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"Broken Bail" in Canada: How We Might Go About Fixing It

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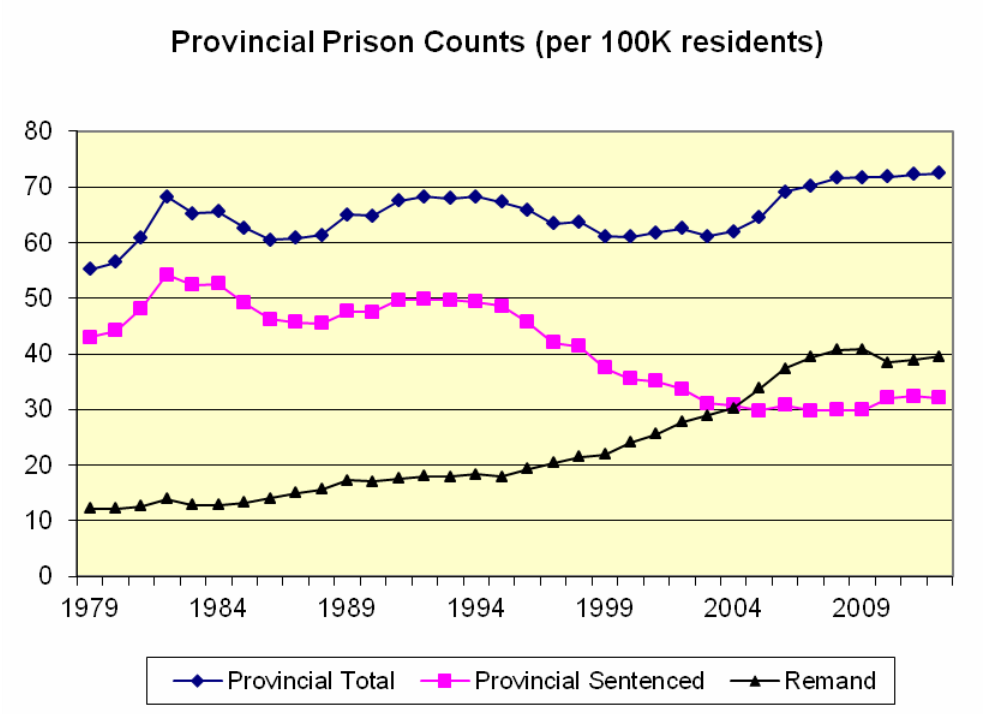
1. The Problem

In recent academic, professional and media conversations regarding pre-trial detention in Canada, a new expression has been taking shape. Specifically, an increasing number of people have claimed that "Bail is Broken" in this country. It is likely safe to assume that the generic reference to 'bail' in this context refers not only to the bail process (i.e., the criminal procedure of determining whether an accused detained by the police will be released or formally detained until trial) but also to remand (i.e., the detention of these accused in provincial/territorial custody awaiting either a bail determination or, having forgone or been denied bail, the resolution of their court case). Indeed, not only are a greater number of criminal cases beginning their lives in bail court and the determination of bail is taking longer to occur, but those (formally or informally) detained until trial are also spending longer periods of time in remand. Both of these separate but interrelated phenomena have contributed to the problem of pre-trial detention in Canada.

Figure 1 tells half of the story.

Figure 1: Provincial Sentenced and Remand Rates (1978-2012)



While the sentenced population in Canada shows a relatively steady decline over time, the remand population has increased more than threefold over the last 35 years. Specifically, it has risen from a rate of 12.6 per 100,000 in 1978 to 40.9 per 100,000 residents at its peak in 2009. Although the

remand rate dropped somewhat between 2009 and 2010, it would appear to have been creeping back up between 2010 and 2012. At approximately 40 per 100,000 residents, the Canadian rate is still higher than most comparable Western European nations as well as many English-speaking countries (Australia, New Zealand, England/Wales, Scotland and Ireland). Notably, this significant increase in Canada has occurred in the wider context of relative stability in the overall provincial/territorial prison counts over the last 3-4 decades as well as declining (overall and violent) crime rates since the early 1990s. By 2012/13, 54.5% of all adults in provincial/territorial institutions on an average night were on remand. In fact, a greater number of legally innocent (or at least unsentenced) people have been held in remand than offenders actually serving custodial sentences post-conviction in provincial/territorial correctional facilities in Canada since 2004/5. While there is substantial variability in remand rates across provinces/territories, the extent of the growth of the problem is clearly illustrated in Table 1. The five largest provinces have been depicted, constituting roughly 90% of the Canadian population. As one quickly notes, the increase in each of these jurisdictions is large, even for those provinces that were already quite high in 1980.

Table 1: Percentage of Average Total Provincial Prison Population that are on Remand

Province	1980	2013
Quebec	32%	46%
Ontario	18%	61%
Manitoba	19%	63%
Alberta*	37%	61%
British Columbia	24%	52%

* Data for Alberta are from 2012, not 2013.

Of course, the other half of the story is rooted in the numerous and far-reaching repercussions of our problem of "Broken Bail". Fiscally, our large and growing remand population represents significant additional economic costs to the provincial/territorial governments, further straining limited resources. Institutionally, correctional institutions are also facing progressively greater challenges associated with the effective management of this population. Particularly given the unique characteristics of remand prisoners (i.e., unpredictability in terms of length of stay, the need for their separation from sentenced offenders, their frequent need to be transported to/from courthouses, and their lack of access to activities/programming), the day-to-day operations have quickly become an administrative nightmare, with serious repercussions for the safety of staff and inmates. In fact, this burgeoning population of remand offenders has frequently resulted in prison overcrowding and less than optimal living conditions – a reality which has been linked to prison disturbances in other nations.

On a more individual level, detention – even for short periods – can have devastating effects on an accused's life. In terms of criminal justice consequences, remand may negatively impact the ability of the accused to defend him/herself (e.g., rendering it more difficult to hire and communicate with a lawyer, find evidence or witnesses to support one's case or procure employment or engage in other activities which might demonstrate intent to 'mend one's ways'). In addition, pre-trial detention can affect an accused person's decision to plead guilty – an effect that also appears to differ across races. In one study, accused who were denied bail were two and a half times more likely to plead guilty than those released into the community, controlling for other legal factors. Further, detained suspects are more likely to receive (longer) custodial sanctions than those who are released, even across cases in which the most serious offences are relatively similar in nature.

Even with regard to non-criminal justice ramifications, remand can have equally damaging consequences for the accused. Beyond possible job loss and its collateral effects on family members relying on this income, the stigmatization of the accused (and family) reduces subsequent reintegration. Moreover, pre-trial detention for even the shortest of time has been suggested to be onerous for the accused who is often housed in overcrowded detention centres with no recreational, educational or rehabilitative programs. These harmful effects are only exacerbated for the non-trivial proportion of those held in remand who are ultimately never found guilty.

More broadly, a reality in which a greater number of people are being held in custody before rather than after trial has been considered by several legal scholars to be a flagrant disregard for the principles of justice. Beyond challenges to the presumption of innocence, Canada's current remand problem also risks distorting sentencing. As 'time served' credits are frequently taken into account at sentencing which reduce the severity of the actual sentence handed down, public perceptions of inappropriate leniency on the part of the court have increased.

2. The Dynamics of the Problem

While the (technical) sources of the problem are seemingly simple to identify (i.e., an increasing number of people detained by police for a bail hearing combined with longer periods of time spent in remand awaiting either the determination of bail or the resolution of one's criminal case), the dynamics driving these realities are considerably more complex and intertwined. In short, Canada's 'broken bail' system would appear to be largely rooted in a significant change in mentality. Specifically, Canadians have seen the rise of a cultural climate over the last 3-4 decades which can be characterized primarily by risk aversion and risk management. Broadly speaking, the gradual substitution of the welfare state ideology with a neo-liberal mentality has introduced heightened concern with risks or potential dangers in society which cause unease and fear in (law-abiding) citizens. Within the criminal justice sphere, the role of the state has become one of limiting – to the

greatest extent possible - the risks to public safety which offenders represent.

Not surprisingly, this risk-averse mentality has permeated the bail process and translates into vigorous attempts to avoid releasing accused persons who might subsequently commit crimes while on bail. Given that we have yet to perfect a means of distinguishing, with complete reliability, those who will, in fact, offend once released on bail, a risk-averse culture in the bail system has created – in practice – a generalized incentive among all criminal justice players to avoid – as long as possible – releasing anyone with more than a non-trivial likelihood of committing a crime. In legislative terms, we have, for all intents and purposes, abandoned the primary grounds for detention – to ensure the attendance of the accused in court (under *Criminal Code,* 1985, s 515(10)(a))[1] - as the primordial concern in determining whether an individual should be released on bail and elevated the secondary grounds – to ensure the protection and safety of the public from additional criminal acts that the accused might commit while on bail (under *Criminal Code,* 1985, s 515(10)(b))[2] – as the principal focus of the decision-making process.

More importantly, this shift in priorities has meant that criminal justice decision-makers have begun conceptualizing any release decision in terms of being either right (i.e., the accused does not commit a criminal offence while on release) or wrong (i.e., the accused does, in fact, commit a crime while in the community) rather than simply being the best decision made at the time and based on the information that was available. In broader terms, decisions about release/detention are now seen as a product of a particular individual who – in the case of a tragic incident - will be personally held responsible (read: blamed). By extension, individual – as well as institutional – risk reduction has emerged as a primary concern.

In practice, all of the principal players in the decision-making process relative to bail would appear to have chosen to 'play it safe' by either opposing bail or passing along the decision to someone else. Indeed, any rational decision-maker in our current risk-averse society will favour detention or, better yet, avoid making any decision regarding detention precisely because the incentives to oppose/delay release are greater than those to grant release. When considering a decision to release, all of the possible costs relative to reoffending by the accused person (e.g., disapproval/critique, bad press, reduced confidence in the criminal justice system) are of a public nature and can easily implicate the decision-maker. In contrast, the benefits of release are hidden (e.g., supporting the presumption of innocence, cost savings, continuation of employment of the accused) and do not accrue to the decision-maker. As such, the decision-maker can only 'lose' by releasing or recommending release. When one considers a decision to detain, the potential costs are completely hidden (e.g., the offender loses his/her job; incarceration costs) while the benefits to the decision-maker are direct and can be attributed to him/her.

[1] *Criminal Code*, RSC (1985) c C-46.
[2] Supra note 1.

As the front-line decision-makers, the police (arresting officer and/or officer-in-charge) are increasingly less likely to release an accused person. Although overall crime (and in particular, violent crime) has been falling for decades, the proportion of criminal court cases starting with a bail hearing would appear to be increasing over time. Said differently, police officers seem increasingly prone to sending the case to court for the Crown or a judicial officer to decide whether to release the accused. In fact, accused persons in Ontario were more likely to be detained for a bail hearing than released by police on an appearance notice following the laying of charges in 2007. My suspicion is that one of the reasons that arresting officers do not release many accused is that they believe that to ensure the protection of the public, the accused person should be released with conditions imposed on him/her – an option unavailable to the arresting officer. Similarly, although the officer-in-charge of police stations does, in fact, have the power to release accused persons with certain conditions, he/she may be detaining many individuals for a bail hearing on the belief that a surety is 'necessary' for their safe release – an option unavailable to the officer-in-charge.

Notably, it would appear - at least in some jurisdictions – that part of the increase in accused persons being sent to bail court by police is driven by a large number of relatively minor cases. While these minor offences – minor assaults, for instance – would have likely been dealt with informally by the police in the past, they are now increasingly being sent to court as yet another way of ensuring greater public safety. Particularly for cases involving accused who might have a criminal record or have committed a minor offence while on some form of criminal justice warrant, the likelihood of release by police on an appearance notice or a recognisance decreases dramatically. Similarly, it would appear that the police are also laying a greater number of charges generally per case, as well as a greater number of 'administration of justice' charges than in the past. In both cases, release on bail becomes significantly less likely. More importantly, these two phenomena are interrelated. Specifically, the rising number of charges being brought to court – at least in Ontario - is driven, to a large extent, by 'administration of justice' charges.

Risk avoidance has also permeated our criminal courts. Most obviously, bail cases are being processed more than in the past. At least in Ontario, bail hearings to determine whether an accused should be released on bail or, alternatively, held until trial are taking an increasing amount of time and a larger number of appearances to be completed. While one might be tempted to assume that the problem is one of court backlog, the immediate cause of these delays seemingly resides predominantly with defence counsel in the form of repeated requests for adjournments. Specifically, adjournments appear to be the norm – rather than the exception – in the bail process. In fact, it is precisely the creation and perpetuation of this 'culture of adjournments' which facilitates (if not encourages) a risk-averse approach on the part of the other key players in the bail process. In particular, a generalized expectation that a substantial number of cases will be adjourned on any given day in bail court

renders it easy for the Judge/Justice[3] or the Crown to simply accept these requests as inevitable or even acceptable. By rarely opposing them, any decisions regarding the determination of an accused person's bail is simply 'avoided' for another day (and likely becoming the problem of another Crown or Judge/Justice). The result is longer stays in remand. For those ultimately released, several additional court appearances awaiting the determination of bail translate into additional days in remand. For those ultimately detained until trial, the wait can be months. Although cases in which the accused has been detained in custody are – in practice – given priority in terms of more expedited court processing, lengthy case processing times (read: court inefficiency) have been a growing problem across Canada, further increasing remand stays for those denied bail.

However, this 'culture of adjournments' is only a part of the risk-averse mentality related to the process of determining bail. First, Canadians have also witnessed a number of legislative amendments which have acted as additional impediments or hurdles to obtaining bail. Most obviously, Canada's law of bail has experienced a shift in the onus of proof (from the Crown Attorney to the accused person to demonstrate why his/her release is justified) with respect to release in an increasing number of situations. Certainly for the substantial number of unrepresented accused appearing in bail court, this onus is particularly heavy. However, it is equally important for our current purposes to note that a reverse onus has also been added to an accused who - while at large, having been released relative to another offence - is charged with an administration of justice offence.

Second, Canadians have also seen legislative expansion of the criteria for release that has also made it more difficult to obtain bail. Specifically, an explicit public interest ground – to maintain confidence in the administration of justice - has been added. While this tertiary ground for detention has the potential – particularly in our current 'tough-on-crime' mentality - to significantly increase the number of accused detained given that the justification for imprisoning a person without a finding of guilt is not related to the accused but rather to what uninvolved members of the community think about the case, the most recent Supreme Court of Canada decision underlines that the test is that of a reasonable person who understands the principles behind the law, the Canadian *Charter of Rights*[4], and the actual case. Perhaps more restrictive are the changes in the primary and secondary grounds from their original text in the *Bail Reform Act* of 1971.[5] On the one hand, although these two grounds were originally to be considered separately, the judicial official can presently decide that it is a 'combination' of criteria or, perhaps, a little of each. On the other hand, although the test for future offending has remained a 'substantial likelihood' that the accused would commit a criminal offence, the offence in question has moved from one involving *serious harm* or an interference with the administration of justice to *any* criminal offence.

[3] Although I am unaware of any research on the relative risk aversiveness of judges versus justices of the peace in this setting, it may be that judges would be more able to resist wider pressure and act in a less risk averse manner.
[4] *Canadian Charter of Rights and Freedoms*, 1982, c 11.
[5] *Bail Reform Act*, SC 1970-71-72, c. 37.

Third, bail has also been rendered more difficult to obtain through an increasing use of more stringent release orders. Although the legislation is clear that the accused should be released on bail without conditions, a monetary component or a surety unless the Crown can prove that a more onerous type of release is warranted, the underlying 'ladder approach' has – in many cases – been set aside in favour of increasingly stricter forms of release. Within this context, the use of sureties in bail cases appears to have become the norm rather than the exception in many courts. In fact, recent research has shown that the use of sureties is not only the most common form of release order for adults but also for youth in several jurisdictions. Particularly for the most vulnerable populations (e.g., poor, Aboriginal), this requirement for release often constitutes a permanent impediment to release. Even for those with surety possibilities, the time needed to identify, contact, and convince an individual to act as a surety as well as the frequent practice of having the surety attend court and submit to an interview by the Crown (despite there being no formal requirement that the potential surety appear and/or be examined in court) translates into additional time in remand until the bail process is complete.

Moreover, the onerous nature of current release orders in bail extends well beyond the frequent recourse to sureties. Indeed, many of the forms of release – including 'surety release' – typically involve conditions being placed on the accused once in the community. Although the original 1971 legislation on bail was clear that bail conditions should be approached with restraint and made the least burdensome as possible given the coercive elements attached to them, the vast majority of releases currently have conditions. Notably, this reality applies not only to adults but also to youth. Further, recent research has demonstrated that the accused persons are not only being released with a substantial *number* of conditions but also with '*catch-all provisions'* that direct the accused to 'comply with such other reasonable conditions specified in the order as the justice considers desirable' (*Criminal Code*, 1985, s 515(4)(f)))[6]. This broad discretion has seemingly resulted – at least in many courts – in a host of conditions that are routinely imposed but frequently appear to have little relation to the facts of the alleged offence and do not seem to be necessary to give effect to the criteria for release. Rather, it has be suggested that conditions such as 'attend school' or 'attend counselling/treatment' may serve broader social welfare objectives but are unrelated to the actual offence alleged to have been committed.

Faced with the options of being detained or being released with what, from the accused person's perspective, may look to be unreasonable or unnecessary conditions, the accused has a difficult choice: accept the conditions and be released or risk remaining in custody until the case is resolved. Few accused choose the latter alternative. However, while this decision may arguably be wise in the short term, it carries the potential for even more onerous effects in the long run. Specifically, the greater the number of conditions on a release order, the greater the likelihood that the accused will

[6] Supra note 1.

breach one of these conditions—a circumstance that can result in an additional criminal charge of 'failure to comply with a court order' (an offence widely accepted, in almost all cases, to involve a violation of a bail order). When numerous bail conditions are coupled with the increasingly lengthy period of time on bail awaiting the completion of the case, the opportunity to acquire this administration of justice charge significantly increases.

Table 2 confirms the outcome.

Table 2: Percent of all people charged by the police in which the most serious offence in the incident was failure to comply with a court order (Source: Statistics Canada, CANSIM, Incident based crime statistics)

Year	Adults & Youth	Adults	Youth
1998	6.1	6.1	6.1
1999	6.4	6.4	6.2
2000	7.2	7.3	6.8
2001	8.2	8.3	7.9
2002	8.7	8.8	8.2
2003	9.6	9.6	9.6
2004	10.0	9.9	10.4
2005	10.1	10.0	10.6
2006	10.2	10.1	11.2
2007	11.1	11.1	11.7
2008	11.8	11.8	12.1
2009	11.9	11.9	12.2
2010	12.2	12.2	12.0
2011	12.7	12.6	12.9
2012	12.9	12.9	13.2
2013	13.1	13.1	12.9

In the past 15 years, the proportion of individuals charged with a 'failure to comply with a court order' as their most serious charge has more than doubled for both adults and youths. Said differently, approximately 1/8 of all accused going to court in 2013 had this offence as their most serious charge. In effect, a vicious circle is seemingly being created whereby the criminal justice system manufactures, in effect, its own crime. Particularly in cases in which an accused is, in fact, convicted of a charge of failure to comply with a bail order, another entry is added to this offender's criminal record, rendering it more difficult for the individual to obtain bail in the future. Further, an administration of justice offence committed while on release for another offence now falls under the reverse onus provisions. Even in those cases in which an accused is again released on bail, the court is

likely to impose even more onerous conditions, creating even greater opportunities for the accused to breach the new release order. This 'feedback model' becomes especially disconcerting when one recalls that many of the original bail conditions may have been unnecessary, unreasonable or clearly setting up the accused for failure (e.g., imposing a condition to abstain from drugs/alcohol on an accused person who has clear substance abuse issues; requiring an accused suffering from Fetal Alcohol Spectrum Disorder to report to a police station on a specific day each week).

3. An Overall Assessment of the Current Problem

The panorama certainly lends strong support to the claim that "Bail is Broken" in Canada. In fact, one would be hard pressed to find that any of its various components do not need repair. Indeed, a pervasive risk-averse mentality has been progressively adopted over the past several decades which has set in motion a plethora of changes in the legislative framework, the court culture and ultimately the policies and practices of the day-to-day operations of the Canadian bail court. On the ground, we have effectively enhanced the proverbial revolving door of criminal justice system on multiple levels. With a heightened preoccupation with reducing individual and institutional risk, the police are laying a greater number of charges generally and, in particular, a greater number of administration of justice charges. Not surprisingly, we are seeing a greater number of cases beginning their criminal court lives in bail court as both the number of charges and the presence of administration of justice charges are associated with a greater likelihood of being held for a bail hearing. Once in court, the bail process is taking longer, with a greater number of adjournments, a greater degree of case processing and, ultimately, requiring a greater number of days spent in remand awaiting a determination of bail. It is no secret that any time in prison increases the likelihood of future criminal behaviour.

Of those granted bail, more onerous forms of release are being preferred and a greater number of conditions are being imposed. Not surprisingly, a greater number of accused persons are violating bail conditions (predominantly committing acts that would ordinarily constitute non-criminal behaviour rather than new substantive offences) and the police are laying a greater number of administration of justice charges in response. With reverse onus provisions for accused persons who have violated a court order while on bail, the likelihood of being granted bail a second time is significantly reduced. Even in those (rarer) cases in which the accused person is re-released on bail, additional – and even more onerous – conditions are often imposed, further enhancing the likelihood of another return to bail court on an additional bail violation. With the accumulation of an even lengthier criminal record, the likelihood of being granted bail for a future offence is further reduced. Of those (formally or informally) detained until trial, increasing case processing inefficiencies in the court system generally translate into even longer stays in remand. Without access to educational, treatment or recreational programming, time spent in remand is – for all intents and purposes - real 'dead time', with little ability to maintain (or acquire) pro-social values but multiple opportunities and reasons to become

(further) integrated into a criminal lifestyle. Again, it is no secret that time in prison is associated with recidivism. And the revolving cycle goes on.

The bottom line is that in the last 44 years, we have seemingly moved increasingly away from the rights-protecting philosophy underlying the original *Bail Reform Act* of 1971.[7] While Canadians may still arguably enjoy a liberal and enlightened system of bail – at least in comparison with its closest neighbour (USA) – broader comparisons with other Western democratic countries do not shed favourable light on us as a nation which genuinely values – and vigorously upholds – the presumption of innocence, restraint in the use of imprisonment and such fundamental principles as fairness and equality. Indeed, both legislative amendments and actual policy/practices over the last 4 decades would seem to suggest that we are returning – in a number of important ways – to a past in which pre-trial detention could be characterized, at least to some degree, as excessive, unfair and inequitable.

4. Where to Go From Here

In thinking about various strategies to 'fix' Canada's 'broken bail', it is important to separate the bail problem 'stricto sensu' (i.e., those remand prisoners waiting to have their bail status determined) and the 'remand problem' (i.e., those remand prisoners who have either voluntarily or formally been detained until trial/resolution of their case). While both are serious concerns, they reflect related, but somewhat different, underlying problems. In other words, fixing the former problem (i.e., delays in the determination of bail) will not adequately address the latter problem (i.e., lengthy case processing more generally). More importantly, these two groups of detainees contribute unevenly to the growing number of accused persons being held in remand. Specifically, the increasing remand population in Canada is not driven primarily by the large numbers of prisoners who are still having their bail status determined. Rather, it is rooted in the much smaller number of accused persons who are in remand for a long time. Table 3 illustrates the difference.

[7] Supra note 5.

Table 3: Identifying which Prisoners are Responsible for the Growing Remand Population (Ontario, prisoners released from remand in 2007/8)

Time in Remand	Number of persons	% of all Remand **Prisoners**	% of all Remand **Days** used by this group
1 – 7 days	28,490	**65.6%**	**10.1%**
8-60 days	11,676	26.9%	33.1%
61 days or more	3,270	**7.5%**	**56.8%**
Total	43,436	100%	100%

Using Ontario data as a case in point, 65.6% of all remand prisoners spend only a short time (up to 1 week) in remand, constituting the large group of detainees who are awaiting a determination of bail. This group is contrasted with the much smaller group of prisoners (constituting only 7.5% of remand prisoners) who spend much longer periods of time in remand (2 months or more), likely having forgone or been denied bail. However, while the former group accounts for only 10.1% of all remand days, the latter group is responsible for approximately 57% of the remand days used by the total remand population. Arithmetically, one remand bed for one year can either be used to house 52 different detainees spending 1 week in remand or 1 detainee spending 1 year in remand. Said differently, 1 person in remand for 1 year counts exactly the same as 52 people each in remand for 1 week in terms of their contribution to the overall remand population. (This is not to suggest, however, that the administrative costs for provincial/territorial corrections for these two groups – one prisoner for 52 weeks vs. 52 prisoners for 1-week each – would be the same.)

In my mind, intervention would be directed predominantly in two different – albeit not entirely unrelated - directions: 1) reducing the length of time to resolve the cases of those (formally and informally) detained in remand before trial; 2) reducing the number of accused persons who are detained during the 'bail' process or while awaiting trial.

In the first case, solutions would lie largely in improving case processing efficiency – a problem of 'court delay' which has plagued Canadian criminal courts for many years and extends well beyond the bail process. Notably though, such a discussion is clearly beyond the scope of the current paper as it would constitute a topic in and of itself as many of its root causes diverge from those related specifically to bail.

In the second case, a singular focus on recommendations to 'fix' the 'bail problem' – the focus of this paper – will likely have spill-over effects in addressing this direction for change. As an illustration, assuming that the proportion of bail cases which are ultimately detained until trial does not change – a reality found recently in Ontario - the mere fact of reducing the actual number of cases starting their lives in bail court will translate into a smaller number of accused persons who are detained until trial.

5. Recommendations to Improve the 'Bail Problem'

Certainly in the last 5 years, we have seen a number of recommendations offered by various government and non-governmental agencies to fix the 'bail problem'. In my mind, they can be loosely characterized as 'tinkering' with the current bail system. If adopted and practised, any of them might constitute improvements to the current reality. And, in fact, a number of Canadian provinces have shown some success in affecting their remand populations over the past several years. However, the magnitude of improvement has been small, despite – in a number of cases – large-scale efforts (e.g., Ontario's Justice on Target Initiative). Moreover, despite a drop in the overall provincial remand rate between 2009 and 2010 (Figure 1), it has once again been creeping up.

My interpretation of our current inability to reduce our remand rates in any significant way is that – simply put - it is not tinkering that has got us into this situation and it will unlikely be tinkering that is going to get us out of it. Our current bail system is the result of a particular mentality, driven in large part by a climate of risk aversion and risk management. The problems that we have are both endemic and systemic in nature. In fact, they are feeding off each other in what amounts to a vicious circle. What is needed is an approach which will break this feedback model by challenging the underlying mentality. Indeed, isolated changes are unlikely to be particularly effective in the long run. For instance, while the repeal of the reverse onus provisions might have symbolic value, it is likely to have little real impact as most offences are already treated – in (our current risk averse) practices - as if there were a reverse onus. Or a new policy explicitly discouraging the need to have sureties appear in court might marginally speed up the bail process but will do little to address the underlying (risk averse) problem of the frequent recourse to this more onerous type of release. Or even a requirement that all adjournments need to be justified – if not scrutinized – by the (risk averse) presiding justice will unlikely translate into little more than a trivial reduction in the multiple court appearances currently used to delay, as long as possible, a determination of bail. Despite these changes in legislation, policy or practice, the underlying risk averse culture remains. To bring about systemic change, a different mindset is needed that will force the key players to reconceptualise bail as it was originally intended: a summary procedure which upholds and defends the presumption of innocence while ensuring – above all – the attendance of the accused in court.

The trick – of course – is to create incentives for this type of cultural change. I see two possible avenues. Having said this, they should not be considered as mutually exclusive.

6. A New Bail Regime

The first option is perhaps the most radical – the introduction of a completely new bail reform act (akin to the one created in 1971). Given that the Constitutional division of labour in regard to the administration of justice is vested in each individual province/territory, arguably the most powerful tool for change at the federal level is its responsibility over the criminal law. I draw on both the *Bail Reform Act* of 1971[8] and the *Youth Criminal Justice Act* (YCJA) of 2003[9] as inspiration for this recommendation. Both new Acts constitute dramatic successes in addressing chronic criminal justice problems in Canada.[10] Shortly after the introduction of the *Bail Reform Act*[11], Canada saw a substantial reduction in the number of accused in pre-trial detention. Police were more likely to use their discretionary power to release accused persons on their own recognizance and for those cases held in custody, the determination of bail was accomplished in only 1-2 appearances in the vast majority of cases.

Similarly, after several unsuccessful attempts through legislative changes to the *Young Offenders Act* of 1985[12] to reduce the number of youth being charged by police and incarcerated by judges at sentencing, the government announced, in 1998, its intention to bring in entirely new youth legislation. Almost immediately after the new law came into effect, the number of youth charged and brought to court fell and continued to fall for several years after the introduction of the YCJA. A similar – dramatic – decline in the number of youth sentenced to prison occurred. Youth rates of custody and imprisonment have remained low ever since.

My suspicion is that both of these new Acts had the advantage of being seen by those making decisions under the legislation as completely new regimes for dealing with criminal cases. Hence, it was *expected* that everything (or at least most things) would change. I would argue that it is precisely the 'clean slate' mentality inherent in a wholesale new regime that might allow key players in our current bail process to be more open to changing long-term (risk averse) practices, even if the new regime maintains elements of the old regime. In other words, a new bail reform act might more effectively open up space for cultural change than mere tinkering (legislative or otherwise).

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[8] Supra note 5.

[9] *Youth Criminal Justice Act,* SC 2002, c 1.

[10] While it could be argued that the YCJA was not successful in reducing the pre-trial detention of youth, I would argue that this reality makes it an even more appropriate model for this paper. Indeed, it is likely that its lack of effect is rooted in the fact that in the original legislation, very little was done to change the laws related to the detention of youth. This is in sharp contrast with the sentencing sections in which new explicit rules were laid out in great detail. Had a similar approach been adopted for youth detention, we may have seen a similar drop. Further, the changes to youth detention that were introduced in 2012 (currently in s 29) – while considerably more explicit in nature - were not part of the extensive educational program that occurred between 2001 and 2003. As such, few people know about them and, by extension, are applying them.

[11] Supra note 5.

[12] *Young Offenders Act*, RSC 1985, c Y-1.

However, I would also argue that the success of the *Bail Reform Act* of 1971 and the YCJA in dramatically reducing pre-trial detention/youth imprisonment was not rooted exclusively – or even principally – in their 'newness'. Rather, it was found in the various components of the legislation and how they were packaged. Using the YCJA as an illustration, many of the rules/decisions were made as explicit as possible. For instance, the decision to charge by police officers was simple. In *all* cases (not "all appropriate" cases), police officers were required to consider not charging a youth. The fact that there are no consequences for not following this requirement did not apparently matter. Police officers, not surprisingly, followed the law. Similarly, judges had a fairly clear mandate under section 38 to hand down proportional sentences (and to avoid disproportionate sentences even if they were 'for the youth's own good'). Probably more importantly, section 39 listed four exhaustive possible justifications for a custodial sentence. Even the last – which allowed, in theory, infinite flexibility – was made difficult because judges were required to provide detailed reasons why a case was exceptional. Most youth cases are remarkably unexceptional.

Similar explicit guidelines could be developed in the new bail regime. Simply as an illustration, the grounds for detention would be situated within a (new) legislative framework that starts with the presumption of innocence and does not detain anyone unless the Crown demonstrates a need to do so.[13] One obvious 'need' would be to ensure that the accused person appear in court. However, detention on this ground would require clear evidence that the particular accused in question would not show up for court and not simply the presumption that any persons without fixed addresses will be unlikely to appear as required. Similarly, another 'need' would be that the accused person – if released – would be likely to commit crimes that cause *serious harms* to society. In the spirit of making this requirement explicit, the detention decision (if there is one) would have to outline what those suggested harms would be and what evidence there was that this person would do it as well as an explanation of why 'conditions' imposed on the accused person would not sufficiently reduce the likelihood of serious harm. Obviously, these justifications for detention would have already been discussed broadly and widely in the context of an understanding that innocent people will be detained.

Further, the rules should not only be made explicit, but also operational (and not simply aspirational). For instance, an individual player in the bail process does not know how to accomplish a goal such as "90% of bail cases should be decided within two court appearances." However, a policy that states that "cases that are not ready to proceed should not be adjourned to a later day. Instead, they should be set down until later that same day. Accused people without lawyers present in court should be referred to duty counsel who are instructed to prepare for a full show cause hearing that will take

[13] Obviously, this principle could be seen as being already contained in the current legislation. However, its reiteration in a somewhat different structure may render it more likely to be followed than currently is the case. For example, the YCJA was effective in reducing the imprisonment of youth from previous levels under the *Young Offender's Act* (YOA) even though the YOA (s 24(1.1)c) already stated that "custody shall only be imposed when all available alternatives to custody that are reasonable in the circumstances have been considered".

place that same day"[14] explicitly sets out the steps to accomplishing the general principle of bail as a summary procedure. Indeed, each critical section of the bail regime would make reference to the overall principles of bail which would be set out in a statement of general principles. Beyond providing direction and coherence, this 'principled' framework would also provide institutional support for individuals who follow the new policies. Particularly if a case 'goes bad', it is not the individual (or the institution) who made the decision to release an accused who is ultimately held responsible.

Within this same context, it would also be important to *package* changes in the law and practice in terms of clear, acceptable principles. It is probably not too difficult to remind Canadians of the principle of the presumption of innocence, and that a police charge does not constitute a conviction. At the same time, Canadians can be told explicitly that pretrial detention is, without doubt, punitive for those experiencing it even though that is not its purpose. Thus, in explaining the law to Canadians, the inherent conflict between the presumption of innocence and the need to protect Canadians from dangerous people (as well as the need to ensure that accused people are properly tried) needs to be respected. I am not suggesting that this approach will be 100% successful. But I do think that in this one case – the removal of an important *Charter* right - is something that Canadians can understand. At the same time, it needs to be made clear to Canadians that the identification and 'preventive detention' of those who are deemed to be dangerous are not likely to be perfect: some will not be identified as people who are dangerous. But, once again, if Canadians are taught the difference between a good policy that is not perfect, and a bad policy, a 'tragic incident' may not automatically be seen as a justification for a change in the law.

Another lesson that we learned from the YCJA is that training and education for criminal justice personnel is also fundamental. It helped that there was an almost 5-year period between the release of the YCJA "framework" and the coming into force of the new law. More important, there were four years between the first introduction of the new law and its coming into force. During this time, governments spent millions of dollars ensuring that youth justice personnel understood that on 1 April 2003, new rules would come into effect. It is unsurprising, therefore, that in the 3-month period following the implementation there was a dramatic change in the administration of youth justice in Canada. Everyone knew that the law had changed and, it would appear, they tried to follow the law.

Within this context, it would seem imperative that in order to accomplish meaningful changes in the bail process, broad consultation and discussion should occur long before the new bail reform act is introduced. Specifically, I would strongly suggest that a document analogous to the 1998 "framework" document for youth justice be produced which outlines the problems with the bail system as it stands. These problems – with statistical evidence – should be described in the context of

[14] This may require, in certain provinces/territories, a change in legal aid regulations such that all accused persons have automatically available to them a legal aid lawyer for the purposes of conducting a bail hearing.

the overall values and principles (e.g., presumption of innocence) that are relevant. The evidence could include

- The growth of the remand problem (with reference to the fact that it is difficult, or impossible, to provide treatment to those on remand);
- The inability of courts to deal with bail matters in an expeditious manner;
- The fact that, after a long and involved bail process, few are actually detained and that a very high proportion of those detained for bail in fact are released (often without any further criminal justice involvement) after their cases are completed (i.e., they are not imprisoned, or put on probation).

In this same document, proposals for legislative changes could be outlined (in ordinary language), followed by wide consultation with relevant groups (police, prosecutors, defence counsel, judicial officers, provincial officials, the public).

7. Targeted Changes to the Current Bail Regime[15]

Whether or not Canada has a completely new bail regime, the introduction of strong incentives which discourage risk averse behaviour would – at least in my mind – help to remedy the current status quo. I draw inspiration from the dramatic reduction in the provincial imprisonment rate in Alberta during the early 1990s. When Ralph Klein became Premier, he decided to balance the budget by cutting provincial expenditures in all departments by approximately 20% rather than by raising taxes. The justice ministry was not exempt. Faced with this non-negotiable imperative, it closed one of its prisons, forcing the ministry to restructure its criminal justice system in a way to ensure that the prison would not be missed. Police became more selective in whom they charged. Crowns became more selective in whom they prosecuted. Judges became more selective in whom they sentenced to prison. Within 5 years, the average daily prison count dropped from 102 provincial prisoners per 100,000 total residents of the province in 1993 to 69 in 1997 – a decrease of 32%. In simplistic terms, the expenditure cuts created a strong incentive to change established behaviour amongst all criminal justice players.

Within the bail context, new incentives against risk averse behaviour need to be created to force key players to adopt a different mindset that favours release. Such incentives need to begin with support from the top. In Alberta, a new focus on serious and violent crime created a politically acceptable framework in which to reduce the use of imprisonment. Further, the Justice Minister, the Deputy

[15] Most of the proposed changes would best be imposed legislatively. In addition – or as an alternative – for provinces/territories strongly opposed to federal intervention, these recommendations could be implemented through provincial/territorial policy.

Minister, and others in the Ministry supported the overall goal of decarceration. As such, those players on the ground not only had the comfort of an explicit policy to which they could point in the face of criticism but also knew that their decisions to implement the changes would be supported from above. A similar top-down approach is needed with regards to bail. To-date, this has not happened.

Simultaneously, public education will be fundamental. In Alberta, residents – in the face of across-the-board expenditure cuts - appeared to be more willing to close prisons than schools or hospitals. By extension, it is likely more palatable in today's world in which the 'tough on crime' mentality is being challenged by soaring costs and strained resources to argue for restraint in the use of detention for those who are still considered innocent than for those already found guilty of a criminal offence. Indeed, as the US can attest, new 'less-tough-on-crime' criminal justice policies are growing out of necessity because prison populations have reached levels which are unsustainable and costly. With simply no more room to house additional prisoners, it may be politically more acceptable to use the remand population as a safety valve than the sentenced population.

On the ground level, specific incentives to release accused persons can also be either legislated or incorporated into provincial policy. For instance, steps should be taken to encourage arresting police officers to release accused people on a promise to appear. I would argue that there are two (non-mutually exclusive) ways to achieve this goal: (a) reduce the imposition of conditions in later stages of the bail process, hence taking away the 'incentive' to detain an accused in a belief that conditions are necessary; (b) address directly the arresting police officer's decision. Police officers can be told that they should release unless there are compelling reasons to do otherwise relating directly to the need for detention (not the need for conditions to be imposed). Police officers, then, could be required to provide reasons to the accused (in writing) for the need to detain.

Similarly, officers-in-charge of police stations who have the power to release (with certain conditions, but not requiring sureties) may be detaining many people for a bail hearing on the belief that a surety is 'necessary' for the safe release of an accused. Hence the reduction in the use of sureties may help police in making release decisions more in keeping with the legislative justification for pretrial detention. Once again, though, given that we are talking about the need to violate the accused person's right not to be punished without a finding of guilt, it would not be unreasonable to require police officers to justify in writing the detention of an accused for a bail hearing. The reasons, then, would have to be justified in court. If we truly believe that the Crown must justify (at least for most accused people) why they need to be detained, then it would be reasonable to require the police to indicate – in advance of the court hearing – exactly what those reasons are.

For those accused persons who continue to be held for a bail hearing, the most urgent need is to address both the conditions and the consequences of violating a condition of release. To discourage the current imposition of multiple – often automatic - conditions, the presumption should be that no

conditions be placed on release unless they can plausibly be related directly to the goals of ensuring the accused person's attendance in court or that he/she does not commit a(nother) serious offence while in the community. Each condition that is imposed must be evaluated against these criteria and justified[16]. Treatment conditions – in particular – should not be imposed on accused people unless there are compelling reasons to conclude that the condition being treated is related to the offence alleged to have taken place as well as to the reason(s) for which the accused would otherwise be detained. But in addition, evidence should be provided to demonstrate that the treatment has been shown to be effective in circumstances such as the one facing the accused, and that the requirement of treatment can be fulfilled without undue hardship to the accused or others (e.g., those required to take the accused to a treatment facility, those who are displaced from treatment by an accused).

But reducing the number of conditions is not enough to break the revolving door phenomenon rooted in additional charges of 'failure to comply with a court order' and even greater likelihood of detention. I am proposing a response very similar to that used with adults who violate a condition of their release on parole (e.g., they fail to report as required to their parole officer). The consequence is not a new criminal offence. Rather, parole can be suspended, the person is returned to prison or penitentiary, and a decision is subsequently made on what to do. The parole authority can re-release the offender with the same conditions or with different conditions, or parole can be revoked. When applied to bail violations, there is – at least in my mind - no need to criminalize accused persons who violate conditions of release that prohibit normal legal behaviour. Instead, the apparent violation should put the accused person in jeopardy of being brought back before a court to have bail reconsidered. Using the analogy of parole, the court might re-release the accused on the same conditions, change the conditions, or decide to detain the accused.

Equally important, while there are currently mechanisms in the law for a review of conditions, those on release with conditions need to be explicitly informed of them by the court. Further, they need to be easily and quickly accessed. In addition, there needs to be a guarantee that more onerous conditions cannot be placed on the accused without his/her consent. In addition, the accused should not be in jeopardy – as a result of the appeal of conditions – of being detained.

As for types of release, sureties – at least in some parts of Canada – are apparently almost always 'required' for release. Given that we have no convincing evidence of the value of sureties in so many cases, two changes should be introduced:

(a) The purpose for requiring a surety must be included as part of the record. In order to ensure compliance, it should be stated in the law that a surety should not be required.

(b) Sureties, if required, should presumptively not be required to appear at the bail hearing.

[16] Obviously more compelling reasons would need to be required for particularly onerous conditions such as house arrest, curfews or bail verification and supervisions programs.

The acceptability of the surety should (presumptively) be determined by a justice outside of court.

To encourage greater case processing efficiency during the bail process, ensuring that an accused's case is dealt with at the first appearance, the provisions in the *Criminal Code* should be altered to make it more difficult for the Crown or the defence to ask for an adjournment. At present, under section 516(1) of the *Criminal Code*[17], a case can be adjourned on application of either party for 3 days (or more, with the accused's consent). This could be strengthened by, first of all, stating that adjournments should be allowed only in exceptional circumstances where there is clear evidence that to proceed would cause a miscarriage of justice.[18] In addition, there should be a requirement ensuring that the judicial officer must be convinced that there is no way that the case can proceed on the first day *and* that the adjournment to the specified date will lead to the bail decision being made on that date. The party making the adjournment could be required at the beginning of the adjourned hearing to report on the matter that was the justification for an adjournment. Adjournments are expensive and can be damaging to the accused (even if the accused's lawyer is the one asking for the adjournment)[19]. At the moment, nobody is accountable for the adjournment.

Finally, if we truly believed in the presumption of innocence, we would re-visit the list of offences in which the onus is reversed and accused people must demonstrate why they should be released. At a minimum, consideration should be given to two matters:

a. Ensuring that there is truly a reverse onus. This might be done by suggesting that the provisions be made explicit: if the Crown does not provide evidence that an accused must be detained or that specific conditions of release must be imposed on an accused, the accused shall be released on an undertaking without conditions.

b. If the accused demonstrates that there is no need for detention, it should be made clear that the accused should be released on an undertaking without conditions unless the Crown shows cause as to why a more onerous form of release is required.

[17] Supra note 1.

[18] Except in extraordinary circumstances (e.g., tornado) should a case be adjourned until the next day because the presiding judge/justice fears that the hearing might not be completed by the end of the ordinary court day. Indeed, it should be made a requirement to provide a bail hearing at the first appearance.

[19] It may be that creative scheduling (e.g., bail court held in the evenings) would also reduce the necessity for adjournments. Indeed, bail hearings are, by their very nature, unpredictable for defence lawyers. A more flexible or extended bail court schedule may be a possible solution.

8. A Final Word

While the sheer number and seriousness of the current problems with bail in Canada are daunting, the time is ripe for action. First, the continuing decline of overall – and especially violent – crime can be used to argue against our current climate of risk aversion and risk management as well as encourage the implementation of new policies in favour of release. Second, Canada is not alone in facing growing concerns with bail. There is a great deal that we can learn from other nations which are experimenting with various ways of 'fixing' the problem. Third, the problems in bail are, in many ways, a reflection of wider problems in the Canadian criminal justice system. As such, intervention at the bail stage may provide not only a useful model for broader change but may, in and of itself, reduce problems in other parts of the criminal justice system (e.g., overcrowding issues in correctional facilities). Fourth, other nations are becoming increasingly disenchanted with the generalized ratcheting up of responses to crime/criminals/accused persons as costs soar without a demonstrable increase in public safety. Canadians can draw upon these examples in order to avoid making the same mistakes. Fifth, Canada already has a number of its own success stories in terms of reducing the recourse to prison without experiencing any obvious detrimental effects to public safety. Such examples can be used to justify change in the same direction. Sixth, Canadians have a long history of restraint in the use of imprisonment as well as the values and attitudes (e.g., communitarianism, non-violence, compassion) underlying this criminal justice approach. We have frequently considered these attributes to be an important part of what has historically distinguished us from our closest neighbours. And finally, Canadians have shown themselves to be reasonable and thoughtful when educated about the facts. Indeed, public education of criminal justice matters has been shown – on multiple issues – to be effective in gaining support.