentences in (provincial/territorial) youth facilities rather than in penitentiaries. While a small number of youths may serve their sentences in a penitentiary, it has become increasingly unlikely as youths are no longer able to serve their sentence in a penitentiary until they are 18 years of age, at which time they would then be counted as part of the adult population. This is because of the amendments to the YCJA ushered in by Bill C-10, which came into effect on 23 October 2012.
98 Data on youth custody levels in Canada were only available as an average across 2009/2010.
Table 1: Proportion of Provincial/Territorial Custodial Population on Remand in 2009/2010

<table>
<thead>
<tr>
<th></th>
<th>Adults</th>
<th>Youths</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newfoundland and Labrador</td>
<td>30%</td>
<td>18%</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>18%</td>
<td>18%</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>62%</td>
<td>39%</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>33%</td>
<td>33%</td>
</tr>
<tr>
<td>Quebec</td>
<td>47%</td>
<td>41%</td>
</tr>
<tr>
<td>Ontario</td>
<td>67%</td>
<td>59%</td>
</tr>
<tr>
<td>Manitoba</td>
<td>69%</td>
<td>70%</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>37%</td>
<td>36%</td>
</tr>
<tr>
<td>Alberta</td>
<td>62%</td>
<td>57%</td>
</tr>
<tr>
<td>British Columbia</td>
<td>56%</td>
<td>55%</td>
</tr>
<tr>
<td>Yukon</td>
<td>60%</td>
<td>61%</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>39%</td>
<td>40%</td>
</tr>
<tr>
<td>Nunavut</td>
<td>--</td>
<td>--</td>
</tr>
</tbody>
</table>

In Ontario, Canada’s most populous province, on an average day in 2010 there were 5,341 adults in remand and 3,173 serving a sentence in provincial institutions, along with 368 youths in remand and 252 serving a sentence (CANSIM). This means 62.7% of the adult and 59.4% of the youth provincial custodial population in Ontario was in remand in 2010 (Porter and Calverley 2011).
Research and Legislation

There is not a lot of research that looks at the bail process for adults and there is even less for youths. Bail research has tended to focus on the factors that are related to the decision to release or detain an accused (e.g. Koza and Doob 1975; Gandy 1992; Kellough and Wortley 2002; Varma 2002; Moyer and Basic 2004; Moyer 2005). There is very little work that examines the actual bail process. Furthermore, I was unable to find any research that compared the way bail was being administered for adults and youths.

The Law on Bail

The basic principles and procedures of bail for adults and youths are governed by s.515 of the Criminal Code (See Chapter 1 for an overview of the law on bail for adults and youths). The additional protections and considerations stipulated within the YCJA supersede any sections of the Criminal Code that are inconsistent with them (s.28 of the YCJA). Indeed the Preamble of the YCJA outlines the Act’s guiding principles and indicates youths have “special guarantees of their rights and freedoms” and stipulates that the criminal justice system is to exercise restraint in the use of custody by reserving “its most serious intervention for the most serious crimes and reducing the over-reliance on incarceration for non-violent young persons”. In order to promote the long-term protection of the public, the youth justice system is to emphasize “timely intervention that reinforces the link between the offending behaviour and its consequences, and the promptness and speed with which persons responsible for enforcing this Act must act, given young persons’ perception of time” (s.3(b)(iv) and s.3(b)(v)).

One limitation on the use of pre-trial detention for youths is contained in, s. 29(1) which establishes that “A youth justice court judge or a justice shall not detain a young person in custody prior to being sentenced as a substitute for appropriate child protection, mental health or
other social measures”. Up until October 2012 s.29(2) stated that “In considering whether the detention of a young person is necessary for the protection or safety of the public...a justice shall presume that detention is not necessary...if the young person could not, on being found guilty, be committed to custody”. Since Bill C-10 (41st Parliament, Session 1) the ‘Safe Streets and Communities Act’ received Royal Assent and came into force on October 23, 2012, s.29(2) now lists all the reasons justifying detention and expand the reasons for doing so. The Act provides that the pre-sentence detention of young persons is prohibited, except where the young person is charged with a “serious offence” or where “they have a history that indicates a pattern of either outstanding charges or findings of guilt.” This new provision is broader than what previously existed as it instructs the court to consider not only previous findings of guilt but also any outstanding charges levied against the youth. The Bill also removes the current requirement that, to be ordered into pre-sentence detention, the young person must have a history or pattern of offences and be currently charged with committing an indictable offence for which an adult would be liable for more than two years in prison. The YCJA also provides an additional option for fashioning a release for youths who may otherwise be detained; s.31(1) states “A young person who has been arrested may be placed in the care of a responsible person instead of being detained in custody...”.99 Together, these sections of the YCJA suggest custody for youths must be employed with restraint and additional efforts are to be made to ensure youths are not detained unnecessarily in pre-trial custody.

Given the statutory recognition of the differences between adults and youths and the extra protections provided for youths in the YCJA that are designed to limit the use of pre-trial

99 A responsible person is someone who according to s.31(1)(b) is willing and able to take care of and exercise control over the youth. Section 31(3)(a) further stipulates that the responsible person must undertake in writing to “take care of and to be responsible for the attendance of the young person in court when required and to comply with any other conditions” the court specifies.
detention (sections 28-31) one would expect bail to be operating in a different way for youths. For example, one may expect that youths would be less likely to be held for a bail hearing, be more likely to be released on bail and be processed through the bail system faster, given the provisions in the YCJA. These suppositions however are not supported by the trends in the custodial population. Despite the statutory recognition of youths’ differences from adults, the proportion of the youth custodial population who is in remand (53%) far exceeds the proportion of the total adult custodial population that is in remand (34.6%). If the YCJA provides additional barriers to custody for youths, how has the proportion of the youth custodial population in remand come to exceed the proportion of adult accused in remand? Are youths in practice being treated differently than adults in the bail process?

Methodology

This study used court administrative data on all criminal charges processed in Ontario, Canada in 2006 and 2007. The difficulty with charge based data is the court does not process individual charges per se; rather the court processes cases which have one or more charges associated with them. In this way, the court makes the bail decision by looking at all the charges an accused is facing; the bail decision is not made for each separate, individual charge. To make the data more relevant for an evaluation of the use of bail in adult and youth court, the charge data were aggregated so as to create cases. A ‘case’ was created by collapsing all charges associated with the same information number, age and court location. A choice had to be made when aggregating about which charge in a case to follow all the way to completion. Knowing that approximately one third of charges laid by police are ultimately withdrawn by the

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100 All charges are given an information number. For the most part, all charges that are laid at the same time or stem from a single occurrence are given the same information number.
Crown, the charge associated with the information number with the higher number of appearances was followed to completion. Again, this was done because accused are released or detained on the basis of their case of charges, not the individual charges. There is an important limitation to this dataset. Previous research indicates that a non-trivial number of accused will be charged with failing to appear in court, failing to comply with their bail order and/or may be charged with another criminal offence while on bail. The difficulty is that these charges will appear on a different information, even though they are generally brought together with the earlier information (the one on which I used as the basis for aggregating the charges and converting the unit of analysis to a case). In this way, this dataset is unable to fully capture the charge and case history of the accused. This method of constructing cases is not perfect; however, it is the closest approximation to cases that can be created given the data available. Inferences from this data will be drawn with caution with this limitation in mind.

Once aggregated, the dataset contained information on 550,976 constructed cases. In Canada the age of criminal responsibility is 12 and adulthood begins at age 18. There were 12,819 cases in which the age of the accused was unknown; as a result these charges were excluded from all future analysis. This left a sample of 538,157 cases; 459,873 adult cases and 78,284 youth cases.

For the purposes of this study “early bail” was defined as a case that had a bail appearance at the beginning of court proceedings. This means cases in which there was a bail appearance within the first 7 days of the case were included. This was done to correct for errors in data entry on the part of court personnel in which the first appearance was not coded as a bail appearance though subsequent appearances were in bail made clear by the a bail determination being made and noted in the case history.
hearing later on in the case history were excluded\textsuperscript{102}. This was done to ensure only cases in which bail was the first type of appearance were considered. Filtering out cases with a bail appearance later in the case history eliminated those who appeared for a bail variation or who were granted bail pending sentencing or an appeal.

\textbf{Results}

\textit{Descriptives}

As can be seen in Table 2 below close to half of all adult and youth cases brought into the criminal courts in Ontario started their case history in bail court. This means that in close to half of the cases, the officers decided not to use their powers to release the accused from the scene with a promise to appear at a future date. Rather the officer arrested and detained the accused in custody for a bail hearing. Despite a strong presumption against holding youths in detention, the data below also indicate that though a higher proportion of adult cases (48.3\%) started their case history with a bail decision, youths were not much less likely (44.3\%) to have their case start the criminal court process in bail court.

Consistent with literature on offending rates it is not surprising to see that males comprise the majority of accused before the court. The data in Table 2 indicate that the proportion of youth cases with a female accused (22.2\%) is slightly higher than the proportion of adult cases with a female accused (18.3\%). This difference in proportions is larger amongst cases with an early bail hearing, with females representing 20.8\% of the youth bail cases and 14.5\% of the

\textsuperscript{102} A case may have a bail appearance later in their case history as a result of a request for a bail variation (generally a request to alter a condition of release) or as a result of allegations of a breach of one or more of the bail conditions.
adult bail cases. Said differently, it appears that proportionally, female youths were more likely than female adults to be detained by police for a bail hearing.

Given the additional protections offered to youths under the YCJA it seems reasonable to expect that youths who were arrested and held for a bail hearing by police would be more serious cases, either in terms of the number of charges in the case or the seriousness of the offence(s). As can been seen in the range depicted in Table 2 below there does not appear to be any real appreciable difference in the number of charges in the case overall or in the number of charges in the early bail case, as both adults and youths were brought into bail court with a mean of 2.4 charges and a median of 2.0 charges. That said, for both adults and youths, it appears that early bail cases tend to have more charges in the case than do cases overall.

Looking next at the charges in the case, there were some noteworthy differences seen in the types of charges being brought before the court. This analysis considers only the broad categories of violence (with one further categorization of common assault), property, and administration of justice, federal (drug) offences and other Criminal Code offences. These categories were not mutually exclusive; these data reflect all charge types associated with the case information number. As can be seen in Table 2 below youths were less likely than adults to have a violent offence in their case overall and were less likely to have a violent offence in their case with early bail, including being less likely to have a charge for common assault. Interestingly, youths were also significantly less likely to have an administration of justice offence as one of the charges in their case overall or as one of the charges in cases with an early bail hearing. That said Table 2 makes it clear that for both adults and youths, cases before the bail court are more likely than cases overall to have a charge against the administration of justice. While there have been concerns expressed in the literature (Sprott and Myers 2011; Myers and Dhillon 2012) about charges of failing to comply with a court order (largely, failure
to comply with bail conditions) for youths, this issue has also been recognized for adults. There are a few possible explanations for this difference. It may be that adults have simply had more time to accumulate convictions for failing to comply with conditions or that adults may be less likely to comply with conditions of release. Alternatively, police may be more vigilant in monitoring and charging adults with failing to comply. Youths were also slightly more likely to be held for a bail hearing for a property offence or for an ‘Other Criminal Code’ offence.

Conversely, youths were much more likely than adults to have a federal (drug) charges in their case overall. That said, the proportion of youths with an early bail hearing with a federal (drug) charge in their case is consistent with that seen overall. The large difference seen in the proportion of cases with a federal offences may be the result of youths being more likely to be apprehended and charged for drug offences. For example, it may be that youth were more likely to use drugs in public spaces or have less experience avoiding detection when selling drugs. Another possibility is that youths have been caught using or selling drugs on school property and as a result of ‘zero tolerance policies’ school authorities automatically notify police. This may also be the result of social welfare concerns on the part of police. Given youths’ age and level of maturity, along with concerns about addiction and harms associated with drug use, it may be that police were more concerned about drug use and trafficking by youths than by adults.
<table>
<thead>
<tr>
<th></th>
<th>All Cases</th>
<th>Early Bail Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Age</strong>*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total number of cases</td>
<td>538,158</td>
<td>221,997</td>
</tr>
<tr>
<td>Proportion of total cases that had an early bail hearing</td>
<td>48.3%</td>
<td>44.3%</td>
</tr>
<tr>
<td><strong>Sex</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Male</td>
<td>81.7%</td>
<td>85.5%</td>
</tr>
<tr>
<td>Female</td>
<td>18.3%</td>
<td>14.5%</td>
</tr>
<tr>
<td>(375,557)</td>
<td>(189,721)</td>
<td>(32,181)</td>
</tr>
<tr>
<td>(84,051)</td>
<td>(27,481)</td>
<td></td>
</tr>
<tr>
<td><strong>Number of charges before the court for the bail hearing</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mean</td>
<td>2.09</td>
<td>2.42</td>
</tr>
<tr>
<td>Median</td>
<td>1.0</td>
<td>2.0</td>
</tr>
<tr>
<td>Range</td>
<td>1-517</td>
<td>1-517</td>
</tr>
<tr>
<td></td>
<td>1-131</td>
<td>1-131</td>
</tr>
<tr>
<td>1 charge</td>
<td>55.4%</td>
<td>47.5%</td>
</tr>
<tr>
<td>2 charges</td>
<td>23.3%</td>
<td>23.0%</td>
</tr>
<tr>
<td>3 charges</td>
<td>9.6%</td>
<td>12.5%</td>
</tr>
<tr>
<td>4 charges</td>
<td>4.7%</td>
<td>6.8%</td>
</tr>
<tr>
<td>5 or more charges</td>
<td>7.1%</td>
<td>10.3%</td>
</tr>
<tr>
<td><strong>Type of offences before the bail</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Violence</td>
<td>26.4%</td>
<td>32.6%</td>
</tr>
</tbody>
</table>

103 Due to the nature of the data (court administrative data) I did not have access to information about such personal characteristics as ‘criminal record’ which might have influenced the police’s decision to detain an accused for a bail hearing as well as the court’s decision to detain an accused in custody until case resolution.
To see if youths were more or less likely than adults to be held for a bail hearing depending on the type of charge(s) laid, we constructed a number of ‘simple’ cases to see if there was a difference between adults and youths. A ‘simple’ case was operationalized first as any case in which there was only one type of charge before the court, for example a charge of violence only. All cases with more than one type of charge in the ‘case’ were excluded from this analysis. A simple case was then defined as any case with only a single charge of any kind, then again as a case with only a single charge that was not a violence charge. Table 3 below presents a number of ‘simple’ case scenarios. For cases in which there was one or more violent offences, one or more common assault offences, one or more property offences or when there was only a single charge in the case, adults were more likely to be held for a bail hearing. This finding is consistent with the notion that youths should be less likely than adults to be held for a bail hearing as there is stronger presumption against detention for youths. This pattern however does not hold when there was an administration of justice charge in the case before the court or when an administration of justice offence was the only offence in the case. As depicted in Table 3 below, in both of these scenarios youths were more likely than adults to be held for a bail hearing.

### Table 3: Simple Case Scenarios

<table>
<thead>
<tr>
<th>Category</th>
<th>Adults</th>
<th>Youths</th>
<th>Overall</th>
</tr>
</thead>
<tbody>
<tr>
<td>Common assault****</td>
<td>14.4%</td>
<td>13.0%</td>
<td>17.3%</td>
</tr>
<tr>
<td>Property</td>
<td>28.5%</td>
<td>36.1%</td>
<td>26.2%</td>
</tr>
<tr>
<td>Administration of justice</td>
<td>36.3%</td>
<td>26.5%</td>
<td>50.6%</td>
</tr>
<tr>
<td>Federal (drugs)</td>
<td>12.6%</td>
<td>27.6%</td>
<td>11.2%</td>
</tr>
<tr>
<td>Other Criminal Code</td>
<td>12.5%</td>
<td>12.8%</td>
<td>14.1%</td>
</tr>
</tbody>
</table>

*age was missing for the remaining 12,819 cases, these cases have been excluded from all analysis
**sex was missing for 9 youths and 95 adults
*** This analysis considers only the broad categories of violence (with one further categorization of common assault), property, and administration of justice, federal (drug) offences and other Criminal Code offences. These categories were not mutually exclusive; these data reflect all charge types associated with the case information number.
****Cases with charges of ‘common assault’ are also included under ‘violence’; these categories are not mutually exclusive.
hearing. This is interesting, when arguably administration of justice offences are less serious than violent or property offences, yet these charges were the most likely to result in youths being held for a bail hearing. This also suggests police officers take charges of failing to comply with a court order seriously, and see allegations of failing to comply as more serious and thus requiring the accused be held for a bail hearing, and this is especially so when the accused is a young person.
Table 3: ‘Simple’ Cases by Decision to Hold for Bail Hearing (% with ‘early bail’)

<table>
<thead>
<tr>
<th></th>
<th>Adults</th>
<th>Youths</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Early bail</td>
<td>Early bail</td>
</tr>
<tr>
<td>Violence only</td>
<td>52.0%</td>
<td>32.6%</td>
</tr>
<tr>
<td></td>
<td>(39,185)</td>
<td>(4,158)</td>
</tr>
<tr>
<td>Common assault only</td>
<td>50.9%</td>
<td>27.0%</td>
</tr>
<tr>
<td></td>
<td>(23,099)</td>
<td>(1,765)</td>
</tr>
<tr>
<td>Administrative offence in the ‘case’</td>
<td>67.4%</td>
<td>72.0%</td>
</tr>
<tr>
<td></td>
<td>(112,381)</td>
<td>(14,915)</td>
</tr>
<tr>
<td>Administrative only</td>
<td>62.4%</td>
<td>68.6%</td>
</tr>
<tr>
<td></td>
<td>(70,038)</td>
<td>(10,000)</td>
</tr>
<tr>
<td>Federal (drug) offence only</td>
<td>39.9%</td>
<td>38.5%</td>
</tr>
<tr>
<td></td>
<td>(105)</td>
<td>(4,698)</td>
</tr>
<tr>
<td>Other Criminal Code offence only</td>
<td>32.5%</td>
<td>27.9%</td>
</tr>
<tr>
<td></td>
<td>(6,363)</td>
<td>(646)</td>
</tr>
<tr>
<td>Single charge only</td>
<td>41.4%</td>
<td>35.8%</td>
</tr>
<tr>
<td></td>
<td>(105,344)</td>
<td>(14,975)</td>
</tr>
<tr>
<td>Single charge, no violence</td>
<td>40.0%</td>
<td>37.7%</td>
</tr>
<tr>
<td></td>
<td>(81,367)</td>
<td>(12,402)</td>
</tr>
</tbody>
</table>

Looking next at the way in which all the adult and youth bail cases were addressed, Table 4 below presents the outcome of the (early) bail hearing for the case before the court. There appear to be some significant differences in the bail decisions made in adult and youth cases. Compared to adults, youths were less likely to have their bail denied, less likely to be remanded in custody without a formal bail decision being made, were less likely to plead guilty at the bail
hearing and were less likely to have their charges dismissed or withdrawn. Consistent with the provisions of the YCJA, youths were more likely than adults to be granted release on bail.

Table 4: Outcome of the Bail Process

<table>
<thead>
<tr>
<th>Bail Outcome</th>
<th>Adults</th>
<th>Youths</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bail denied</td>
<td>12.7%</td>
<td>8.7%</td>
</tr>
<tr>
<td></td>
<td>(28,295)</td>
<td>(3,011)</td>
</tr>
<tr>
<td>In custody without a bail decision</td>
<td>28.8%</td>
<td>23.9%</td>
</tr>
<tr>
<td></td>
<td>(63,870)</td>
<td>(8,289)</td>
</tr>
<tr>
<td>Bail granted</td>
<td>48.9%</td>
<td>59.1%</td>
</tr>
<tr>
<td></td>
<td>(108,597)</td>
<td>(20,497)</td>
</tr>
<tr>
<td>Pled guilty</td>
<td>4.0%</td>
<td>2.6%</td>
</tr>
<tr>
<td></td>
<td>(8,857)</td>
<td>(917)</td>
</tr>
<tr>
<td>Dismissed/withdrawn</td>
<td>3.6%</td>
<td>3.1%</td>
</tr>
<tr>
<td></td>
<td>(8,046)</td>
<td>(1,061)</td>
</tr>
<tr>
<td>Other</td>
<td>1.9%</td>
<td>2.7%</td>
</tr>
<tr>
<td></td>
<td>(4,328)</td>
<td>(925)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>100%</td>
<td>100%</td>
</tr>
<tr>
<td></td>
<td>(221,993)</td>
<td>(34,700)</td>
</tr>
<tr>
<td></td>
<td>*4 missing</td>
<td>*2 missing</td>
</tr>
</tbody>
</table>

Those accused who have been remanded in custody without a bail decision having been made, are in ‘limbo’. These accused may eventually have a bail hearing where they will be released or formally detained, while others may remain in custody without a bail decision as they move through the next and perhaps remaining stages of the criminal court process.
The difference in the way bail was administered for adults and youths is made more clear in Table 5 below; by combining accused who had their bail formally denied with those who were in custody without a bail decision having been made (in limbo\textsuperscript{105}), it is clear adults were much more likely (45.9%) to have their bail denied or be in ‘limbo’ than youths (35.5%).

**Table 5: Collapsed Outcome of the Bail Process**

<table>
<thead>
<tr>
<th>Bail Outcome</th>
<th>Adults</th>
<th>Youths</th>
</tr>
</thead>
<tbody>
<tr>
<td>Formally detained or in ‘limbo’</td>
<td>45.9% (92,165)</td>
<td>35.5% (11,300)</td>
</tr>
<tr>
<td>Bail granted</td>
<td>54.1% (108,597)</td>
<td>64.5% (20,497)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>100% (200,762)</td>
<td>100% (31,797)</td>
</tr>
</tbody>
</table>

To better understand the difference in bail outcomes for adults and youths depending on the type of charge(s) before the court, we will look once again at ‘simple’ cases. A few important differences can be seen in Table 6 below. For all offence types youths were less likely to be denied bail than adults, a pattern consistent with the provisions of the YCJA. Overall, this suggests bail was being used more liberally in youth cases. An alternative possibility is that though broadly categorized by offence type in the same way as adults, the allegations of the offence may have been less serious for youths and this may be why they were more likely to be released.

\textsuperscript{105} See footnote 8 for explanation of ‘limbo’.
Table 6: ‘Simple’ Cases by the Bail Decision

<table>
<thead>
<tr>
<th></th>
<th>Adults</th>
<th></th>
<th>Youths</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Denied or in Limbo</td>
<td>Granted</td>
<td>Denied or in Limbo</td>
<td>Granted</td>
</tr>
<tr>
<td>Violence only</td>
<td>26.1% (9,553)</td>
<td>73.9% (27,069)</td>
<td>20.8% (812)</td>
<td>79.2% (3,095)</td>
</tr>
<tr>
<td>Common assault only</td>
<td>21.1% (4,573)</td>
<td>78.9% (17,058)</td>
<td>20.2% (338)</td>
<td>79.8% (1,335)</td>
</tr>
<tr>
<td>Property only</td>
<td>48.5% (9,089)</td>
<td>51.5% (9,659)</td>
<td>28.2% (869)</td>
<td>71.8% (2,213)</td>
</tr>
<tr>
<td>Administrative offence in the ‘case’</td>
<td>55.1% (54,888)</td>
<td>44.9% (44,666)</td>
<td>38.3% (5,092)</td>
<td>61.7% (8,219)</td>
</tr>
<tr>
<td>Administrative offence only</td>
<td>50.0% (30,504)</td>
<td>50.0% (30,535)</td>
<td>36.5% (11,300)</td>
<td>63.5% (5,629)</td>
</tr>
<tr>
<td>Federal (drug) offence only</td>
<td>56.3% (40)</td>
<td>43.7% (31)</td>
<td>43.1% (1,864)</td>
<td>56.9% (2,458)</td>
</tr>
<tr>
<td>Other Criminal Code offence only</td>
<td>41.8% (2,425)</td>
<td>58.2% (3,380)</td>
<td>25.5% (153)</td>
<td>74.5% (448)</td>
</tr>
<tr>
<td>Single charge only</td>
<td>41.5% (38,939)</td>
<td>58.5% (54,938)</td>
<td>31.6% (4,309)</td>
<td>68.4% (9,312)</td>
</tr>
<tr>
<td>Single charge, no violence</td>
<td>46.6% (33,309)</td>
<td>53.4% (38,207)</td>
<td>33.7% (3,770)</td>
<td>66.3% (7,431)</td>
</tr>
</tbody>
</table>
The use of sureties in bail court offers another possible explanation for the differences seen in Table 5. According to Myers (2009) and Myers and Dhillon (2012) most adults and youths observed in these studies required a surety in order to be released. It may be that youths were better able to produce a suitable surety (generally a parent) who was willing and was seen as being capable of supervising them in the community. The YCJA also contains a provision requiring the court to inquire as to the availability of a responsible person to whom the youth may be released before their detention is ordered. It, however, is unlikely that this difference is the result of the responsible person’s provision in the YCJA as, according to Myers and Dhillon (2012), the responsible person was rarely if ever raised in youth court and was more or less irrelevant if the issue of a surety had already been raised.

Looking at all cases that had an administration of justice charge in the case, as well as all ‘simple’ cases in which an administration of justice offence was the only offence reveals interesting differences between adults and youths. While youths in both categories were less likely to be denied bail, the proportion of cases in which bail was denied for both adults and youths when the administration of justice charge was the only charge in the case is noteworthy. For adults, 50% of cases with only a charge against the administration of justice were denied bail, whereas for youths 36.5% of cases with only a charge against the administration of justice were denied bail. Clearly, the court sees allegations of failing to comply quite seriously.

Being detained until case resolution is a significant loss of liberty and in these cases accused were detained on the basis of a single charge for behavior that may have only been illegal due to the presence of a court order. Myers and Dhillon (2012) express the concern that conditions of release may be problematic as their existence creates the possibility of committing

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106 A surety is generally a family member, who indicates a willingness to pay the court a specified amount of money if the accused person fails to appear in court or violates a condition of his or her release.
a criminal offence. What is more, Sprott and Myers (2011) found that cases with many bail conditions that took a long time to be resolved were most likely to result in a charge of failing to comply with a court order. This means that a non-trivial proportion of accused who were detained were being held in detention because they broke a condition of their release, a condition that may have prohibited behaviour that outside of the court order was not a criminal offence. For example, accused were denied bail because they broke their curfew or did not attend school. The proportion of youths detained when the only charge before the court was against the administration of justice is noteworthy because the YCJA prohibits detention solely on the basis of a charge of failing to comply.  

Looking together at adults and youths, a higher proportion of accused were released on bail with ‘violence only’ charge(s), than were released for any other offence type that I examined. The lowest proportion of accused securing a release order came before the court on federal (drug) charge(s). Said differently, those charged with ‘violence only’ were more likely to be released on bail than accused coming before the court with ‘property only’ ‘administrative only’, ‘federal (drug) offence only’ or ‘other Criminal Code offence only’ for both adults and youths.

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107 Section 39(1) of the YCJA identifies restrictions on the use of custody for youths. Interestingly, the YCJA prohibits detention on the secondary grounds for breaching a court order alone, but it could be used as evidence, perhaps, justifying detention on the primary grounds. That said multiple convictions for breaches of a court order may result in detention if the youth were also charged with an offence for which an adult could be given a sentence of more than 2 years.
Time Spent in the Bail Process

Another way of looking at the way in which bail was being used for adults and youths is to look at how long adults and youths spent in the bail process. This can be done by comparing the number of bail appearances accused made before a formal bail decision was made and the number of days that passed while the accused was in the bail process.

_Criminal Code_ provisions suggest bail is supposed to be decided relatively soon after an arrest. Section 503(1)(a) and s.503(1)(b) require accused be brought before a justice within 24 hours of arrest or as soon as is practicable. Additionally, s.516(1) indicates adjournments of bail proceedings can be no longer than three clear days except with the consent of the accused. The importance of timely case processing is also recognized the Canadian Charter of Rights and Freedom. Section 11(b) stipulates that any person charged with an offence has the right “to be tried within a reasonable time”. The importance of timely intervention is reiterated in the YCJA. Indeed, s.3(b)(v) of the YCJA affirms youths’ differential perception of time and s.3(b)(iv) emphasizes the importance of “timely intervention that reinforces the link between the offending behaviour and its consequences”. This suggests that for young offenders in particular, the closer the sanction (sentence) is to the commission of the offence the more meaningful it is likely to be. This leads to the expectation that the criminal court process generally and the bail process specifically should take fewer appearances and fewer days for youths.

Looking first at the number of days spent in the bail process, the distribution in Table 7 below clearly indicates youths were more likely (45.6%) than adults (39.7%) to finish the bail process on the same day that they first appeared in bail court. After this, the proportion of cases taking one to ten days was consistent between adults and youths. The difference in time however was again seen in the proportion of cases taking ‘11-30 days’ or ‘more than 31 days’, with adults being more likely than youths to spend a longer period of time in the bail process.
Looking next at the number of appearances made by accused in the bail process, we see a similar pattern. Youths were more likely to complete the bail process in one or two appearances and were less likely to have more than three appearances in bail court than adults.

Taken together, youths spending fewer days and making fewer appearances in bail court is consistent with what would be expected given the principles of the YCJA. That said, the differences in terms of both the number of days and the number of appearances made in bail was not as large as may have been anticipated.
Table 7: Time Spent in the Bail Process

<table>
<thead>
<tr>
<th>Days in bail process</th>
<th>Adults</th>
<th>Youths</th>
</tr>
</thead>
<tbody>
<tr>
<td>Same day</td>
<td>39.7% (88,195)</td>
<td>45.6% (15,832)</td>
</tr>
<tr>
<td>1 day</td>
<td>11.8% (26,132)</td>
<td>11.6% (4,022)</td>
</tr>
<tr>
<td>2 or 3 days</td>
<td>14.7% (32,733)</td>
<td>14.0% (4,874)</td>
</tr>
<tr>
<td>4-7 days</td>
<td>14.4% (31,929)</td>
<td>13.7% (4,769)</td>
</tr>
<tr>
<td>8-10 days</td>
<td>4.5% (9,999)</td>
<td>3.9% (1,357)</td>
</tr>
<tr>
<td>11-30 days</td>
<td>10.8% (24,016)</td>
<td>8.6% (2,999)</td>
</tr>
<tr>
<td>31 or more days</td>
<td>4.0% (8,989)</td>
<td>2.4% (847)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>100% (22,1993)</td>
<td>100% (34,700)</td>
</tr>
<tr>
<td>*4 missing</td>
<td>*2 missing</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Appearances in the bail process</th>
<th>Adults</th>
<th>Youths</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 appearance</td>
<td>38.0% (84,380)</td>
<td>43.8% (15,189)</td>
</tr>
<tr>
<td>2 appearances</td>
<td>27.5% (61,081)</td>
<td>28.4% (9,852)</td>
</tr>
<tr>
<td>3-4 appearances</td>
<td>22.1% (49,140)</td>
<td>20.5% (7,113)</td>
</tr>
<tr>
<td>5-10 appearances</td>
<td>11.0% (24,412)</td>
<td>6.9% (2,405)</td>
</tr>
<tr>
<td>11+ appearances</td>
<td>1.3% (2,975)</td>
<td>0.4% (141)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>100% (221,988)</td>
<td>100% (34,700)</td>
</tr>
<tr>
<td>*9 missing</td>
<td>*2 missing</td>
<td></td>
</tr>
</tbody>
</table>
**Time Between the End of Bail and Case Completion**

Given the timeliness principles outlined above it is also reasonable to expect the time between the end of the bail process and case completion\(^{108}\) to be shorter for youths. Despite this expectation, adults were more likely than youths to complete their case on the same or next day. This, however, suggests adults may simply be more willing to plead guilty to the charge(s) earlier in the process, which may be result of adults generally having more experience with the criminal court process and thus a better understanding of their legal rights and the options available to them with how to proceed with the charge(s).

Conversely, the proportion of youth cases taking six months (25.2%) or more is not much smaller than the proportion of adult cases taking more than six months (30%). Indeed, it does not seem that the additional principles in the YCJA emphasizing the importance of timely intervention are being implemented in a way that has resulted in youths completing the court process that much faster than adults.

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\(^{108}\) Case completion means the charge(s) were resolved and the accused/offender is no longer required to appear before the court on this/these charge(s). Cases can be resolved by way of a guilty plea, a conviction or acquittal after trial, the charges being withdrawn by the Crown or stayed by the justice.
Table 8: Time to Case Completion After Bail

<table>
<thead>
<tr>
<th>Time to case completion after bail</th>
<th>Adults</th>
<th>Youths</th>
</tr>
</thead>
<tbody>
<tr>
<td>Same or next day</td>
<td>13.9% (30,864)</td>
<td>9.5% (3,284)</td>
</tr>
<tr>
<td>2-10 days</td>
<td>9.8% (21,762)</td>
<td>8.8% (3,044)</td>
</tr>
<tr>
<td>11-30 days</td>
<td>10.7% (23,814)</td>
<td>11.1% (3,847)</td>
</tr>
<tr>
<td>31 to 60 days</td>
<td>10.5% (23,419)</td>
<td>12.6% (4,360)</td>
</tr>
<tr>
<td>61 days to 180 days</td>
<td>25.0% (55,390)</td>
<td>32.9% (11,426)</td>
</tr>
<tr>
<td>181 to 365 days</td>
<td>19.6% (43,550)</td>
<td>19.7% (6,820)</td>
</tr>
<tr>
<td>More than 1 year</td>
<td>10.4% (23,143)</td>
<td>5.5% (1,913)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>100% (221,942)</td>
<td>100% (34,694)</td>
</tr>
<tr>
<td></td>
<td>*55 missing</td>
<td>*8 missing</td>
</tr>
</tbody>
</table>

The time between the end of the bail process and case completion is important for a few different reasons. For accused who have been denied bail the time between the bail hearing and case completion will be spent in custody. Remaining in detention until the charges before the court are resolved can take a significant period of time; indeed the median time to case completion across Canada is 124 days for adults (Thomas 2010) and 119 days for youths.
During this time the accused has lost their liberty and is subject to the daily realities of detention. Research indicates that this deprivation of liberty prior to trial can have significant legal and social implications. Being detained makes it more difficult for accused to meet with counsel and assist with the preparation of their defense. These accused are also more likely than accused who have been released to plead guilty to the charges. Indeed, it has been suggested by Kellough and Wortley (2002) that detention pending trial may influence accused’s resolve to fight the charges against them, with accused electing to plead in order to simply ‘get it over with’. This is especially so for accused who find themselves in the situation where it is unlikely they will be sentenced to custody or who have already served more time in custody than they would have been sentenced to serve after a finding of guilt. In addition to the legal implications of being detained, the social consequences may also be experienced as punishment in that accused are separated from their friends and family and may lose their employment and housing.

Accused who are released on bail also face challenges and restrictions of their liberty. In most cases in which the accused was released, conditions of release that prohibit and proscribe certain behaviors in the community were attached (Myers 2009). By virtue of the existence of the bail order, these conditions criminalize what outside of the bail order would not be criminal behaviour. Research in one Toronto court location revealed youths had an average of six bail conditions placed on them, with the vast majority receiving relatively broad conditions such as “obey the rules of the house”, curfews, requirements to live at a specific location and non-communication orders (Sprott and Doob 2010). More dramatically, in Myers and Dhillon’s (2012) observations of youth court, an average of 9.4 conditions of release were imposed. Sprott

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109 In Ontario, in 2008/2009 the median time to case completion for adults was 118 days. Unfortunately, data on case processing time for youths in Ontario is unavailable.
and Myers (2011) highlight the challenges associated with the length of time accused are bound to comply with bail conditions. They found that the more conditions of release there were and the longer the accused was subject to these conditions of release, the more likely they were to be charged with the criminal offence of failing to comply. The difficulty with charges against the administration of justice is that although they may pertain to what is not normally criminal behaviour, the court treats these charges very seriously as they are indicative of a willful disrespect and unwillingness to comply with a court order. For youths, repeatedly violating a condition of release “may justify detention, even if the original charge could not result in a custodial sentence” (Bala and Anand 2009 302). Indeed, failure to comply with a court order almost certainly constitutes a major justification for placing accused in remand, since 10.4% of all adult admissions and 24% of all youth admissions to pre-sentence custody across Canada involve an administration of justice charge as the most significant charge (Porter and Calverley 2011).

Given these challenges, it is important to know how long adults and youths spend in custody awaiting the completion of their case after their bail has been denied or how long they spend in the community subject to conditions of release. Looking first at all accused (both adults and youths) who had their bail denied or granted, more accused who were denied bail completed their case in less than 60 days. This supports Kellough and Wortleys (2002) finding that accused detained in custody are more likely to plead guilty and less likely to take their cases to trial than accused who are released on bail. Since trials are scheduled a number of months in advance, offenders who complete the court process earlier have likely pled guilty to the some or all of the charges. Pleading guilty can be done at any time and eliminates the need to wait a considerable period of time for a trial. This however, raises important concerns about the pressure accused may feel to plead guilty when they have been denied bail, in order to expedite their release.
There were, however, some differences that emerged when comparing adults and youths who have been detained or released. Youths who had been detained were less likely than adults who had been detained to have their charges resolved the same or next day, more likely to have their charges resolved in ‘2 to 365 days’ and less likely to have their charges resolved after ‘more than a year’. Conversely, youths who had their bail granted were more likely than adults who had their bail granted to have their charges resolved between ‘2 to180 days’ and were considerably less likely to have their charges resolved after ‘more than 181 days’. Another way of looking at the data in Table 9 is that there is less difference in terms of time to case completion between adults and youths for the detained sample than for the released sample.
Table 9: Time to Case Completion for Accused Denied and Granted Bail

<table>
<thead>
<tr>
<th></th>
<th>Adults</th>
<th></th>
<th>Youths</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Denied or</td>
<td>Granted</td>
<td>TOTAL</td>
<td>Denied or</td>
</tr>
<tr>
<td></td>
<td>in Limbo</td>
<td></td>
<td></td>
<td>in Limbo</td>
</tr>
<tr>
<td>Same or next day</td>
<td>14.2% (13,086)</td>
<td>0.3% (339)</td>
<td>6.7% (13,425)</td>
<td>10.2% (1,156)</td>
</tr>
<tr>
<td>2-10 days</td>
<td>21.2% (19,494)</td>
<td>1.6% (1,703)</td>
<td>10.6% (21,197)</td>
<td>22.1% (2,500)</td>
</tr>
<tr>
<td>11-30 days</td>
<td>18.9% (17,450)</td>
<td>5.3% (5,732)</td>
<td>11.5% (23,182)</td>
<td>19.3% (2,180)</td>
</tr>
<tr>
<td>31 to 60 days</td>
<td>14.4% (13,293)</td>
<td>8.8% (9,503)</td>
<td>11.4% (22,796)</td>
<td>16.9% (1,914)</td>
</tr>
<tr>
<td>61 days to 180</td>
<td>20.2% (18,637)</td>
<td>32.8% (35,615)</td>
<td>27.0% (54,252)</td>
<td>21.5% (2,432)</td>
</tr>
<tr>
<td>days</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>181 to 365 days</td>
<td>7.4% (6,831)</td>
<td>33.3% (36,145)</td>
<td>21.4% (42,976)</td>
<td>7.5% (844)</td>
</tr>
<tr>
<td>More than 1 year</td>
<td>3.6% (3,340)</td>
<td>21.4% (42,976)</td>
<td>11.4% (22,887)</td>
<td>2.4% (270)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>100% (92,131)</td>
<td>100% (108,584)</td>
<td>100% (200,715)</td>
<td>100% (11,296)</td>
</tr>
</tbody>
</table>

**Conclusion**

Canada’s youth justice system is premised on the presumption that youths are developmentally different from adults and thus must be treated differently by the criminal justice system. This difference has been formally recognized since the enactment of the Juvenile
Delinquents Act (JDA) in 1908. The current youth legislation, the YCJA, contains a number of provisions that provide extra protections for youths at the bail and sentencing stage. These principles are designed to keep youths out of detention. It is clear bail is supposed to be used in a different way in youth court.

This study found there to be some important similarities and differences in the way bail decisions were made for adults and youths. Of particular significance is the fact that youths and adults were almost equally likely to start their case history in the bail process, though the proportion of early bail cases with a female accused was higher for youths. Looking at the characteristics of the case, both adults and youths came before the court with a mean of 2.4 charges. There were however some differences in the types of cases being held for a bail hearing. Overall, youths were less likely than adults to be held for a bail hearing for a violent or administration of justice offence and were more likely to be held for a federal (drug), property, or for an ‘other Criminal Code’ offence. When I looked at ‘simple’ cases, youths were less likely than adults to be held for a bail hearing when there was only one or more violent offences, one or more common assault offences, one or more property offences or when there was only a single charge in the case. This finding is consistent with the notion that youths should be less likely than adults to be held for a bail hearing as there is a stronger presumption against detention for youths.

This pattern however did not hold when there was an administration of justice charge in the case or when an administration of justice offence was the only offence in the case. In both of these scenarios youths were more likely than adults to be held for a bail hearing. This is interesting, when arguably administration of justice offences are less serious than violent or property offences, yet these charges were the most likely to result in youths being held for a bail hearing. However, when it comes to the actual bail decision, when we looked at all cases and at
only ‘simple’ cases, for all offence types youths were more likely to be granted bail than adults, a pattern consistent with the provisions of the YCJA.

In terms of the amount of time spent in the bail process it appears that youths were being processed more expeditiously than adults which is consistent with s.3(b)(iv) and s.3(b)(v) of the YCJA. Not only did youths spend fewer days in the bail process and make fewer appearances, they were more likely than adults to finish the bail process on the same day that they first appeared in bail court. Despite these differences, as seen in Table 7, both adults and youths made numerous appearances, over multiple days before a bail decision was made. This delay in decision making is consistent with a ‘culture of adjournment’ (discussed in Chapter 3), whereby the most accepted and expected outcome in the case is that it will be remanded to another day.

This difference in the timeliness and efficiency of case processing was seen to a lesser degree in the time it took for the case to reach completion after the bail process. Adults were both more likely to complete their case in one or two appearances and more likely to take more than a year to reach case completion.

While youths seem to have been being processed in different ways through the bail system, in a lot of ways the differences that were examined in this paper were not as significant as may have been expected, given the provisions of the YCJA. In the end, in Ontario, there are similar patterns in the use of remand for both adults and youths; there are currently more adults and youths in custody awaiting a bail decision or their trial than there are serving custodial sentences. Indeed, 62.7% of Ontario’s adult and 59.4% of Ontario’s youth custodial population was in remand in 2010 (Porter and Calverley 2011). Across Canada the proportion of the youth custodial population that was in remand (53%) in 2010 far exceeded the proportion of adult accused in remand (34.6%) in provincial/territorial and federal institutions (CANSIM). Given this context, the differences seen do not appear to be large enough to support the conclusion that
bail is being administered in a dramatically different way for youths. Indeed, it appears as though 
bail is operating in a relatively similar manner for both adults and youths, despite the additional 
protections found in the YCJA.
Introduction

Despite the fact that the overall crime rate and the violent crime rate have been falling for the last 20 years, the number of people being held in pre-trial detention has continued to climb. When one considers the imprisonment trends in Canada, there appears to be remarkable stability in the rate with which people are incarcerated. As suggested by Webster, Doob and Myers (2009), the rise in remand does not appear to be part of a general rise in punitiveness as there has not been a commensurate increase in the overall incarceration rate. This stability however is a construct of co-occurring phenomena. While the overall incarceration rate remains relatively unchanged, the composition of the custodial population has shifted dramatically; the population of people in remand has steadily climbed while the population of sentenced inmates has steadily declined. This commensurate decline in the sentenced population appears to be the result of judges giving credit at sentencing for time spent in pre-trial detention.  

The size of the remand population, measured as either the rate with which accused are admitted to remand or the proportion of the custodial population that is in remand has reached unprecedented levels. Tonight, more people in Ontario’s provincial custodial institutions are awaiting the determination of their bail, the commencement of their trial or their sentencing hearing than there are serving custodial sentences. Every day since the year 2000 Ontario has

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110 There may be other factors contributing to this result such as the legislative changes to the adult and youth sentencing regimes that have taken place over the past two decades.
held more people who are legally innocent (or un-sentenced) in detention than who have been proven guilty of an offence.

Considering the liberating provisions of the *Bail Reform Act* (1972), particularly the expansion of police powers of release, the overall presumption that accused should be released on bail, the mandating of restraint in the use of detention and conditions of release and the prohibition of cash bail, one would anticipate a decrease rather than an increase in the remand population. While it is possible that initially the change in law caused a decrease in the remand population, this has not been sustained over time. The entrenchment of the *Canadian Charter of Rights and Freedoms* in 1982 further established guaranteed rights and protections for citizens, including the right to be presumed innocent until proven guilty, not to be denied reasonable bail and to be tried in a timely fashion. Despite the assurance of these procedural restraints and fundamental rights, the remand population has continued to grow since the early 1980s (see Chapter 1). Indeed, it seems the bail system has shifted rather dramatically from its intended legislated purpose.

While the remand problem is shared across Canada (to varying degrees), Ontario was used for the purposes of examining the bail problem. This dissertation conceptualizes the court as a quasi-organization, a social institution where questions of risk and uncertainty rest heavily on those charged with making pre-trial release decisions. The dominance of the risk mentality is exemplified by the reluctance of the Crown and justice of the peace to make pre-trial release decisions. This risk averse mentality is shared by defence counsel who seem hesitant to run show cause hearings, a reality demonstrated by the proportion of accused who remain in ‘limbo’ without a formal bail decision being made while their case proceeds through the system. The coming together of a court culture devoted to getting through the day as expeditiously as possible, (as evidenced by the ‘culture of adjournment’) with a risk aversion mentality has
shifted the bail system away from its legislated purpose. Together, these co-occurring cultural forces have come to make the bail decision take longer which is partially responsible for the size of the remand population. Not only are accused making more appearances and spending more days in pre-trial detention before a bail decision is made, accused are required to produce suitable sureties and agree to comply with numerous restrictive conditions of release. In court examination of sureties has become routine, rather than delegating this to the justice of the peace outside of court. Failure to produce a surety the court deems appropriate or refusal by the accused to consent to the conditions of release required by the court will result in the detention of the accused in custody until the resolution of their charge(s).

**What Do We Now Know About the Bail Process in Ontario?**

*Adults and Youths*

Canada’s youth justice system is premised on the presumption that youths are developmentally different from adults and thus must be treated differently by the criminal justice system. Indeed, the YCJA contains a number of provisions that provide extra protections for youths at the bail and sentencing stage, making it clear bail is supposed to be used in a different way in youth court. Given this, the youth bail experience provides a conservative means of evaluating the operation of the bail system. For example, one would assume that fewer youths should be held by police for a bail hearing, youths should appear before the court with a higher number of charges and for more serious offences, youths should be more readily released by the court and with fewer conditions of release than we would expect for adults given the legislation.
What is clear, however, is the difference in the way bail is being used for youths and adults is not as dramatic as may have been expected.

With the exception of Newfoundland and Labrador and Nova Scotia, the provinces/territories appear to have similar proportions of their adult and youth custodial population on remand. Indeed, those provinces/territories with low proportions of adults in remand have similarly low proportions of youths in remand, while provinces/territories with high proportions of their adult custodial population on remand have similarly high proportions of youths on remand (Spearman Rank Order Correlation = +.88)\(^{111}\). The similarities in remand proportions suggests an erosion of the presumption of bail in most cases for both adults and youths and supports the notion that a culture appears to have developed that accepts and expects bail matters to be adjourned to another day. Delaying the bail decision has resulted in more bail appearances being made and a consequent expansion of the remand population as accused await a bail decision.

Youths were almost equally likely to start their case history in the bail process though the proportion of early bail cases with a female accused was higher for youths. As suggested by Sprott and Doob (2009), this may be the result of police detaining girls for a bail hearing for social welfare reasons. Both adults and youths came before the court facing on average 2.4 charges. When we looked at ‘simple’ cases, youths were less likely than adults to be held for a bail hearing when there was only one or more violent offences, one or more common assault offences, one or more property offences or when there was only a single charge in the case. This pattern however did not hold when there was an administration of justice charge in the case or when an administration of justice offence was the only offence in the case. In both of these

\(^{111}\) See Chapter 6
scenarios youths were more likely than adults to be held for a bail hearing. This is interesting, when arguably administration of justice offences are less serious than violent or property offences, yet these charges were the most likely to result in youths being held for a bail hearing. However, when it comes to the actual bail decision, when we looked at all cases and at only ‘simple’ cases, for all offence types youths were more likely to be granted bail than adults, a pattern consistent with the provisions of the YCJA.

In terms of the amount of time spent in the bail process it appears that youths were being processed more expeditiously than adults, both in terms of the number of appearances made and days spent in the bail process, which is consistent with s.3(b)(iv) and s.3(b)(v) of the YCJA. While youths seem to have been being processed in different ways through the bail system, in a lot of ways the differences were not as substantial as may have been expected, given the additional protections for youth in the YCJA.

The Bail Process

Looking at the way cases are processed in court, it seems the bail court does not use its time in an effective way. While the court may technically be open for operation all day (in most cases), a considerable proportion of this operating time was lost to court breaks and times when nothing was actively happening in court (‘dead time’). In the end, the court actually spent very little time actively addressing cases. Indeed, for a court charged with making pre-trial liberty decisions the bail courts in Ontario make remarkably few bail decisions each day. While the bail courts observed for this research heard an average of 30 cases a day, a decision with respect to bail was only made in an average of 5.6 cases-- four accused released with the consent of the Crown and 1.6 bail hearings where an accused was detained or released by the justice of the
peace. In addition to these release decisions, on an average day 3.5 accused were traversed to another court and 2.6 were traversed into plea court. While it is likely that these accused had their bail decided or their cases resolved by way of a plea on that day, this did not happen in every case. Rather than making release decisions the bail court appears to largely operate as a remand court, simply adjourning bail matters to another day, effectively leaving the bail decision to someone else on another day.

The Expediency of Adjournments

Despite the legislated purpose of the bail court it appears that a more mundane desire to get through the docket each day is driving in court practices. Indeed, most cases appearing in bail court were simply adjourned to another day. Adjourning a case to another day is a substantively unproductive outcome as this simply delays the consideration of the case until the next appearance; it does not remove the case from the bail court docket or move the case to the next phase of the process. In this emergent culture, an adjournment is not only the most common way to deal with a case, it is also the most expeditious way of dealing with the case that day, and as a result is the most accepted by court actors. Not only does an adjournment postpone the bail decision, it is an outcome the Crown is generally in favour of as it ensures the accused remains in custody until the next court appearance. From this perspective, then, doing ‘nothing’ on a case and adjourning it to another day is, in fact, productive, in that it helps achieve the immediate goal: getting through the docket for the day and avoiding all risks.

In this way the interests and values of the courtroom workgroup conflict with the objectives of the criminal justice system as a whole. There seem to be two sets of expectations. On the one hand there is the legal definition of the court and how the court is supposed to operate in law. On the other there is the reality of an emergent court culture, in which the interests and
values of the courtroom workgroup may conflict with the purposes and mandates of the criminal justice system. Indeed, what may on its face appear to be a workgroup whose primary objective is the impartial administration of justice, upon closer examination reveals itself to be a veil behind which a ‘culture of adjournment’ and the objective of getting through the list as expeditiously as possible has developed.

Risk Avoidance

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 are required to produce a suitable surety and agree to comply with a number of conditions in order to secure release on bail. It was argued that 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. This risk aversion and offloading of responsibility has manifested itself 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.

While the Criminal Code enumerates instructions on how to approach the release decision of accused persons the court appears to disregard the legislated (ordered) approach to bail as outlined in the Criminal Code. Indeed, it seems courts apply their own interpretations of the Code, interpretations that are consistent with a court’s culture of risk aversion. In many of the courts observed, release under the ‘supervision’ of a surety has come to be considered the standard for securing release. Given the absence of any indication in law that a surety release
should be the presumptive form of release, it is argued that this practice is intimately intertwined with the court’s risk adverse culture.

The fixation with managing risks posed to the criminal justice system and the over-cautiousness of criminal justice professionals has significantly impacted the efficient and proper functioning of the bail court. This reluctance to be the one to make a release decision has increased the number of bail appearances it takes to process a case, which has resulted in an appreciable increase in the remand population.

*Conditions of Release as a By-product of a Risk-aversion Mentality*

Conditions of release are attached to bail orders in an attempt to constrain the behaviour of accused in the community so as to prevent future offending. However, each condition, by virtue of its attachment to the release order, creates the possibility of a new criminal offence. Should accused people fail to comply with any one of the conditions they may have their bail revoked; they may not be released again; and they may be charged with the criminal offence of not complying with a judicial order.

Many of the conditions that were routinely imposed had little or no relationship to the grounds for detention and facts of the alleged offence (in Chapter 5 we found this to be the case in youth bail matters). Approximately 41% of conditions imposed had no apparent connection, 22% had an ambiguous connection and 38% had a clear connection to the allegations or grounds for detention. Rather than exercising restraint and crafting narrow conditions that were clearly related to the grounds for detention and the facts of the alleged offence, conditions placed on youths were generally vague and far reaching which leads to infringements on legally innocent accused’ liberty. Indeed, it seems the court was making liberal use of the *Criminal Code* provision that allows justices to impose *any* condition that they deem reasonable and justified.
This however, appears to be inconsistent with the YCJA’s prohibition on detention for social welfare reasons. Indeed, the spirit of the Act would suggest bail conditions for welfare reasons should also be prohibited.

A number of conditions the court routinely imposed may be difficult to comply with for the duration of time it takes for a case to be completed. Some conditions were overly vague or far reaching, in that they could 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 charges. Charges of failing to comply are taken seriously by the court, and impact the likelihood of the accused being held for a bail hearing by police and the likelihood of being released on bail by the court. It seems that rather than a mechanism for ensuring accused return to court and do not commit further offences, bail conditions have developed into a tool that has little to do with their legal purpose of ensuring the accused returns to court and does not commit further offences.

**The More Things Change the More they Stay the Same**

Since Friedland’s study of the magistrate’s bail court in Toronto in the early 1960s the law on bail has been fundamentally changed. The enactment of the Bail Reform Act in 1972 saw an increase in police powers to release accused from the scene with conditions, the end of cash bail (security in advance), the introduction of further grounds for detention, and an expansion of the forms of release available along with the types of conditions that can be imposed by the court. Perhaps most importantly, it brought in a general (but subsequently not universal) presumption in favour of release rather than detention of those awaiting trial. Since coming into force, the law on bail has been amended by a number of parliamentary bills focussed primarily
on the grounds for detention and establishing situations in which the onus is on the accused to
demonstrate why they should be released on bail (reverse-onus provisions). Despite these
changes, a number of concerns raised by Friedland 47 years ago are still relevant today.

Friedland (1965) begins by lamenting the lack of research on bail, noting that without any
empirical research we have no accurate idea of how the system is operating and how well it is
fulfilling its objectives (3). While the issue of bail was also raised by the McRuer Report (1968)
and the Ouimet Report (1969) following the release of Friedland’s book, since the enactment of
the Bail Reform Act in 1972 bail has received relatively little attention and as a result there are
few empirical data available on the operation of the court. The limited work that has been done
tends to focus more on the release decision and what factors predict the denial of bail. Since
Friedland’s work there has not been any systematic attempt to understand the way the bail court
is functioning, despite the expanding remand population.

Sureties are Today’s ‘Cash Bail’

Friedland (1965) notes that bail practices “operate in an ineffective, inequitable, and
inconsistent manner” (172). It appears little has changed. Writing at a time when Canada
operated on a cash bail system, where money had to be deposited with the court in advance to
secure the accused’s release, Friedland (1965) found “In the setting of bail there is an undue
preoccupation with its monetary aspects”. In his study very few people were released on their
own recognizance and bail seemed to be set more so in relation to the offence than the offender
(176). The consequence of this was bail was often set at a quantum that was tantamount to a
detention order, a means of ensuring the accused would not be released without actually denying the accused’s release.

As was demonstrated in Chapter 4, few people today are released on their own recognizance and most require a surety. While the quantum of bail is supposed to be determined on the basis on the surety’s assets rather than on the severity of the offence or risk of the risk of the accused, it appears that in some cases bail is being set at a quantum far exceeding what the surety indicated under oath that they were capable of providing. It appears that the financial ability of a surety remains a primary consideration in deciding the surety’s suitability to act in a supervisory capacity, a practice reminiscent of the former cash bail system. While the quantum of bail is supposed to be determined on the basis of the surety’s assets rather than on the severity of the offence or risk of the accused, it appears that in some cases bail is being set at a quantum far exceeding what the surety indicated under oath they were capable of signing bail for. The result of this is that while the court has not formally denied the bail of an accused, it has been set at an amount the accused and their surety are unable to meet and the accused thus remains in pre-trial detention with the status of ‘bail set not met’. Friedland (2007), reflecting on the state of the current bail system, states that “What appears to be happening is that the requirement to find sureties has taken the place of cash bail as a method of holding accused persons in custody” (105). This practice effectively discriminates against people without well-to-do friends or family. However, it would appear that caution must be exercised in setting the quantum of bail; under s.11(e) of the Canadian Charter of Rights and Freedoms, accused have the right to reasonable bail and not to be denied bail without just cause. Should bail be set at a level that is not available to a proposed surety, it is tantamount to a detention order, which is arguably a violation of the Charter.
In addition to financial considerations, the surety’s moral character is subject to scrutiny, as is their ability to supervise the accused. It appears that a ‘suitable surety’ for the most part excludes those with a criminal record. Though there were a few observed cases in which sureties were approved despite the presence of criminal record (their records were minor and dated), this was the exception rather than the rule. While the argument can certainly be made that the presence of a criminal record is indicative of disrespect for the law, it is not entirely clear why a criminal record almost automatically precludes someone from acting as a surety. Similar to the financial requirements, this practice may also disadvantage particular accused.

Discussing the need to move away from the security in advance (cash bail) system, Friedland (1965) cautions that “There would be little point, however, in a complete revision to reliance on the supervision of sureties” (184). Sureties may be difficult for accused to obtain, and in modern society it is impractical to expect sureties to be able to supervise and track down accused if they abscond. It also seems unreasonable to expect sureties to be able to ensure accused do not violate any of the conditions of release imposed by the court and to hold sureties accountable for the actions of accused in the community. Indeed, it seems this responsibility for supervision and compliance is best left to the police. The tacit acceptance and acknowledgement of this by the court is reflected in the routine practice of the Crown not sending bails for estreatment when accused fail to comply or fail to appear in court.

Given the shift to an over-reliance on the use of surety bails, it is interesting to note that at a time when sureties were rarely used Friedland (1965) contends having a surety supervise the accused is of secondary importance to the act of signing the recognizance (184). Said differently, it is not the supervision the surety offers that is important, rather he suggests that it is the act of signing the recognizance (promising the court) that is most important (184). In this way, release on the accused’s own recognizance should be the most common form of release the
court uses. Despite this argument, most of the courts I observed required sureties for most of the accused released. The level of supervision the surety can provide is the primary basis on which a surety is evaluated.

**Challenging the Presumption of Innocence**

Friedland (1965) expresses concern about denying the accused’s release on bail on the basis of a risk of further offending (what has come to be the basis for the well-established and frequently employed secondary grounds for detention), as the “very practice presumes that the accused is guilty of the crime with which he is presently charged.” (187). It is reasonable for the state to want to reduce the risk of future offending. However, denying an accused’s bail on the basis of what they may do in the future seems to violate the right to be presumed innocent until proven guilty. What is more, this involves a deprivation of liberty that is not only open to abuse but is based on predictions of risk that we know are often inaccurately made. In addition to concerns around accuracy, formal risk assessments are almost never used in Ontario bail courts. Indeed, predictions of risk are largely based on informal intuitive risk assessments. Friedland (1965) continues, noting that “If an accused in fact commits offences while awaiting trial he can be dealt with by the law in the same manner as any other alleged offender. Why should an accused be deprived of his liberty in this very important period before trial because of something he may do in the future?” (187).

Pre-trial detention is a severe deprivation of liberty. As observed by Lord Denning 112 “It would be contrary to all principle for a man to be punished, not for what he has already done but

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112 *Everett v Ribbands* [1952] 2 QB 198, 206.
for what he may hereafter do” (in Friedland 1965: 187). In addition to concerns around the predication of risk and eroding presumption of innocence, Friedland (1965) notes that “If preventative detention were really justified in these cases it would be even more justified after the accused was convicted” (188). Indeed, while there are accused who commit offences while they are on bail, “there is no evidence to suggest that the danger (of offending) is significantly higher before trial than after release from prison (Friedland 1965: 188).

*Caution Against Reverse Onus Provisions*

Friedland (1965) recommended that the onus of establishing the necessity of denying an accused’s bail should always be on the Crown (188). Indeed, it seems sensible to require the state to demonstrate the need to deprive its citizens of their fundamental right to liberty. Despite this, the government has expanded the list of offences in which the onus is reversed and it is on the accused to demonstrate to the court that they should not be held in pre-trial detention and instead ought to be released into the community. Reverse onus provisions are premised on the belief that certain enumerated offences are so offensive that the Crown should not have to argue for an accused’s detention. Instead, the court is to presume that accused charged with these offences should not be released on bail. This is in contrast to the foundational principle of Canada’s bail laws- release on bail should be presumed in all cases unless the Crown can show just cause for an accused’s detention (s. 515(1) and s. 515(2)).

Interestingly, it appears that, as suggested by Webster, Doob and Myers (2009), the changes in the law have been more symbolic than real (98). In the context of reverse onus bail hearings this appears to be true. To an average observer of bail court, there is no appreciable difference in the bail hearing or the bail outcome in cases in which the onus is reversed. In
practice the difference appears to be confined to defence counsel presenting evidence in the show cause hearing and making final submissions before rather than after the Crown. Whether the onus is on the Crown or on the accused to justify detention or release, there does not appear to be anything remarkably different happening in bail court. Unless one was familiar with the operation of the bail court, no appreciable difference is obvious. This may be because the offences that result in a reversal of the onus tend to be relatively serious offences, meaning the accused may have already been more likely to have their bail denied even if the onus was on the Crown to demonstrate the necessity of detention. Another possible explanation is that in serious cases, regardless of whose onus it is, the accused has to demonstrate why release is appropriate.

It may be there is an underlying presumption that in serious cases, even if the onus is technically on the Crown to demonstrate why the accused should be denied bail, the accused, in attempting to refute this is demonstrating the appropriateness of release. Indeed, it may be that the seriousness of the offence has more bearing on the ultimate release decision than which party has the burden of discharging the onus of proof.

**Unforeseen Consequences of Encouraging Greater Use of Conditions of Release**

In 1965 Friedland suggested the courts be given wider authority to impose conditions of release beyond the requirement of returning to court (189). He went on to suggest a number of types of conditions, most of which were incorporated into the *Bail Reform Act* and today remain among the enumerated conditions in s. 515(4). The types of conditions suggested by Friedland (1965) largely centred on specific conditions that demonstrated a clear connection to the grounds for detention. Nowhere did he suggest Parliament adopt the provision contained in s.515(4)(f) allowing any other conditions to be imposed. Indeed, though speaking in the context of grounds
for detention Friedland’s (1965) comments are equally applicable to conditions of release; he notes that we need definite, clear and unequivocal criteria to be used for denying bail as there is significant potential for the misuse of “unarticulated, vague criteria” (186).

The wide, undefined discretion the court enjoys in the imposition of conditions has resulted in the criminalization of non-criminal behaviour. It seems that in an effort to control the behaviour of accused in the community under the guise of preventing any further offending, conditions of release have been used to increasingly structure and regulate the daily activities of accused people. This appears to be premised on a belief in the ability of conditions of release to prevent crime. Contrary to this belief, quite the opposite has occurred. Conditions of release create criminality - in 2010/2011 9.2% of all findings of guilt in adult court and 7% of all findings of guilt in youth court, had as the most significant charge ‘failing to comply with an order’ (Statistics Canada). Making it a criminal offence to fail to comply with any of the conditions the court imposes increases the likelihood of the accused committing another offence, even though in many instances the behaviour that is prohibited is not criminal in and of itself.

This situation is made more problematic when conditions of release are often unrelated to the allegations of the offence or the grounds for detention (see Chapter 5). Without a rational connection between the conditions imposed and ensuring the accused returns to court and does not commit any other offences, the court is imposing onerous restrictions on the liberty of innocent accused. These restrictions are likely experienced as punishment by those who are subject to them. Indeed, as a collective, conditions of release may be especially restrictive and may be in effect for a considerable period of time. As demonstrated by Sprott and Myers (2011) a large number of conditions of release imposed on accused combined with requiring that the accused be subject to these conditions for a long time creates the conditions for a youth to be charged with failing to comply with a court order.
Charges against the administration of justice are problematic for a number of reasons. Police will routinely detain accused for bail hearing if they are charged with failing to comply with a condition of their release. The presence of outstanding charges and allegations of failing to comply reverse the onus in the bail hearing. The court takes charges of failing to comply rather seriously as they are seen as indicative of a lack of respect for the court and an unwillingness to comply with the court’s order. This makes securing release on bail more difficult. It also means in the future the accused is more likely to be arrested, held for bail and have their bail denied on the basis of a history of failing to comply with a court order. The difficulties extend to other stages of the criminal court process as accused may have the substantive charges ultimately withdrawn while being convicted for the offence of failing to comply.

**Court Culture**

A courtroom workgroup model is better equipped than a bureaucratic model to explain what is happening in bail court. Among the workgroup a culture has developed; a shared understanding of how the day will proceed, how cases will be addressed and how time will be used. What makes this different from a bureaucracy is the goal (production outcome) is not moving cases towards resolution; rather the goal is to get through the day as quickly as possible. While the concept of a shared culture may more commonly be used to explain differences between groups, I suggest it can also be used to explain commonalities in court operation across courts. While the courts have certainly developed their own jurisdictionally unique practices, across the courts there appears to be a general culture that shares the same desire for the efficient ending of the day. This similarly does not undermine the explanatory power of the concept of
culture; rather it is interesting to see courts that are relatively autonomous having developed similar goals with similar ways of achieving them, while also seemingly rejecting the bureaucratic goal of efficient case processing.

Another part of the shared culture is the cultivation of set of shared beliefs about the bail decision and bail process. With these shared beliefs comes ideas about what the ‘going rate’ for bail is (i.e. who gets bail and who does not get bail). These ideas are influenced not only by the law but by the implicit beliefs of the courtroom workgroup. These shared beliefs can be seen for example in the way adjournments dominate the bail process (Chapter 3), the way sureties are used (Chapter 4), the number and type of conditions that are imposed on youth’s bail orders (Chapter 5), and the generally accepted notion that charges of failure to comply are indicative of disrespect for a court order and thus those who are charged with failing to comply ought to be treated more harshly (Chapter 4 and Chapter 5). In this way, the bail decision is about more than an evaluation of the risk the accused poses. The bail decision is also about the relationship between the accused and their surety, it is about disciplining youths who are in trouble with the law, it is about affirming the power of the criminal justice system and demanding respect for its authority through the imposition of conditions of release and harsher treatment of those who have been charged with failing to comply.

A Culture of Adjournment

The quantity of adjournments in bail court is the primary factor implicated in the magnitude of delays that plague the bail system. Adjournments augment the number of people in pre-trial detention and prolong the determination of bail, relegating accused to confinement for increased periods of time. The way cases are processed in bail court is demonstrative of the
short term interests of courtroom workers, who seem to be more interested in getting through the day than in distributing justice. The ‘culture of adjournment’ is often explained away by the workgroup as being the unavoidable consequence of dealing with an expanding caseload of increasingly serious cases. Notwithstanding the evidence that neither the crime rate nor the seriousness of crime is on the rise, even in courts that are not faced with a large caseload, the majority of cases are remanded to another day. Since an adjournment simply puts the case off to another day, the bail court gets backlogged with old cases, which impacts the volume of cases on the daily docket. This higher volume of cases leads to cases being shuffled into court without anyone knowing who the particular accused is or what their intentions are for the proceedings that day. Since it is unknown what to do with the case, an adjournment is the easiest and least contentious way to address the matter. This results in an assembly-line processing of cases, as staff attempt to process a large number of cases in the fastest way possible.

Reducing the number of appearances accused make in the bail process will significantly decrease the size of the daily bail docket. Most accused who appear in bail court on any given day are not in court for their first appearance, they have been remanded from another day. Table 1 below provides an example of what can happen if the number of appearances made in bail court is reduced. Using real data ‘Court X’ describes the number of appearances required to complete the bail process. In this example the court had an average of 30.2 cases on the daily docket, 13 of which were new bail (first appearance) cases. Using hypothetical data ‘Illustrative Goal’ provides an example of how decreasing the number of bail appearances can reduce the daily bail caseload. In this example the court had an average of 23 cases on the daily docket, 13 of which were new bail (first appearance) cases; a caseload reduction of 24%. Indeed, it is the cases that take more than four appearances that are the problem; these cases count for an enormous number of appearances, and have a significant impact on the average number of
appearances and days in bail court. If the bail court is able to identify these cases and work on moving them towards the completion of bail in fewer appearances there would be a substantial decline in the daily case load. Improving the operation of the bail court is not only about moving cases through the bail process more efficiently, it is about reducing the duplication of Crown work and reducing the heavy caseload seen in many bail courts, giving courts more time to focus on the more complex cases.

**Table 1: Example of Possible Caseload Reduction in Bail Court**

<table>
<thead>
<tr>
<th>Number of appearances</th>
<th>Court X</th>
<th>Illustrative Goal</th>
</tr>
</thead>
<tbody>
<tr>
<td>One</td>
<td>57.1%</td>
<td>60%</td>
</tr>
<tr>
<td>Two</td>
<td>14.3%</td>
<td>25%</td>
</tr>
<tr>
<td>Three</td>
<td>7.1%</td>
<td>10%</td>
</tr>
<tr>
<td>Four</td>
<td>7.1%</td>
<td>5%</td>
</tr>
<tr>
<td>Five</td>
<td>5.4%</td>
<td>--</td>
</tr>
<tr>
<td>Six-fourteen</td>
<td>8.9%</td>
<td>--</td>
</tr>
<tr>
<td>Total (100%)</td>
<td>Actual cases: 30.2</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Actual new cases: 13</td>
<td></td>
</tr>
<tr>
<td></td>
<td>“Expected” caseload: 23.0 with 13 new cases</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Savings of: 24%</td>
<td></td>
</tr>
</tbody>
</table>

In the end, it appears that nobody in court really cares about the formal legal purpose of the bail hearing as it is traditionally defined. The courts and what transpires within their walls
throughout the course of the day has little to do with pursing justice. Due process is an adversarial notion that is a time-consuming principle to uphold. Conflict requires time and energy thus making it easier to cast aside differences, hold fast to the commonalities that permeate the group and work together to make the day go by as simply as possible. Though there certainly is the exception, the vast majority of those working in the courts are neither invested in nor rewarded for accomplishing the ultimate outcome of a particular case or in pursing outside goals of increased efficiency. Everyone is simply trying to do a satisfactory job and finish the working day as quickly as possible.

A Culture of Responsibility Aversion

Power (2004) would suggest that what is being seen may be more so a function of responsibility aversion than an ideology of risk aversion (45). This means actors are not exhibiting a reluctance to engage with risk per se; rather they are trying to avoid being held responsible for the risk decision. This culture of fear has incubated a preoccupation with avoiding responsibility to evade the consequences of making the ‘wrong’ decision. Since decision makers are held accountable for how they handle uncertainty, the most defensible action seems to be the most conservative. For police this means choosing to hold more accused in custody for a bail hearing instead of releasing them from the scene. This practice has emerged despite increased powers of release given to officers under the Bail Reform Act (1972). Though it seems reasonable to assume that officers are holding more accused because there is more crime and the offences are more serious, statistics on crime (or even serious crime) are not reflective of this; the volume and seriousness of offences has remained relatively constant over time (see Chapter 1) and many people are being held for not very serious offences. In this way the police, perhaps apprehensive about censure, are avoiding responsibility for the decision by forwarding
cases to court where it is the Crown’s discretion that will determine how the case proceeds. In
remanding an accused to custody, the police immunize themselves from potential criticism.

The transferring of responsibility from the police places increased accountability on the
Crown. Confronted with more accused being held for a bail hearing, the Crown is facing more
potential challenges to their reputation, unless there is a surety available to supervise the accused
(police cannot impose sureties). In deciding to consent to an accused’s release the Crown is
inadvertently challenging the authority and legitimacy of the arresting officer’s decision to detain
the accused pending a bail hearing. What is more, if the Crown consents to the accused’s release
it is their decision, not the decision of the arresting officer, which will be challenged if the
accused re-offends. It seems it is no longer good enough for a professional to say that behaviour
is difficult to predict and ‘unfortunate incidents will happen’. Instead, each incident is seen by
the public as a failure of expertise, a failure for which someone must be held accountable (Rose
1997: 15). The Crown is charged with upholding the public interest and minimizing the risk
posed to the community. In the event of an unfortunate incident their actions will be publicized
and they will indeed be blamed for the decision and resultant incident. The consequence of this
is each case is seen as the next potential inquest and no one wants to be implicated as the one
who decided to release the accused.

Given the weight of this accountability and the desire to protect their reputation, it is
often easier and safer to oppose the release of an accused. In so doing there must be a show
cause hearing where the justice decides whether or not to release the accused. As with the
police, the result, from the Crown’s perspective is that the decision gets passed further along.
What seems to have happened is what Power (2004) calls an “intensification of attention to
process” (46). This magnification creates the appearance of process, which is important for
defending the rationality of decisions. In this way, it is more defensible to contest the accused’s
release and go through the rigors of a bail hearing, leaving the ultimate decision up to the justice. In so doing, the Crown is absolving itself of responsibility and thus blame-ability for the decision.

The bail risk assessment is focused solely on the individual’s risk; it is looking at the risk the individual poses to the system and its image. This has resulted in the creation of internal control mechanisms; policy directives that guide behaviour and dictate expectations. As has been demonstrated, it has become standard in some courts—perhaps courts most concerned with reputation management and public relations—to require a surety in almost all cases in order for a release order to be fashioned. It is suspected that the demand for surety supervision is increasing, which can be understood as an intensification of strategies of process to give the impression of manageability and to avoid blame. In requiring a surety, the court is able to manage the risk and is provided with an assurance of risk minimization. The release decision is defensible because the accused is being released into the custody of a surety who is responsible for monitoring and supervising the accused. The surety functions as an insurance strategy by minimizing the risk posed by the accused and insulating the court from criticism and culpability. Only in the most serious of cases or where there is no suitable surety available does the court prefer to detain an accused. In these cases the court is more critical of the insurance a surety can provide and prefers to self-manage the risk through detention (Power 2004:26).

The Politics of Risk

Through the language of risk society has created the impression that we are being exposed to growing risks and threats to our security. As pointed out by Power (2004), whether society is more risky or objectively more dangerous than in the past is debatable. In the context
of criminal justice the declining crime rate and declining violent crime rate support this
suggestion. The difficulty is that significant operational risk events, though of a low probability,
when they do occur are of high impact (30). It is these events that lead to public outcries for
change; these rare occurrences are than translated into the driving force behind a policy response
from the government. It may be that the government is overly responsive to public concerns (the
over-use of pre-sentence detention does not appear to be a public concern). Power (2004)
suggests reputational risk management may itself be part of the amplification of reputational risk.
In being unable or unwilling to contest public perceptions, the government is reifying risk by
reinforcing the public’s interpretations. Crises, whether real or perceived, are important pressures
for change in practices of risk management and risk regulation (35, 43). For politicians,
responding with policy change and denouncements of behaviour are the rational responses to the
perceived crisis; it is politically risky to deny the fears of the citizenry. In this way, institutional
responses are very much guided by cultural demands for control, accountability and
responsibility attribution (Power 2004: 38). “It is the specific dynamics of these amplification
processes in society, rather than any generalised aversion to risk-taking at the individual level,
which potentially inhibits organizational innovation” (Power 2004: 45). Politicians are not
willing to risk themselves or their reputation; it is easier to appease the public through assurances
of closer regulation, stricter control and more surveillance of risky people. In a climate governed
by fear and calls for increased security, the government cannot say it is normal or expected that
some accused will offend while on bail.
Resistance to Change

In February 2012 British Columbia’s Ministry of the Attorney General released a Green Paper recommending an examination of the justice system so as to improve the effective and efficient use of resources and processing of criminal cases. The Minister acknowledged a growing demand for resources despite reform initiatives to improve the system and noted with limited resources and competing priorities, the problem cannot be solved with more resources. The Minister emphasised the importance of fiscal responsibility and the efficient delivery of public services. As it currently operates the criminal justice system is fragmented, with no one managing the system. Indeed, requests for more resources have not been tied to measures of system performance. In order to stabilize the criminal justice system budget by developing cost containment strategies, the Minister insists we need to better understand how the system operates by establishing monitoring, evaluation and reporting protocol.

What is interesting is the Chief Justices of British Columbia’s response to the government’s Initiative to make the system more effective. In a collaborative statement released in 2012 the Chief Justice of British Columbia, the Chief Justice of the Supreme Court of British Columbia and the Chief Justice of the Provincial Court of British Columbia state that “judges have a responsibility to protect their independence and impartiality”. While judicial independence was not the focus of this Green Paper, the Minister in seeming foresight did comment that ‘independence’ is often misinterpreted, stating ‘…independence should not be used as a shield against scrutiny on issues related to public administration…Overbroad concepts of independence make it harder to understand why process and other justice system inefficiencies occur. They can also limit accountability.”

In framing their argument around the importance of preserving judicial independence and impartiality the Chief Justices appear to be missing the point by interpreting questions of
efficiency and management of the criminal courts as a challenge to their independence and impartiality. They do this by indicating the Constitution requires that in addition to security of tenure and financial security, judges must maintain administrative independence; “courts must be able to decide how to manage the litigation process and the cases judges will hear” (Chief Justices of British Columbia, 2012). They note the Supreme Court of Canada has stated that this administrative independence is necessary to maintain separation between the judiciary and legislative and executive branches of government. This administrative independence includes judges having control over the assignment of judges to hear particular cases; the scheduling of court sittings; the determination of court lists in terms of cases to be heard; the allocation of courtrooms; and the direction of registry and court staff in the carrying out of these functions.

The government’s objectives surround conserving limited fiscal resources and improving access to justice. It is unclear how attempts to improve the efficient operation and management of a public institution are being interpreted as a threat to judicial independence. In framing their concerns in this way, the Judges are ignoring the fiscal constraints the system confronts and are tacitly refusing to be involved in initiatives to improve the efficiency of the system. Indeed, the Judges seem to ignore the fact that experience would suggest that the problem may lie in the lack of judicial management of appearances made by accused before their case reaches completion. In response to the suggestion that Judges can exercise better control over their dockets by more actively managing the list and encouraging the progression of cases towards resolution, the Chief Justices note “The court exercise(s)(sic) some measure of control over this, but they must respect the accused’s constitutional rights, as well as the professional obligations of the lawyers to their respective clients” (Chief Justices of British Columbia, 2012). This seems to be a mechanism for insulating themselves from responsibility for the problem of court administration. Reverting to claims that in an adversarial system judges cannot exercise much control on the processing of
cases by interfering with the way defence counsel manage their cases, is little more than an excuse, a way to avoid changing their behaviour and encouraging a wider cultural shift.

The Judges’ sentiments are further evidenced by their resistance to the idea of fixed resources for the criminal justice system. Indeed, they indicate that more financial resources are required for the system to perform better; “Flexibility is necessary if changing demands for judicial and court resources are to be met” (Chief Justices of British Columbia, 2012). However, if the past is any indication of the future performance of the system, more resources will simply be absorbed with little permanent perceptible change in the operation of the court. Given what we know about court culture and resistance to change, any initial improvements are likely to fade in time as attentions shift and court actors resume the ‘normal’ way of processing cases. Indeed, rather than simply investing more resources at the problem, the system needs to learn to do better with what it has. Simply infusing more resources without implementing strategies to improve the efficient operation of the court will likely result in maintenance of the status quo. It is only once inefficiencies have been identified and remedied that the system will be able to evaluate what resources are required.

Advocating for an increase in resources is a simplistic solution to a complex problem and is little more than a means by which to avoid the more difficult task of altering behaviour. This is not a new concern. Judge Zuber’s Report on Ontario courts, released in 1987 recommended the creation of government, judicial and court management committees that would engage in a constant process of evaluation, innovation and experimentation to ensure the court system was providing the best possible service. Judge Zuber did not express any concern that these committees would threaten judicial independence, nor did he indicate more resources were required. This sentiment however was clearly not shared across the legal profession as Anthony Doob (1988), in a column in the Globe and Mail noted that while judges were then sitting on
average three hours a day, Earl Levy (president of Ontario’s Criminal Lawyers Association) suggested unreasonable delay in the court system can be solved by appointing more judges.

Governor General David Johnston, speaking to the Canadian Bar Association’s 2011 annual legal conference regards the problem of court inefficiencies in a remarkably different way than the Chief Justices of British Columbia.

“What let me now turn to a contemporary instance in which the administration of justice cries out for improvement: in the administration of our courts themselves…Although I have focused on court delays in Ontario, wide discrepancies exist all across Canada, both in our criminal and civil justice system. Why? Interestingly, Anthony Doob suggests that reducing these delays would require a hard look at what he calls ‘court culture’; that is, “shared expectations about how things should work”, among judges, the accused, defence counsel, Crown attorneys and legal aid. In addition to understanding these cultures, a shared willingness is needed to work towards ensuring a fair, equitable and speedy end to each case, for the benefit of the individuals involved, the legal system itself and society as a whole. We need to bring a sense of urgency to that shared culture and redefine professionalism. Judges, in particular, can help in our effort to reduce delays and improve the administration of our courts, by lending their expertise and authority to this important matter. As the individuals entrusted to preside over our courts, judges have a responsibility to ensure justice is served in all its formats, not solely when it comes to delivering judgements.” (from Plant, 2012)

What is particularly interesting about this invitation to court actors generally and judges in particular is there is absolutely no mention of the need for more resources and personnel. Indeed, one would think the Chief Justices and Governor General were discussing different issues. There is no suggestion by the Chief Justices that the problem is with the system itself. They indeed, seem unaware or willfully ignorant of a growing lack of confidence in the administration of justice, and the role courts play in this declining sentiment. Instead they provide a lecture on ‘judicial independence’, diverting attention away from the actual issue. As suggested by Plant (2012) the Judges critique the government for not understanding the meaning of judicial independence however they are perhaps taking this definition too far. Indeed, “The idea that any participation by government in judicial administration is a violation of judicial independence is a bit of a stretch” (Plant, 2012). By framing the issue as a challenge to judicial
independence the Judges are refusing to accept any responsibility for the current situation and are refusing to acknowledge the role they must play in improving the system. The difficulty is that any effort to reform the operation of the court system will be frustrated without judicial support, as real reform requires an “active, contributing, constructively engaged judiciary” (Plant, 2012). While all members of the legal profession must play a role in addressing these challenges, judges are uniquely positioned to influence the systemic and cultural change required.

Suggestions for Change

It is becoming increasingly clear that continuing to operate the bail and pre-trial detention system as it is currently run is not sustainable. In a time characterized by austerity measures and calls to tighten public spending, we must critically examine our current bail practices. The simple truth is we can no longer afford to maintain the current bail system. In order to create the systemic and cultural changes that are required to reduce the remand population we need to re-conceptualize the bail process and change the way cases are being processed in the bail system.

Easing the Flow of Cases

Friedland (1965) suggested police should increase their use of a summons for accused rather than arresting and holding the accused for a bail hearing. This suggestion holds the same merit today. Stemming the flow of cases would ease the caseload pressure on the bail courts, allowing more time to make bail decisions. It appears that despite the augmentation of police powers of release accused are continuing to be held for a bail hearing at an increasing rate (see Chapter 1); more cases are starting their case history in the bail process. This means reconsidering the types of cases that are worthy of being held for a bail hearing and reevaluating
the necessity of holding all accused charged with failing to comply with a court order for a bail hearing. Indeed, considering the proportion of cases that are released on consent of the Crown (especially those released on consent of the Crown on the same bail as the previous bail order or on the accused’s first appearance) (see Chapter 4), it would appear there are a category of cases that are being held by police that could perhaps be released at the scene. Police have the power to impose conditions of release; use of this power should be encouraged in less serious cases (property offences, minor violence, administrative offences).

Improving the Administration of the Courts

Every effort must be made to facilitate the timely release of accused. There are a number of options that ought to be explored if we are serious about improving the operation of the court. The court should remain open past current operating hours so that all cases that are ready to proceed with a bail hearing are heard. For example this could mean operating an evening or night court. This is not a new idea; in 1965 Friedland made the same suggestion (174). To compensate for a later closing time the court could open later in the day so that more cases are prepared to proceed when the court opens for operation. Another possibility would be to have a justice of the peace available 24 hours a day via video link. This would mean that a system could be implemented that would allow bail to be determined while the accused is in police custody.

Though this research demonstrates that it is the accused who is most often the one requesting an adjournment, it does not necessarily follow that this practise is, therefore, something that can be seen as benign. In order to reduce the number of people in remand institutions, accused persons must cease to be subject to multiple bail appearances before a bail
determination is made. If bail is determined in one or two appearances, the same people will no longer be appearing day after day in bail court. The docket will consequently be comprised primarily of accused who have only recently been arrested, effectively increasing the overall efficiency of the bail system by dramatically reducing the daily bail docket.

Sureties

Over 148 days of court observation in 8 adult courts in Ontario, 61.3% of all cases in which the accused was released a surety was required (in 54% of consent releases and 82% of show cause hearings a surety was required) (see Chapter 4). The court’s current view seems to be that sureties must not only have sufficient assets and commit to an intensive level of supervision, they must be seen as being of strong moral character and demonstrate a solid relationship of trust and respect with and for the accused. Procuring a suitable surety, consequently, takes the concerted effort of both the accused and private or duty counsel, and it often takes considerable time to locate a person who is both suitable to the court and willing and able to take on this responsibility. This is further complicated by the apparent requirement or practice in some courts that sureties be present in court prior to court starting and must remain in court until their case is reached. This means that cases are often held down until later in the day or adjourned to another day for the accused to locate a suitable surety. The case may also be delayed until a date can be found when both counsel and the surety are able to be present for the consent release or show cause hearing.

Changing the way sureties are used includes altering the shared perception that sureties are required to be physically present in court to be personally assessed by the Crown. This practice seems to have grown out of the desire of Crowns and justices of the peace to have the
surety present to hear and be fully aware of the allegations and the conditions of release. In a non-trivial number of cases where the Crown is consenting to the release of the accused, the surety was called forward to give evidence. While this is sometimes done informally in court, in most cases sureties were asked to give sworn testimony on their assets, relationship with the accused, knowledge of the allegations and plan of supervision. Admittedly, this is done in some cases so the surety can be named, thus doing away with the necessity to be re-interviewed by a justice of the peace. That said, it is unclear why it is undesirable for a potential surety to be evaluated by the justice of the peace outside of court when the Crown is consenting to the accused’s release. A more principled approach would see the court craft a release order in the absence of a surety and simply have the surety be approved by a justice of the peace outside of court when they are able to attend, except in very serious or otherwise exceptional circumstances.

In nearly all of the cases in which a surety was required, the surety took the stand to give evidence during the bail hearing. This is not surprising since it is through the surety’s testimony that defense counsel introduces to the court the plan of release and supervision for the accused. The surety’s testimony typically made up most of defense counsel’s evidence. Since sureties are a vital component of the defense’s evidence and the Crown is contesting the accused’s release it may not be appropriate to have sureties examined by the justice of the peace outside of court. That said, there is some work that can be done in streamlining the examination of sureties and in shifting the expectation away from the idea of ‘perfect’ (24 hour) supervision.
Legal Decisions by the Legally Trained

Friedland (2007), reflecting on the bail situation in Canada 45 years after his study, notes a comment made by defence counsel in *R. v. Hall* 113 - “the bail hearing is often the single most important step for an accused person in the criminal process”. While bail often seems to be overlooked in terms of its importance or status as a court process, the influence pre-trial liberty status has on the likelihood the accused will enter a plea, be convicted and sentenced to custody is well documented (98). In light of the importance of the bail decision in terms of its timeliness, the legal rights that require protection, the liberty at stake and the implications of conditions of release attached to bail orders, one is left wondering why in Ontario bail court is presided over by justices of the peace who are not required to have any legal training? Given the law that needs to be applied, the importance of the bail decision and the reality that we have a growing remand problem, it seems perhaps that judges, who have a better understanding and greater experience with the law would be better situated to interpret and apply the law to the bail decision.

Another difficulty with the lack of legal education of Ontario justices of the peace is that the Crown then is often deferred to when interpreting areas of the law with which the justice of the peace is unfamiliar. This is not to suggest malicious intent on the part of the Crown; however, the criminal court process is to be presided over by an impartial judicial official, and relying on the Crown, who represents the state in the adversary process, to assist with legal interpretation is treading on dangerous ground.

By having a judge preside over bail court the processing of cases could be expedited on account of their knowledge of the law and ability to narrow the focus of issues addressed in the bail hearing. If an accused decides they would like to plead guilty to the charges they would be

able to do so right away without having to be traversed to another court. Judges, who maintain sole authority to sentence accused, are more familiar with the requirement that conditions of probation be rationally connected to the offence and it would be more likely to extend this level of scrutiny to the evaluation of bail conditions.

Consistent with this suggestion is Bill 97 ‘Ontario Justices of the Peace Modernization Act, 2012’, a private members bill that has passed the First Reading in the Ontario Legislature. If enacted, this Bill would create two categories of justices of the peace - ‘presiding justices of the peace’ and ‘administrative justices of the peace’. The distinction between ‘presiding’ and ‘administrative’ justices of the peace would be that ‘presiding’ justices of the peace must have been practicing law for five years before being appointed. Enhancing the qualifications of ‘presiding justices of the peace’ is a step towards having legally trained justices of the peace preside over trials and sentence accused charged with summary conviction offences, an ability already contained in s.785 of the Criminal Code.

Moving Forward

Risk or responsibility aversion is eroding the presumption of release on bail. In delaying the decision making process, accused are remanded in detention for increasing periods of time, which has significant impacts on the size of the remand population. In this way, the presumption of detention appears to have crept back into the bail court process. It is contrary to fundamental principles of justice for the punishment to come before the conviction, yet we treat accused persons as though they are convicted offenders. The importance or value of liberty and being secure from government surveillance and restrictions is being downgraded by a culture obsessed with risk and security.
It seems that an increasing concern about risk has created a culture of fear amongst criminal court actors; fear of not only what may happen but fear of being the one to make the release decision. This fear does not appear to be about a real concern that the accused may reoffend while on bail, rather the fear appears to centre on being held accountable for what may come to be perceived to be the ‘wrong’ decision. Delaying the release decision or denying an accused’s bail is the easier decision to make, as it in many ways insulates the system from criticism. Indeed, as suggested by Webster, Doob and Myers (2009) the benefits of holding an accused in detention are visible (protection of society, administration of justice) while the costs of pre-trial detention are often invisible (deprivation of liberty, conditions of confinement, implications for later stages of criminal court processing).

Court actors are making the best decisions they can with the information they have within a relatively limited time frame. Perhaps what needs to be remembered is that just because an accused allegedly commits another offence while on bail, does not mean that the original release decision was the wrong one. In the bail court the release decision is based on predications about what may happen in the future. These predictions will never be perfect but the decisions with respect to bail must nonetheless be made. Indeed, as has been demonstrated, the majority of accused will ultimately be released on bail. With this knowledge, it seems then what needs to be focussed on is not so much the ‘release versus detention’ decision, but rather the delay in making this decision.

Perhaps what is most disconcerting is that the system has become heavily reliant on pre-trial detention, which results in punitive controls being placed on individuals who have not yet been adjudicated. The sheer magnitude of the remand population means it imposes a massive economic cost, which dramatically impacts the system, by straining the capacity and resources of detention facilities and the criminal courts. The remand problem is indicative of larger questions
about the values of society. Our criminal justice system is premised on a presumption of innocence, the right to reasonable bail and a belief in the fundamental need for due process in the administration of justice. Despite this, we hold more people in pre-trial detention before they have been found guilty of any offence than after they have been found guilty and sentenced to custody. Indeed, as suggested by Puttkammer (1953) “We first administer the major part of the punishment and then inquire whether he is guilty” (in Friedland 1965). Friedland (1965) notes that “Little, if any thought is given to the purposes to be accomplished by the granting or denying of bail. The present system is unfortunately often subverted into a form of punishment before trial (Friedland 1965: 175). The notion that punishment is being inflicted on so many legally innocent people is cause for concern. This however, is further aggravated by the reality that there is a reasonable probability that accused who are held in detention for a bail hearing will not be convicted of the charge(s) (acquitted, withdrawn, stayed) that formed the basis for their arrest. In Friedland’s (1965) Toronto bail study 24% of accused were not convicted of any criminal offence; in 2006/2007 38% of accused adults and 34.6% of accused youths who were held for a bail hearing in Ontario were not convicted.114

In the end, there appears to be a considerable disjuncture between the law on the books and the law in practice. The administration of the law on bail and pre-trial detention deviates in non-trivial ways from the original legislated intent of the law. In applying bail in a manner that is inconsistent with fundamental principles of criminal justice, the system has come to rely heavily on the use of pre-trial detention.

114 Unfortunately these data are not exactly comparable to Friedland’s data as his study only looked at cases in one Toronto court. That said, for the purposes of demonstration these data indicate that a considerable proportion of accused that were held for bail hearing were not ultimately convicted of any offence.
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