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27 January 2023

Dear Prime Minister Trudeau and Minister Lametti,

We are writing regarding the recent letter from the Premiers calling for bail reform. While we agree that the bail system merits further attention, and have decades of collective experience studying the operation of Canada's bail system, we do not agree with the perspective raised by the Premiers. The direction for reform proposed by the Premiers contradicts the findings of an extensive body of research documenting the operation of judicial interim release in Canada.

Policy and law reform affecting the criminal justice system should be based on careful research, qualitative and quantitative evidence, and in-depth consultation. It must take into account the fundamental principles underpinning our criminal justice system, including the presumption of innocence and other constitutional rights. As the Prime Minister rightly pointed out when speaking to reporters this month, any changes to the criminal law will have impacts for groups that are overrepresented in the criminal justice system – including Black people and members of other racialized groups, Indigenous persons, and people experiencing poverty, homelessness, mental health issues, and the criminalization of drug use. Criminal justice is a complex policy area where change can have unintended but significant, widespread and long-term repercussions, particularly for marginalized groups.

However, there is frequently a temptation to let policy in this area be driven not by principled, evidence-based considerations, but by expedient political reactions to tragic, high-profile incidents. It is our view that the recent public calls for bail reform fall into the latter category.

In the aftermath of a tragic incident, it is understandable that people are outraged and at a loss to understand how something like this could happen. It is incumbent on our elected leaders and all participants in the justice system to inquire into and learn from the circumstances that led to tragic outcomes. However, we should not jump to conclusions regarding what one incident can tell us about the operation of the legal system or the state of the law more generally. A tragic incident may be the result of errors on the part of one or more legal actors. It may reflect a systemic operational failure. It may reflect a substantive failure in the law. Or it may be, simply, a tragedy. Our criminal justice system cannot and should not be expected to identify, address and eliminate all future risks. Accurately predicting and eliminating all risk is impossible – and attempting to do

so would require the mass incarceration of an untold number of innocent people. Such a system would be fundamentally contrary to Canadian values.

In recent weeks, we have witnessed swift and public condemnation of the law of bail. The Premiers have called for legal reform, and both police and political leaders have stated that our bail system has become significantly more “lenient” in recent years. They argue that changing the law to ensure more people are held in jail while waiting for the resolution of their charges will meaningfully enhance public safety.

Based on decades of evidence regarding the bail system and the impact of pre-trial detention, however, this assumption is inaccurate – and if used as the basis for legal reform, has the potential to cause significant harm to individuals and the public.

In particular, the Premiers’ letter suggests introducing a new reverse onus provision for people charged with firearms offences who are seeking bail. Reverse onus provisions are problematic, as they fail to acknowledge the inequality in power and resources between an accused person and the state. They also invert the foundational principle of the presumption of innocence. Moreover, the firearms provisions in the *Criminal Code* encompass a wide range of behaviours, including, as the Supreme Court of Canada ruled in 2015, individuals accused of “licensing offences which involve little or no moral fault and little or no danger to the public.”¹ When a person’s liberty is at stake, the state should bear the onus of proving that detention is justified – rather than an accused person bearing the onus of demonstrating they ought to be released.

As you consider these proposals, we urge you to keep the evidence regarding the operation of bail in Canada at the forefront of your discussions. We have summarized the evidence regarding bail and pre-trial detention in Canada in an appendix to this letter. Here is a summary of the most salient points:

1. Canadian crime rates, including violent crime rates, continue to be at historic lows.
2. While the rate of individuals found guilty of a crime and incarcerated has declined, the number of people in pre-trial detention has more than quadrupled in the past 40 years.
3. The law already provides mechanisms to keep people in pre-trial custody where appropriate, including for reasons of public safety.
4. Bail decision-making in Canada has become more restrictive and risk-averse over time.
5. It is impossible for our criminal justice system to accurately predict, much less eliminate, risk – and attempts to do so lead to discriminatory outcomes.
6. The only contribution sending an individual to pre-trial detention could make to public safety comes through removing them from the broader community – and that temporary impact is almost always going to be undermined by longer-term negative public safety outcomes.
7. Increased reliance on pre-trial detention makes it significantly more likely that an individual will plead guilty just to be released from jail, raising concerns about wrongful convictions.
8. “Tightening” the bail system and increasing reliance on pre-trial detention will have discriminatory outcomes and undermine efforts to combat systemic discrimination and the legacies of colonialism.

In short, we are facing a crisis of bail and pre-trial detention in Canada – but it is not one of an overly lax system. If anything, Canada’s bail system is detaining more people than ever, with intensely negative outcomes for the individuals and communities that are most directly impacted by the criminal justice system. As recognized repeatedly by the Supreme Court of Canada, it is a crisis of over-detention and over-criminalization. We and other advocates in this field have been raising this alarm for some time.

¹ *R v Nur*, 2015 SCC 15 at para 83.

People in bail court are often facing multiple intersecting crises in other areas of their lives. As noted in a 2017 report by the Independent Review of Ontario Corrections: “When early intervention and prevention strategies fail; when health, social service and education programs, interventions and opportunities are inadequate, denied or rejected; when poverty, mental illness, addiction and trauma overwhelm individuals, there can be conflict with the law.”² Our bail system is one part of a larger cycle of poverty, discrimination and incarceration that could be largely avoided with appropriate community supports and social services.

Legal and policy decisions must be based on evidence, not anecdote. Still, it is worth thinking about the individual stories that rarely make national headlines. Consider the Ottawa woman who was denied bail on shoplifting charges and who pleaded guilty to ensure she would not miss her next chemotherapy appointment.³ Consider the Indigenous single mother of four children from Norway House, Manitoba, who spent 51 days in pre-trial detention trying to navigate the Kafkaesque bail system – all because of charges that were ultimately dropped just before trial.⁴ As these examples illustrate, depriving people of their liberty comes at a steep cost – lost jobs, lost housing, and disruption to families and communities.

Our justice system must find better solutions. To enhance public safety, the evidence urges us to invest in what we know has an impact on crime rates – supporting people experiencing poverty, precarious housing, mental illness and substance use; enhancing social welfare supports; increasing investments in education and health care; keeping people in the community; and improving reintegration programs and supports for those who have been incarcerated.

Your government can play a leadership role in this work by convening stakeholders, underscoring the principled purposes and limits of the criminal law, and providing funding for solutions aimed at keeping people out of the justice system. We look forward to engaging in those discussions.

Respectfully,



Abby Deshman
Director, Criminal Justice Program
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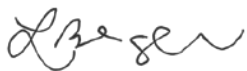
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Canadian Civil Liberties Association



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² Independent Review of Ontario Corrections, *Segregation in Ontario* (Toronto: Queen’s Printer for Ontario, 2017), online: <https://hsjcc.on.ca/wp-content/uploads/IROC-Segregation-Report-2017-03.pdf>.

³ Gary Dimmock, “Ottawa cancer patient denied bail, sent to jail after shoplifting charge”, *Ottawa Citizen* (7 April 2016), online: <https://ottawacitizen.com/news/local-news/0408-jail>.

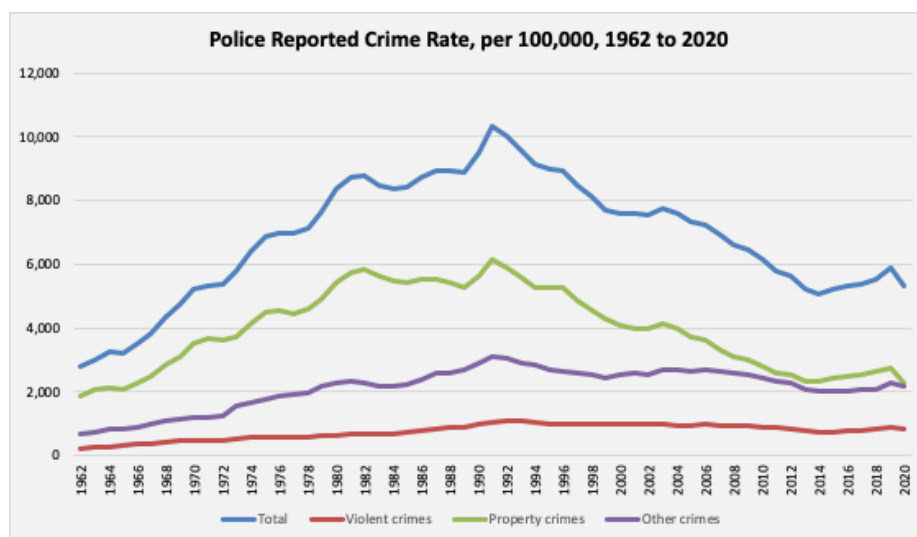
⁴ *R v Balfour and Young*, 2019 MBQB 167.

Appendix: Overview of Research, Statistics and Trends in Canada's Bail System

To hold people accountable for their actions and to sanction behaviour, we must first convict people of the offence(s) for which they are charged. It is dangerous and a slippery slope to provide additional mechanisms to punish people when they are presumed innocent of the allegations. Mistakes are made; sometimes we get it wrong. We must enhance, not diminish, efforts to maintain people's liberty pre-trial.

1. Canadian crime rates, including violent crime rates, continue to be at historic lows.

Canada has experienced a generally declining overall crime rate and violent crime rate for decades. While there has recently been a slight increase in the violent crime rate, we are still experiencing an overall, long-term downward trend in violent crime, and it remains lower than it was 15 years ago.⁵ We have included a graph of Canadian crime rates in order to demonstrate these long-term trends.

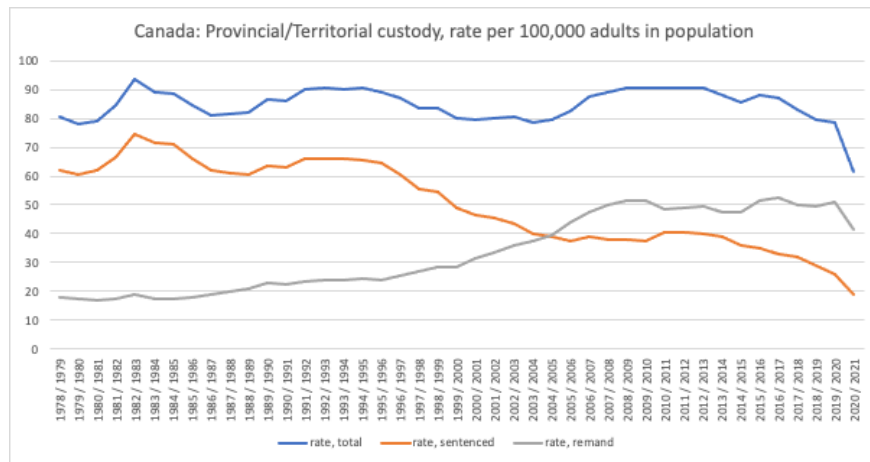


2. While the rate of individuals found guilty of a crime and incarcerated has declined, the number of people in pre-trial detention has more than quadrupled in the past 40 years.

The number of people held in pre-trial detention has more than quadrupled in the past 40 years.⁶ By contrast, the rate of individuals in sentenced custody (i.e. sentenced to imprisonment after a finding of guilt) has decreased steadily for decades. We have again included a graph to help illustrate these trends.

⁵ Statistics Canada, Table 35-10-0177-01 – Incident-based crime statistics, by detailed violations, Canada, provinces, territories, Census Metropolitan Areas and Canadian Forces Military Police (22 August 2022), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510017701>.

⁶ Statistics Canada, Table 35-10-0154-01 – Average counts of adults in provincial and territorial correctional programs (20 April 2022), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510015401>.



There are currently more people in pre-trial detention (remand) in Canada than there are serving custodial sentences in provincial and territorial institutions after a finding of guilt. In the past few years, despite decreases in the overall custodial population in the context of the pandemic, the proportions in pre-trial detention have continued to rise. In 2020-2021, 67.4% of the provincial and territorial jail population across Canada was in pre-trial detention (n = 12,767). In Ontario, it was 77.0%.⁷

Despite several reports and legal decisions that highlight overcrowding, violence, and deaths in pre-trial custody, the pre-trial detention problem has not improved. The Canadian criminal justice system is premised on the presumption of innocence and the right to reasonable bail, but many people are serving time before they have been found guilty. Given the rate, number and proportions of people in pre-trial detention, it is clear that Canada is not “lenient” when it comes to pre-trial detention.

3. The law already provides mechanisms to keep people in pre-trial custody where appropriate, including for reasons of public safety.

Canadian law already provides mechanisms to keep people in pre-trial detention where necessary “for the protection or safety of the public.”⁸ Indeed, Canada’s legal framework governing judicial interim release was codified through the *Bail Reform Act* in 1972. Since that time, a number of legislative amendments have made the law governing judicial interim release more stringent. Reverse onus provisions – which, as discussed above, are deeply problematic – were first introduced in 1975 and expanded through at least five different bills between 1997 and 2019.

Most recently, Bill C-75 introduced a number of legislative amendments affecting the bail system. As pointed out by numerous commentators at the time the bill was being considered by Parliament, the legislation did not introduce significant substantive changes to the law of bail. Instead, for the most part, it merely codified how courts have applied long-standing, pre-existing constitutional principles such as the presumption of innocence and the right to be free from arbitrary detention to the bail context.

4. Bail decision-making in Canada has become more restrictive and risk-averse over time.

The discretionary decisions made by police, prosecutors, and judicial actors related to bail and pre-trial detention have also tended towards greater, not less, pre-trial restrictions on liberty. This trend has been

⁷ *Ibid.*

⁸ *Criminal Code*, RSC 1985, c C-46 at s 515(10)(b).

clearly documented in numerous academic studies⁹ and has been recognized by multiple levels of government and the Supreme Court of Canada.¹⁰

As a 2015 report commissioned by the Department of Justice noted:

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. 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.¹¹

5. It is impossible for our criminal justice system to accurately predict, much less eliminate, risk – and attempts to do so lead to discriminatory outcomes.

There is no reliable way to predict who will go on to commit crimes in general, or serious, violent acts in particular, in the future. On the contrary, research has shown that attempts to make such predictions are unreliable and discriminatory, especially against Indigenous peoples, Black people, other racialized communities, and women.¹² As outlined in British Columbia’s manual for Crown prosecutors:

The decision whether to oppose or consent to bail, and on what terms, requires Crown Counsel to consider and weigh the competing interests of the accused, the public, and victims. Crown Counsel cannot predict the future actions of the accused with certainty, and thus cannot eliminate all risks. This is inevitable in a justice system based on the presumption of innocence, in which every accused person has a fundamental right to reasonable bail.¹³

A more risk-averse approach will inevitably result in more detentions – including imprisoning a large number of people who do not genuinely pose a risk to public safety.

6. The only contribution sending an individual to pre-trial detention could make to public safety comes through removing them from the broader community – and that temporary impact is almost always going to be undermined by longer-term negative public safety outcomes.

Sending someone to jail or prison – whether before trial or after sentencing – increases the likelihood that they will be charged with and convicted of a crime in the future.¹⁴ There are many reasons for this. Conditions in

⁹ Cheryl M Webster, Anthony N Doob & Nicole M Myers, “The Parable of Ms. Baker: Understanding Pre-Trial Detention in Canada” (2009) 21:1 *CICJ* 79; Nicole M Myers, “Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail” (2017) *Brit J Criminology* 664; Marie Manikis & Jess De Santi, “Punishing while Presuming Innocence: A Study on Bail Conditions and Administration of Justice Offences in Quebec” (2019) 60:3 *Cahiers de droit* 873.

¹⁰ *R v Antic*, 2017 SCC 27 at paras 64-66; *R v Myers*, 2019 SCC 18 at para 26; *R v Zora*, 2020 SCC 14 at para 76.

¹¹ Cheryl M Webster, “Broken Bail in Canada: How We Might Go About Fixing It” (Research and Statistics Division, Department of Justice Canada, June 2015), online: https://publications.gc.ca/collections/collection_2018/jus/J4-73-2015-eng.pdf.

¹² Michael Tonry, “Predictions of Dangerousness in Sentencing: Déjà Vu All Over Again” (2019) 48 *Crime & Just* 439.

¹³ British Columbia Prosecution Service, *Crown Counsel Policy Manual: Bail – Adults* (22 November 2022), online: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/bai-1.pdf>.

¹⁴ William D Bales and Alex R Piquero, “Assessing the impact of imprisonment on recidivism” (2012) 8 *Journal of Experimental Criminology* 71-101.

pre-trial detention are overcrowded, harsh and dangerous,¹⁵ with rehabilitative programs being virtually non-existent. Removing individuals from the broader community, even for short periods, is intensely destabilizing. Incarceration disrupts connections to the community and makes it more likely – not less – that someone will engage in crime.¹⁶

7. Increased reliance on pre-trial detention makes it significantly more likely that an individual will plead guilty just to be released from jail, raising concerns about wrongful convictions.

Numerous academic studies have confirmed that accused people face pressure to agree to any bail condition requested by the Crown in order to secure release – and those who are denied bail feel considerable pressure to plead guilty to their charges.¹⁷ Moreover, the bail decision affects the likelihood of conviction and the type of sentence imposed. Accused who are detained pending trial are more likely to receive custodial sentences and to be sentenced for longer periods.¹⁸

An unduly restrictive bail system also has significant impacts on a range of other constitutional rights. Canadian scholars have found that conditions of release are often intrusive, unrelated to the circumstances of the alleged offence,¹⁹ and may be being used for punitive purposes.²⁰ Standard bail conditions can significantly impair basic constitutional and statutory rights, including mobility rights; the right to life, liberty and security of the person; the right to equality; the right to dignity; and certain social and economic rights protected by the Quebec Charter. These conditions have particularly dramatic impacts on marginalized people, who may find themselves legally prohibited from accessing the basic social welfare services they need to survive as a result of overlapping, stringent restrictions on location, contact and movement.²¹ As the Supreme Court of Canada affirmed in *Antic*:

Pre-trial custody “affects the mental, social, and physical life of the accused and his family” and may also have a “substantial impact on the result of the trial itself.” An accused is presumed innocent and must not find it necessary to plead guilty solely to secure his or her release, nor must an accused needlessly suffer on being released. Courts must respect the presumption of innocence, “a hallowed principle lying at the very heart of criminal law... [that] confirms our faith in humankind.”²²

¹⁵ Holly Pelvin, *Doing uncertain time: Understanding the experiences of punishment in pre-trial custody* (2017), online: https://tspace.library.utoronto.ca/bitstream/1807/80896/3/Pelvin_Holly_201711_PhD_thesis.pdf; Ontario Human Rights Commission, *Report on conditions of confinement at Toronto South Detention Centre*, online: <https://www.ohrc.on.ca/en/report-conditions-confinement-toronto-south-detention-centre>; East Coast Prison Justice Society, *Conditions of Confinement in Men’s Provincial Jails in Nova Scotia*, online: <https://www.eastcoastprisonjustice.ca/conditions-of-confinement-report.html>; Protecteur du citoyen, “Unacceptable detention conditions” (29 November 2018), online: <https://protecteurducitoyen.qc.ca/en/news/press-releases/2017-2018-annual-report-unacceptable-detention-conditions>.

¹⁶ Mark T Berg & Beth M Huebner, “Reentry and the Ties that Bind: An Examination of Social Ties, Employment and Recidivism” (2011) 28:2 *JQ* 382; Daniel S Nagin, Francis T Cullen & Cheryl Lero Jonson, “Imprisonment and Reoffending” (2009) 38:1 *Crime & Just* 115.

¹⁷ Martin L Friedland, *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates’ Courts* (Toronto: University of Toronto Press, 1965); Gail Kellough & Scot Wortley, “Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions” (2002) 42:1 *Brit J Criminology* 186.

¹⁸ Martin L Friedland, *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates’ Courts* (Toronto: University of Toronto Press, 1965); Pamela Koza & Anthony N Doob, “The Relationship of Pre-Trial Custody to the Outcome of a Trial” (1975) 17:4 *CLQ* 391; Mandeep K Dhami, “Conditional Bail Decision Making in the Magistrates’ Court” (2004) 43:1 *Howard J Crim Just* 27.

¹⁹ Nicole M Myers & Sunny Dhillon, “The Criminal Offence of Entering Any Shoppers Drug Mart in Ontario: Criminalizing Ordinary Behaviour with Youth Bail Conditions” (2013) 55:2 *Canadian J Criminology and Crim Just* 187.

²⁰ Jane B Sprott & Nicole M Myers, “Set Up to Fail: The Unintended Consequences of Multiple Bail Conditions” (2011) 53:4 *Canadian J Criminology and Crim Just* 404.

²¹ Marie-Ève Sylvestre, Nicholas Blomley & Céline Bellot, *Red Zones: Criminal Law and the Territorial Governance of Marginalized People* (Cambridge: Cambridge University Press, 2020).

²² *R v Antic*, 2017 SCC 27 at para 66, citations omitted.

8. “Tightening” the bail system and increasing reliance on pre-trial detention will have discriminatory outcomes and undermine efforts to combat systemic discrimination and the legacies of colonialism.

Indigenous peoples, Black people, and other racialized persons are over-policed,²³ disproportionately detained in custody,²⁴ and are more likely to spend longer periods of time in pre-trial detention.²⁵ Individuals experiencing poverty, homelessness, mental health issues and/or the criminalization of drug use are among those subjected to the most intense scrutiny and surveillance by police – making them more likely to be arrested and held in custody for a bail hearing. These are the same groups that are disproportionately disadvantaged by the bail system, which often obliges accused people to show they have social supports such as a stable home, employment and family or friends with assets and no criminal record who can supervise them. In the absence of a social support network, and without accessible community services, people can languish in pre-trial detention.

Increasing pre-trial detention or undermining the principle of restraint in bail decision-making would have a disproportionate impact on a range of marginalized communities, including Black and Indigenous accused persons – undermining this government’s commitment and investments in combatting the over-representation of Black and Indigenous people in Canada’s criminal justice system.

²³ Scot Wortley & Julian Tanner, “Data, denials, and confusion: The racial profiling debate in Toronto” (2003) 45:3 *Canadian J Criminology and Crim Just* 367; Akwasi Owusu-Bempah, “The usual suspects: Police stop and search practices in Canada” (2011) 21:4 *Policing and Society* 395; Scot Wortley & Julian Tanner, “Inflammatory rhetoric? Baseless accusations? A response to Gabor’s critique of racial profiling research in Canada” (2005) 47(3) *Canadian J Criminology and Crim Just* 581; Jim Rankin, Sandro Contenta & Andrew Bailey, “Toronto marijuana arrests reveal ‘startling’ racial divide”, *Toronto Star* (6 July 2017), online: <https://www.thestar.com/news/insight/2017/07/06/toronto-marijuana-arrests-reveal-startling-racial-divide.html>.

²⁴ John Howard Society of Canada, *Race, Crime and Justice in Canada* (19 October 2017), online: <https://johnhoward.ca/blog/race-crime-justice-canada>; Jim Rankin et al., “Singled out: An investigation into race and crime”, *Toronto Star* (19 October 2002) A1; Jim Rankin et al., “Police target black drivers”, *Toronto Star* (20 October 2002) A1.

²⁵ For instance, the federal Correctional Investigator has noted that growth in the federal custodial population is driven by increases in the racialized population. Between 2003 and 2013, the Indigenous incarcerated population increased by 46.4% and the Black incarcerated population increased by 90%. *Annual Report of the Office of the Correctional Investigator* (2013), online: <https://oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20122013-eng.aspx?texthighlight=annual+report#s3>. In Quebec, Indigenous people are twice as likely as non-Indigenous accused to make a first appearance in court from detention – and Inuit people are three times more likely. Moreover, between 2012 and 2016, the time spent in pre-trial detention in Quebec increased 150% for Indigenous people. Marie-Ève Sylvestre and Julie Perreault, *La procédure criminelle avant procès chez les Autochtones : effets pervers et discriminatoire liés à l’arrestation, la comparution et la mise en liberté provisoire*, Commission d’enquête sur les relations entre les Autochtones et certains services publics, online: https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Fiches_synthese/ProcEDURE_criminelle_avant_proces_chez_les_Autochtones.pdf.