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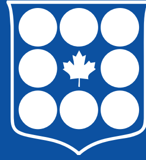

ASSOCIATION CANADIENNE DES LIBERTÉS CIVILES

STILL FAILING

The Deepening Crisis of Bail and Pre-Trial Detention in Canada

Canadian Civil Liberties Association and the
Canadian Civil Liberties Education Trust

2024

About the CCLA and CCLET

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

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Executive Summary

In 2014, the Canadian Civil Liberties Association (CCLA) called out the issues plaguing Canada's bail system in *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention*.[1] In the years since our report was published, courts and lawmakers at the highest levels have expressed similar concerns about the practice and operation of bail across the country. The Supreme Court of Canada released a series of landmark cases on bail, the federal government undertook legislative reforms, and provinces and territories introduced new bail initiatives and policy changes.

We know that the law on bail has been changed and clarified. The goal of this report is to address one simple question: what, if anything, has changed on the ground? Do Canada's bail courts function differently a decade later, and if so, what impact is that having on accused persons?

To allow for meaningful comparisons across time, the research underpinning this report focuses on the same five provinces and territories – British Columbia, Yukon, Manitoba, Ontario and Nova Scotia. Between November 2021 and November 2022, we monitored 79 days of bail court, tracking exactly what happened in the courtroom each day. In total, we observed 1,284 bail appearances. To complement our bail court monitoring, we interviewed 33 justice system professionals across the country, including Legal Aid duty counsel, defence lawyers in private practice, government officials, and bail program staff.

Our research reveals that the issues facing Canada's bail system remain deep-seated and persistent.

The proportion of people in pre-trial detention is at a record level.

Over the past decade, the crisis facing Canada's bail system has only intensified. In 2014, we reported that 54.5% of all people in Canada's provincial and territorial jails were legally innocent, awaiting the determination of their bail or the resolution of their charges, rather than serving a sentence after a conviction. By 2021/22 that proportion had risen to a staggering 70.5%.[2] In Ontario jails, nearly four out of five people – fully 78.9% – are in pre-trial detention.[3]

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The constitutional right to a timely bail hearing is often violated.

There are clear timeframes in the *Criminal Code* aimed at ensuring people do not languish in pre-trial custody.[4] Bail courts across the country, however, are overburdened and inefficient, causing many people to spend days or weeks in detention before they can access a meaningful bail hearing. People who are arrested have a constitutional right to a timely bail hearing.[5] The Supreme Court of Canada has denounced the "culture of complacency" that has fostered delays in routine bail decision making.[6] Yet our research shows that, on any given day, most cases in bail court are adjourned. Each adjournment means, at the very least, another night in jail for the accused person. In Ontario, we observed 43 occasions where people were returned to jail without having their cases heard, even though counsel were ready to proceed with a bail hearing, simply because the courts ran out of time. In recent years, courts across the country have sounded the alarm about long-standing issues of systemic delay at different stages of the bail process. Judges have stayed criminal charges and awarded financial remedies in response to

[1] Abby Deshman and Nicole Myers, *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention* (Canadian Civil Liberties Association and Education Trust, 2014). CCLA's 2014 report was cited by the Supreme Court of Canada in *R v Antic*, 2017 SCC 27; *R v Myers*, 2019 SCC 18; *R v Penunsi*, 2019 SCC 39; and *R v Zora*, 2020 SCC 14.

[2] Statistics Canada, Table 35-10-0154-01 – Average counts of adults in provincial and territorial correctional programs, online: https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510015401.

[3] *Ibid*. For 2021/2022, the proportions were 70.7% in British Columbia, 74.1% in the Yukon, 72.4% in Manitoba, 76.35% in Nova Scotia, and 78.9% in Ontario.

[4] *Criminal Code*, RSC 1985, c C-46. If the police choose not to release a person after arrest, they must be brought before a judge or justice of the peace "without unreasonable delay, and in any event within 24 hours if a justice is available": s 503. The accused can be remanded in custody, but for no more than three clear days, unless the accused consents to a longer remand: s 516(1).

[5] "Unreasonably prolonged custody awaiting a bail hearing gives rise to a breach of s. 11(e) of the *Charter*": *R v Zarinchang*, 2010 ONCA 286 at para 39.

[6] *R v Myers*, 2019 SCC 18 at para 38.

widespread, unconstitutional delays. As one Alberta judge put it, the evidence reveals "an unacceptable willingness to trample on *Charter* rights."[7]

COVID-19 and remote operations have created new challenges.

The COVID-19 pandemic had a significant impact on the operation of Canada's bail courts and further aggravated an already untenable situation. During the pandemic courts pivoted to remote and hybrid operations, a change that has created significant challenges for people attempting to navigate the bail system. Our research revealed that people in custody face more barriers than ever to communicating with their legal counsel and attempting to put together a bail plan. Once released and in the community, accused people face challenges accessing the necessary technology for remote court appearances. Changes in the availability and format of community supports have compounded these challenges.

Conditions in pre-trial custody are dangerous and inhumane.

The conditions of confinement in provincial and territorial jails worsened during the pandemic. Although most jurisdictions did decease the number of people being held in pre-trial detention, programs, visits, and services within jails were drastically reduced. There were frequent reports of inadequate health and sanitation measures, an absence of programming, restrictions on communicating with legal counsel and loved ones, and frequent lockdowns.

The number of people in pre-trial detention has returned to - and surpassed – in-custody counts prior to the pandemic. Over-crowding and under-staffing continue to be significant concerns. In Ontario, for example, courts have repeatedly decried the frequent lockdowns caused by inadequate staffing. During lockdowns, prisoners may receive only 30 minutes outside of their cells each day, and may be forced to go days without showers, recreation, or phone time. As one Ontario judge put it, "it is shocking that detention centres in Toronto in 2017 are consistently failing to meet minimum standards established by the United Nations in the 1950s."[8]

The law of bail continues to be inconsistently, and at times incorrectly, applied across Canada.

Our research reveals that guidance from the Supreme Court of Canada has not been consistently applied. Many lawyers told us that the Supreme Court's seminal bail decisions have pushed counsel, judges, and justices of the peace to scrutinize their decision-making. The Supreme Court has given defence lawyers clearer wording and support their clients' constitutional and statutory rights. However, in every jurisdiction, counsel told us that some Crowns, judges, and justices of the peace take the Supreme Court's instructions in Antic, Zora, and other landmark cases more seriously than others. Given the power asymmetries and high proportion of consent releases, ensuring the rule of law within the bail process continues to be extremely challenging. To quote a lawyer in British Columbia: "The Supreme Court of Canada could come out with 20 other decisions and judges [here wouldn't] think that applied to them. The Supreme Court of Canada, as far as they're concerned, might just as well be the Klingon High Council."

People continue to be released with extraneous and unnecessary conditions.

In 2014, we raised concerns that many accused people are expected to find a surety to secure bail – a friend or family member who promised a sum of money to the court and agrees to supervise the accused in the community. At the time, our research showed that Ontario and the Yukon were uniquely reliant on surety supervision.

Recent research has suggested that the Supreme Court of Canada's 2017 decision in *Antic* has caused courts and Crown prosecutors to exercise more restraint in requests for sureties. This is a welcome shift – but the reality remains that, individuals without stable housing or community supports continue to struggle to secure bail. Many

[7] *R. v. Reilly*, 2018 ABPC 85, at para. 65.
[8] *R. v. Innis*, 2017 ONSC 2779, at para. 38.

accused are still spending days and weeks in jail while their lawyers try to find t hem a surety, a shelter bed or access to a community support program.

Our court observations revealed that people continue to be released with an array of conditions that may be difficult or impossible for them to comply with. Our interviews suggest that there is greater recognition – likely fueled by the Supreme Court's landmark decision in *Zora* – that it is inappropriate to subject people with substance use issues to abstinence conditions. But bail conditions still make life difficult, especially for people whose lives are already unpredictable and challenging. Residency requirements, curfews, check-in conditions, and no-contact conditions are routinely imposed on people who lack stable housing or adequate community supports.

Some of the positive tools added to the *Criminal Code* in 2019 are not being used to their full potential. Bill C-75 created "judicial referral hearings" – a mechanism intended as an off-ramp, a way to avoid re-arresting and holding for a bail hearing, people charged with breaching their bail conditions. Across many provinces and territories, however, lawyers who work in bail court reported that they had never heard of a judicial referral hearing taking place. The handful of interviewees who said they had seen them occur had only witnessed a small number. The police officers and Crowns, who under the current law are the only legal actors who can trigger a judicial referral hearing, are not regularly or consistently putting forward these requests.

Vulnerable groups continue to be underserved and unfairly denied bail

The issues with the bail process are compounded by a lack of housing, adequate health care, social services and community supports. Courts have insisted that pre-trial detention "should not be used as a substitute for shelter, food, mental health or other social measures."[9] In practice, however, bail courts are filled with people who are struggling to survive – grappling with mental illness, trauma, and the criminalization of substance use and poverty. People cycling through bail court are often facing multiple intersecting crises in different areas of their lives. These crises drive people into bail court and have a direct impact on their trajectory through the criminal justice system. The opioid crisis, the lack of affordable housing and the fracturing of supports in the wake of the COVID-19 pandemic –mean that people who really need housing, health care, and community support end up cycling through the criminal justice system. As one lawyer told us: "Jail is the only place that can't say no."

These issues continue to have a disproportionate impact on Indigenous, Black, and racialized accused people. In 2014, there was little case law that specifically guided courts in applying *Gladue* to bail and considering the circumstances of Black and racialized accused. Over the past decade, the case law has evolved, and s. 493.2 of the *Criminal Code* now explicitly directs courts to pay particular attention to the situation of Indigenous people and other vulnerable groups that are over-represented in the justice system, which courts have held includes Black persons.[10] This year, as part of federal legislation concerning bail (Bill C-48), the CCLA successfully proposed an amendment that will require a justice to state on the record how they determined if s. 493.2 applied to an accused, and if so, how they considered the accused's circumstances. This new provision is s. 515(13.1) of the *Criminal Code*. While these changes were welcome, it is still difficult in bail court to secure bail for Indigenous, Black, other racialized accused and others facing intersecting forms of marginalization. The mass incarceration and overrepresentation of Indigenous and Black people in particular is egregious and long-standing. While there is a lack of adequate systematic data that examines bail outcomes and Indigenous identity, sentencing data demonstrates that the mass incarceration of Indigenous peoples has only increased since *Gladue*[11]. In a similar vein, the Supreme Court of Canada has continued to note the overrepresentation of Black persons in the criminal justice system.

Recently proposed federal bail reform is not evidence-based.

Over the past year, the bail system has emerged as a political flashpoint. In May 2023, the federal government tabled Bill C-48 in response to sustained pressure from the police together with provincial and territorial Premiers. The legislation attempts to address a perception that Canada's bail system is too lenient, particularly when it comes to "repeat offenders." Politicians and media outlets have focused on a series of rare but high-profile incidents to argue the *Criminal Code* provisions governing bail must be tightened to enhance public safety. The Senate Committee on

[9] *R v Gibbs*, 2019 BCPC 335 at para 21.

[10] *R. v. LWB*, 2021 ONSC 6152, at para. 42-54; *Raheem-Cummings v. R,* 2020 SKQB 342, at paras. 43-58.

[11] Office of the Correctional Investigator (2023). Annual Report 2021-2022. https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2021-2022#fn81

Legal and Constitutional Affairs, which performed the only Parliamentary committee study of Bill C-48, noted in its report, "the time has come for substantial reform of Canada's bail system. Such a comprehensive effort must be informed by detailed data, to ensure that changes are evidence-based."[12]

Against the backdrop of these debates, it is vitally important to focus on careful research, empirical evidence, and thoughtful policy-making. An extensive body of research contradicts the contention that Canada's bail system has become unduly lenient or that the bail system is propelling an increase in crime. Our criminal justice system cannot and should not be expected to identify and eliminate all future risks. It is impossible to predict with any accuracy exactly who will commit serious offences in the future. Attempts to make such predictions are typically fraught with bias. 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 and the constitution.

Canada can create a better bail system based on comparable evidence-based reforms.

Bail and pre-trial detention are complex human systems. Striking the right balance – ensuring that our justice system promotes community safety and protects the fundamental rights of accused people – is difficult. Yet experience shows that concerted, broad-scale, evidence-based criminal justice reform is possible. In the early 2000s, Canada embarked on an ambitious project to overhaul our youth justice system and reduce the rate of youth incarceration – which had become an outlier among peer nations. A broad-based, rigorous process of research and consultation led to the development and introduction of the *Youth Criminal Justice Act*.

The *YCJA* provides a roadmap for effective, evidence-based criminal justice reform – the kind of reform that could transform our bail system, make communities safer, and reduce the burden on our courts and jails. In the long term, our view is that transformative change of the bail system in Canada will require reconceptualizing and fully replacing the law on bail – with the Supreme Court of Canada's recent jurisprudence providing the guiding principles. More immediately, different levels of government have the ability to introduce targeted legislative and policy changes that would have smaller-scale positive impacts on bail practices and outcomes.

Without concerted action, Canada's bail system will continue to penalize our society's most vulnerable and marginalized people. The case for concrete, evidence-based reform is even more pressing than it was in 2014. To quote the Supreme Court of Canada: "The stakes are too high for anything less."

[12] Observations to the Seventeenth Report of the Standing Senate Committee on Legal and Constitutional Affairs (Bill C-48). https://sencanada.ca/en/committees/LCJC/Report/120730/44-1.

PART 1

PART 1

Introduction

On November 1, 2017, Lesley Ann Balfour, a 25-year-old single mother raising four young children in Norway House, an Indigenous community in northern Manitoba, was arrested and accused of assault.[13] At the time of her arrest in November 2017 Ms. Balfour had outstanding assault charges from September 2017 for which she had been granted bail. She had no criminal record.

In the days and weeks to come, Ms. Balfour was kept in custody and transported between RCMP cells, courthouses, and jails in Norway House, Thompson, The Pas, Brandon, and Winnipeg. It took weeks until she first spoke with a lawyer assigned by Legal Aid to represent her. She had numerous appearances in bail court, but her case was adjourned over and over – often because the court ran out of time to address her matter. At one point, Ms. Balfour even offered to plead guilty if it meant she could get out of custody. Finally, nearly two months after she had been arrested and incarcerated, she was released on bail and flown home to Norway House. But her Kafkaesque journey through the bail system was not yet over.

> People who may never be convicted of the charges they are facing are deprived of their liberty, housed in overcrowded jails, and separated from their families and communities for days and weeks.

Some months after Ms. Balfour's release, unwanted guests came over and left alcohol in her home. The next day, the RCMP arrested her for breaching her bail condition to abstain from alcohol. Once again, Ms. Balfour was detained and transported to Thompson, before the Crown ultimately agreed to her release on bail. Just before trial, the Crown withdrew all charges against Ms. Balfour. By that point, she had spent 56 days in jail.

Stories like Lesley Ann Balfour's reveal the human costs of Canada's broken bail system. People who are legally innocent – people who may never be convicted of the charges they are facing[14] – are deprived of their liberty, housed in overcrowded jails, and separated from their families and communities for days and weeks. They are shuffled in and out of overburdened, inefficient criminal courts, spending unnecessary time in custody while waiting for a meaningful bail hearing. While in pre-trial detention, they face pressure to plead guilty simply to secure release.

Those who manage to obtain release on bail are typically subjected to strict requirements. In some jurisdictions, they may have to find an acceptable friend or family member who will agree to serve as a surety and supervise them in the community. Often, they are saddled with restrictive bail conditions that set them up to fail – such as residency requirements for people experiencing homelessness, abstinence conditions for people struggling with substance use, and orders prohibiting contact between family members. If they breach a bail condition, they can be re-arrested and charged with a separate criminal offence, even where the underlying conduct, like drinking alcohol or missing a curfew, is not otherwise criminal. In this

[13] *R v Balfour and Young*, 2019 MBQB 167.

[14] In 2019/20, across Canada, 43% of criminal cases were resolved without a finding of guilt – for instance, because the Crown withdrew the charges or because the accused was acquitted. In Yukon and Ontario, more than half of all criminal cases were resolved without a finding of guilt. Statistics Canada, Table 35-10-0027-01.

way, many people get trapped in a cycle of arrest, release on onerous conditions, re-arrest for breaching conditions, and incarceration.[15]

No wonder a Manitoba judge called Lesley Ann Balfour's case "a disturbing chronicle of a dysfunctional bail system."[16]

In 2014, CCLA called out the issues plaguing Canada's bail system in *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention* – a major study based on empirical research in five Canadian provinces and territories.[17] In the years since *Set Up to Fail* was published, courts and lawmakers at the highest levels have recognized that stories like Lesley Ann Balfour's are all too common. In a series of landmark decisions,[18] the Supreme Court of Canada identified systemic issues and reaffirmed the bedrock principles that underpin the law of bail – the presumption of innocence and the right to reasonable bail, both guaranteed in the *Charter of Rights and Freedoms*.[19] In 2019, Parliament enacted Bill C-75, which introduced the first major changes to the *Criminal Code* provisions governing bail in nearly five decades.[20]

Yet the evidence shows that, over the past decade, the crisis facing Canada's bail system has only intensified. The statistics paint a sobering picture of bail and pre-trial detention in Canada.

When *Set Up to Fail* was published, CCLA sounded the alarm that 54.5% of people in Canada's provincial and territorial jails were on remand, awaiting trial or the determination of their bail, rather than serving a sentence after a finding of guilt. Over the past decade, remand rates across Canada have continued to rise, despite decreases in the overall custodial population in the context of the COVID-19 pandemic. By 2021/22, a staggering 70.5% of the provincial and territorial jail population across Canada was in pre-trial detention.[21] In the five jurisdictions examined in this study – British Columbia, Yukon, Manitoba, Ontario, and Nova Scotia – the proportion of prisoners on remand now sits above 70%.[22] Indeed, in Ontario jails, nearly four out of five provincial prisoners (78.9%) are in pre-trial detention.

Canada's jail population not always looked this way. In 1984/85, only 20% of the provincial and territorial jail population was in pre-trial custody. Over the past four decades, the average number of people held in pre-trial detention in Canada has increased *fourfold*. The pre-trial detention rate – expressed per 100,000 adults in the population, to account for growth in the overall Canadian population – has doubled. By contrast, the sentenced custody rate, which reflects the rate at which people are sentenced to imprisonment after a finding of guilt, has decreased steadily over the same period.

The growth of Canada's remand population has not come in response to increased crime. Indeed, since the early 1990s, Canada has experienced an overall, long-term downward trend in both the overall crime rate and the violent crime rate. Despite a slight uptick in recent years, Canada's violent crime rate remains lower in 2023 than it was 15 years ago.[23] Similarly, the Crime Severity Index tracked by Statistics Canada has declined from 119 in 1998 – the first year it was measured – to 73.68 in 2021.[24]

The situation in Canada stands in stark contrast to peer jurisdictions, particularly in the United Kingdom. Canada's remand rate per 100,000 people in the population is substantially higher than rates in England and Wales, Northern

[15] A study conducted the federal Department of Justice examined a range of criminal court files. Researchers found that 17.5% of accused who were released on bail violated their judicial interim release (bail) order. Yet nearly all violations (98.0%) were breaches of release conditions or failure to attend court. Only 2.0% of accused who breached their bail order committed a new substantive offence. Karen Beattie, Andre Solecki & Kelly E Morton Bourgon, "Police and Judicial Detention and Release Characteristics: Data from the Justice Effectiveness Study," Department of Justice (2013), online: <https://publications.gc.ca/collections/collection_2018/jus/J4-65-2013-eng.pdf>.

[16] *R v Balfour and Young*, 2019 MBQB 167 at para 1.

[17] Abby Deshman and Nicole Myers, *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention* (Canadian Civil Liberties Association and Education Trust, 2014), online: <https://ccla.org/cclanewsite/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf>.

[18] *R v St-Cloud*, 2015 SCC 27; *R v Antic*, 2017 SCC 27; *R v Myers*, 2019 SCC 18; *R v Zora*, 2020 SCC 14.

[19] Sections 11(d) and 11(e), *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[20] C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2019 (assented to June 21, 2019), SC 2019, c 25.

[21] Statistics Canada, Average counts of adults in provincial and territorial correctional programs, Table 35-10-0154-01.

[22] *Ibid*. For 2021/22, the proportions were 70.7% in British Columbia, 74.1% in the Yukon, 72.4% in Manitoba, 76.35% in Nova Scotia, and 78.9% in Ontario.

[23] Statistics Canada, Incident-based crime statistics, by detailed violations, Canada, provinces, territories, Census Metropolitan Areas and Canadian Forces Military Police, Table 35-10-0177-01.

[24] Statistics Canada, Crime severity index and weighted clearance rates, Canada, provinces, territories and Census Metropolitan Areas, Table 35-10-0026-01.

Ireland, and Scotland.[25] Notably, England and Wales maintained a stable remand rate over the past two decades – this stability however disappeared in recent years with *The Guardian* reporting the remand population had increased to more than 15,500, constituting 20% of the jail population as of June 2023[26].

Jurisdiction	Year	Number in Pre-Trial/Remand Imprisonment	Proportion of Total Prison Population[27]	Pre-Trial/Remand Rate Per 100,000 National Population
Canada	2017/18	15,316	38.7%	42
England and Wales	2019	9,708	11.7%	16
Northern Ireland	2019	514	34.1%	27
Scotland	2020	1,589	19.7%	29

On paper, bail and pre-trial detention in Canada are not supposed to operate this way. Our criminal justice system is premised on the presumption of innocence – the "golden thread" running through Canadian criminal law[28] – and the right not to be denied reasonable bail without just cause. The *Criminal Code* aims to safeguard these principles through a strong presumption that accused people should be released without conditions while awaiting trial.[29] The law sets out three possible justifications for departing from the default of unconditional release, including "the protection or safety of the public." Bail courts must carefully consider whether any restrictions on liberty – including bail conditions, supervision requirements, or remand detention – are truly necessary and justified.

In this way, the law governing bail aims to protect public safety while respecting the rights of accused people who are legally innocent. Striking the right balance will always be difficult. Indeed, research has highlighted a worrisome pattern of risk aversion among the police officers, lawyers, judges and justices of the peace working in our bail system.[30] Yet the bail system cannot – and should not be expected to – identify and eliminate all future risks. There is no accurate way to predict which individuals will commit serious offences in the future. On the contrary, research shows that attempts to predict the risk of future offending can perpetuate discriminatory biases.[31] As outlined in British Columbia's manual for Crown prosecutors:

> 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.[32]

Over-incarcerating people in pre-trial detention carries significant costs for the public purse, for public safety – and, ultimately, for the lives of many thousands of people and families across Canada each year. These costs have only become more palpable and pressing in the years since CCLA released *Set Up to Fail*.

The financial costs of maintaining a high remand population are staggering. In 2012, an Ontario report warned that the costs associated with the province's growing remand population were unsustainable. At the time, the cost of detaining an individual on remand was $183/day, compared to only $5 to supervise an accused person in the community pending trial.[33] By 2020/21, the average daily inmate cost in Ontario had ballooned to $409. In total, Canada's provinces and territories spend $2.84 billion each year on adult corrections – an average of $341/day for

[25] Roy Walmsley, *World Pre-Trial/Remand Imprisonment List (4th Edition)*, World Prison Brief (February 2020), online: <https://www.prisonstudies.org/sites/default/files/resources/downloads/world_pre-trial_list_4th_edn_final.pdf>.

[26] Pamela Duncan, Carmen Aguilar Garcia, Michael Goodier and Lucy Swan. (26 September 2023). The state of prisons in England and Wales – in numbers. The Guardian. https://www.theguardian.com/society/2023/sep/26/the-state-of-prisons-in-england-and-wales-in-numbers

[27] This data represents the remand population as a percentage of *all* prisoners in the jurisdiction. In Canada, this includes both provincial and territorial jails and federal penitentiaries.

[28] *R v Hall*, 2002 SCC 64 at para 48.

[29] Criminal Code, RSC 1985, c C-46, s 515. In some cases, accused people face a "reverse onus," whereby they must demonstrate why they can be safely released on bail.

[30] 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.

[31] Michael Tonry, "Predictions of Dangerousness in Sentencing: Déjà Vu All Over Again" (2019) 48 Crime & Just 439.

[32] 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>.

[33] Commission on the Reform of Ontario's Public Services (Queen's Printer for Ontario, 2012) at 353, online: <https://www.opsba.org/wp-content/uploads/2021/02/drummondReportFeb1512.pdf>.

each person in pre-trial detention.[34] Redirecting even a portion of those funds to community supervision, diversion programs, and social services and supports could be transformative.

Moreover, there are serious system-wide costs to perpetuating the cycle of arrest, release with conditions, and re-arrest for breaching conditions. Our criminal justice system is clogged with charges for administration of justice offences, such as failure to appear in court, breaching a probation order, or failing to comply with a bail order. Between 2006 and 2016, the police-reported rate of people charged with an administration of justice offence increased 28%.[35] In 2020/21, an administration of justice offence was the *most serious charge* in 21% of all cases completed in adult criminal courts; 44% of these administration of justice charges stemmed from alleged violations of bail conditions.[36]

Excessive use of pre-trial detention also has deep-seated, long-term costs for public safety. A report commissioned by the federal Department of Justice in 2015 put it plainly: “It is no secret that any time in prison increases the likelihood of future criminal behaviour.”[37] Research shows that people who spend time in custody have higher rates of subsequent contact with police than those whose pathway through the criminal justice system ends with the police or the courts.[38] Incarceration disrupts connections to the community and makes it more likely – not less – that someone will engage in crime.[39]

CCLA’s 2014 research was sparked by deep concerns about the conditions of confinement in Canada’s pre-trial carceral institutions. Over the past decade, these concerns have not abated. Living conditions in pre-trial detention are harsh, overcrowded, and dangerous. Recreation, treatment, and rehabilitative programs are limited or non-existent.[40] In recent years, for example, Ontario courts have repeatedly decried the inhumane conditions inflicted on remand prisoners, including frequent lockdowns due to staffing shortages.[41] During lockdowns, prisoners are confined to their cells for the entire day, with little or no access to basic necessities like fresh air, exercise, clean clothes and towels, showers, and telephone calls to loved ones. The COVID-19 pandemic exacerbated the situation, as prisoners not only faced high risks of transmission in overcrowded jails, but also a drastic curtailing of what limited programs and services did exist, frequent lockdowns and extensive isolation measures.

Nearly a decade after CCLA published *Set Up to Fail*, the evidence shows that our broken bail system is still failing thousands of Canadians, their families, and their communities each year.

The Supreme Court of Canada has recognized that, for accused people, pre-trial detention “comes at a significant cost in terms of their loss of liberty, the impact on their mental and physical well-being and on their families, and the loss of their livelihoods.”[42] Time spent in pre-trial detention can mean disruption to a person’s employment, family responsibilities, medical treatment, and more.[43] Nearly a decade after CCLA published *Set Up to Fail*, the evidence shows that our broken bail system is still failing thousands of Canadians, their families, and their communities each year.

[34] Statistics Canada, Table 35-10-0013-01 – Operating Expenditures for Adult Correctional Services (20 April 2022), online: <https://doi.org/10.25318/3510001301-eng>.

[35] Statistics Canada, Table 35-10-017701. Incident-based crime statistics, by detailed violations, Canada, provinces, territories, census metropolitan areas and Canadian forces military police, online: https://www150.statcan.gc.ca/t1/tbl1/en/cv.action?pid=3510017701.

[36] Statistics Canada, Table 35-10-0027-01. Adult criminal courts, number of cases and charges by type of decision, online: https://www150.statcan.gc.ca/t1/tbl1/en/cv.action?pid=3510002701.

[37] Cheryl M Webster, “Broken Bail in Canada: How We Might Go About Fixing It” (Research and Statistics Division, Department of Justice Canada, June 2015) at 12, online: <https://publications.gc.ca/collections/collection_2018/jus/J4-73-2015-eng.pdf>.

[38] Department of Justice Canada, *JustFacts: Recidivism in the Criminal Justice System* (August 2020), online: <https://www.justice.gc.ca/eng/rp-pr/jr/jfpf/2020/docs/aug01.pdf>.

[39] William D Bales & Alex R Piquero, “Assessing the Impact of Imprisonment on Recidivism” (2012) 8 Journal of Experimental Criminology 71; 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.

[40] *R v Myers*, 2019 SCC 18 at para 26; 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*; East Coast Prison Justice Society, Conditions of Confinement in Men’s Provincial Jails in Nova Scotia; 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>.

[41] See, for example, *R v Persad*, 2020 ONSC 188 at para 33 (concluding that the province had “clearly chosen to save money” rather than address inhumane conditions at the Toronto South Detention Centre); *R v Spicher*, 2020 ONCJ 340 at para 62 (commenting on “inexcusable and intolerable” conditions at the Central East Correctional Centre); and *R v HO*, 2022 ONSC 4900 at para 90 (describing the conditions of confinement and the number of lockdowns experienced by the accused as “shocking, unconscionable, and inhumane”).

[42] *R v Myers*, 2019 SCC 18 at para 27.

[43] See, for example, Gary Dimmock, “Ottawa cancer patient denied bail, sent to jail after shoplifting charge” (Ottawa Citizen, 7 April 2016).

PART 2

PART 2

The Drive for Change: 2014-2023

In 2014, when CCLA published *Set Up to Fail*, we joined a chorus of voices raising concerns about Canada's bail system. We called for concrete action to ensure that the bail system upholds – rather than undermines – public safety, fundamental rights, and public confidence in the administration of justice.

Since then, the law and practice of bail have drawn increasing attention from the courts, legislators, and policy-makers across the country. Both the Supreme Court of Canada and Parliament have recognized deep-seated concerns about risk-averse, inefficient decision-making in bail court and the growth of Canada's remand population. Most recently, the pendulum has swung in the other direction, and we have witnessed contentious, high-profile debates about whether our bail system adequately protects public safety. This section canvasses nearly a decade of legal and policy changes, at both the national and local levels, that have affected the bail system across Canada.

Both the Supreme Court of Canada and Parliament have recognized deep-seated concerns about risk-averse, inefficient decision-making in bail court and the growth of Canada's remand population.

2.1 Legal Changes

2.1.1 Guidance from the Supreme Court of Canada

Historically, bail-related appeals have rarely gone before the Supreme Court of Canada. When *Set Up to Fail* was released, the Court's most significant decisions regarding bail dated back to 1992 and 2002.[44] Yet between 2015 and 2020, the Court rendered a string of decisions that identified systemic issues and confirmed key principles at the heart of Canada's bail system.

Often, the cases before the Court turned on relatively narrow questions of law – such as the *mens rea* for the offence of breaching bail conditions. Yet in each case, the Court took the opportunity to return to first principles, reaffirm the constitutional right to reasonable bail, and comment on scholarly research that had exposed major fractures in Canada's bail system. In each case, the Court rendered a unanimous judgment, speaking as a whole.[45] Considered collectively, the Supreme Court's recent bail decisions have been described as the foundation of a "second era" of bail reform in Canada – five decades after Parliament enacted the *Bail Reform Act* of 1972.[46]

St-Cloud

In the 2015 judgment *St-Cloud*, the Supreme Court of Canada reinvigorated the so-called tertiary ground as a standalone basis for denying release, not reserved for exceptional cases.[47] Under s 515(10)(c) of the *Criminal Code*, bail may be denied where necessary to maintain confidence in the administration of justice. Before *St-Cloud*, some courts and practitioners felt that the tertiary ground should serve as

[44] *R v Pearson*, [1992] 3 SCR 665; *R v Morales*, [1992] 3 SCR 711; *R v Hall*, 2002 SCC 64.

[45] *St-Cloud* was heard by a quorum of seven judges. All other decisions discussed in this section were decided by the Court's full complement of nine judges.

[46] *R v Simonelli*, 2021 ONSC 354 at para 24.

[47] *R v St-Cloud*, 2015 SCC 27.

an adjunct to the primary and secondary grounds, which seek to ensure the accused attends court and to prevent risks to public safety, respectively. Denying an individual bail purely because of concerns about public opinion, it was argued, was inconsistent with the values animating the bail system and the constitutional guarantee of reasonable bail under s 11(e) of the *Charter*.

The Supreme Court disagreed. The Court maintained that the tertiary ground should be recognized as an independent basis for denying bail, not reserved for rare or exceptional circumstances. The tertiary ground should not be unduly restricted through narrow interpretation, but rather given the same weight as the other two grounds.

After *St-Cloud* was released, some worried that the decision would expand the possible justifications for detention, do little to stem risk-averse decision-making in bail court, and contribute to increased remand populations.[48] At the same time, *St-Cloud* did reaffirm that "in Canadian law, the released of accused persons is the cardinal rule and detention, the exception."[49] The Supreme Court emphasized that this entitlement is grounded in the presumption of innocence and "the right of individuals to liberty even when charged with a serious criminal offence."[50] These principles formed the bedrock of significant Supreme Court decisions in the years following *St-Cloud*.

Antic

In 2017, with the *Antic* decision, the Supreme Court reaffirmed the foundational principles at the heart of the bail system.[51] *Antic* sounded a "clarion call" to justice system actors to give full effect to the presumption of innocence and the constitutional right to reasonable bail.[52] As the Court emphasized, the guarantee of reasonable bail is "an essential element of an enlightened criminal justice system" – one that "entrenches the effect of the presumption of innocence at the pre-trial stage of the criminal trial process and safeguards the liberty of accused persons."[53]

The Supreme Court recognized the ongoing, systemic issues affecting the bail system in Canada. Writing for a unanimous court, Wagner J. (as he then was) cited extensive research showing that remand populations and denial of bail had increased significantly, despite the *Charter* guarantee of reasonable bail. The bail provisions in the *Criminal Code*, Wagner J. observed, "are being applied inconsistently across the country." The Court specifically cited concerns about the over-reliance on surety release and the improper imposition of cash bail.[54] Moreover, the Court recognized that inconsistent and unfair bail decisions have far-reaching effects for accused individuals who are detained in pre-trial custody and who may face pressure to plead guilty simply to secure release.[55]

In light of these concerns, the Court chose to include a pointed and concise restatement of the principles applicable to the determination of bail.[56] Wagner J. explicitly reaffirmed the principle of restraint and the "ladder principle," which requires a judge or justice to impose "the least onerous form of release on an accused unless the Crown shows why that should not be the case."[57] Under the ladder principle, the default position is a release without conditions. More onerous forms of release – similar to rungs on a ladder – must be considered, one by one, and either justified or ruled out. Courts may only order restrictions on a person's liberty if the Crown shows cause why a less restrictive form of release would not suffice to address the statutory grounds for detention.

Ultimately, the principles articulated in *Antic* were intended to ensure consistent, rights-respecting decisions by bail courts across Canada. As Wagner J. observed: "It is time to ensure that the bail provisions are applied consistently and fairly. The stakes are too high for anything less."[58]

48 See e.g. Cristin Schmitz, "Norris warns more will be jailed before trial given top court ruling" (28 May 2015), *The Lawyer's Weekly*.
49 *St-Cloud*, 2015 SCC 27 at para 70.
50 *Ibid* at para 109.
51 Strictly speaking, the dispute in *Antic* arose from a relatively narrow issue. Under s 515(2)(e), bail courts can only order a cash deposit and surety supervision *in combination* when the accused lives in another province or more than 200 km from the place where they are in custody. This geographic limitation reflects the reluctance in Canadian law to order cash bail unless absolutely necessary. The accused in *Antic* unsuccessfully challenged s 515(2)(e), arguing that the combination of cash bail and surety supervision should be available to all. In upholding the constitutionality of s 515(2)(e), the Supreme Court took the opportunity to provide observations and guidance applicable to all bail matters moving forward.
52 *R v Tunney*, 2018 ONSC 961 at para 36.
53 *R v Antic*, 2017 SCC 27 at para 1.
54 *Ibid* at para 65.
55 *Ibid* at para 66.
56 *Ibid* at para 67.
57 *Ibid* at para 4.
58 *Ibid* at para 66.

Myers

Two years after *Antic*, the Supreme Court's decision in *Myers* clarified the law applicable to bail reviews. Once again, the Court took the opportunity to reinforce the presumption of innocence and highlight the serious impacts of pre-trial detention on accused individuals.

Myers dealt specifically with s 525 of the *Criminal Code*, which requires custodial institutions to apply for a bail review once an accused has spent 90 days in pre-trial custody. The Supreme Court confirmed that the purpose behind s 525 is to prevent an accused person from "languishing" in pre-trial detention and to ensure timely trials.[59] The reviewing judge must consider "whether the continued detention of the accused is justified." Moreover, there is no requirement for the accused to show unreasonable delay to be entitled to a bail review.

As in *Antic*, the Court recognized that realities on the ground have diverged from the law's aspirations:

> [O]n any given day in Canada, nearly half of the individuals in provincial jails are accused persons in pre-trial custody. It must be said that the conditions faced by such individuals are often dire. Overcrowding and lockdowns are frequent features of this environment, as is limited access to recreation, health care, and basic programming.[60]

Throughout the decision, the Court emphasized the right to liberty and the presumption of innocence in the pre-trial context. As in *Antic*, the Court expressed concern about the "relationship between prolonged pre-trial detention and induced guilty pleas." Thus, the decision not only clarified the role of s 525 reviews, but situated those reviews as key legal safeguards within a system where an accused person's rights can easily be undermined. Ultimately, the Court emphasized, "we must not lose sight of the fact that pre-trial detention is a measure of last resort."[61]

Penunsi

In the 2019 decision *Penunsi*, the Supreme Court once again emphasized the ladder principle, reaffirming that the default is release on an undertaking without conditions, unless the prosecutor can show cause why an order for more stringent release conditions should be made.[62] In particular, the Court reinforced that – like bail conditions – conditions placed on a peace bond must be tailored, reasonable, and must have a nexus with ensuring the individual's appearance in court or addressing specific public safety concerns. In addition, the Court specifically raised concerns about conditions prohibiting the use of drugs or alcohol:

> Where the condition is not demonstrably connected to the alleged fear, it may merely set the defendant up for breach, especially where the defendant is known to have a substance use disorder… Any condition should not be so onerous as effectively to constitute a detention order by setting the defendant up to fail.[63]

Zora

In 2020, the Supreme Court's string of bail decisions culminated in the release of *Zora* – a thoughtful, far-reaching analysis of the interlocking issues of bail conditions and the criminal consequences for breaching such conditions.[64]

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[59] *R v Myers*, 2019 SCC 18 at para 24.

[60] *Ibid* at para 26.

[61] *Ibid* at para 67.

[62] *R v Penunsi*, 2019 SCC 39 at para 77. Strictly speaking, *Penunsi* arose in the context of peace bond proceedings. The Supreme Court found that significant sections of Part XVI of the *Criminal Code* are applicable, *mutatis mutandis*, to the peace bond context. As such, many of the Court's pronouncements are equally applicable to the distinct but interrelated contexts of bail and peace bond proceedings.

[63] *Ibid* at para 80.

[64] *R v Zora*, 2020 SCC 14. The facts underpinning *Zora* illustrate how challenging it can be for accused people to comply with bail conditions – and how such conditions may expose individuals to intense police surveillance. The appellant, Chaycen Zora, was charged with failing to comply with a condition requiring him to answer his front door within five minutes of a peace officer or bail supervisor attending to confirm his compliance with curfew and house arrest conditions. During the month after Mr. Zora's release on bail, police came to his home *almost every day* for compliance checks. On two evenings over Thanksgiving weekend, Mr. Zora failed to answer the door when police went to his residence to check compliance around 10:30 PM. Mr. Zora, his girlfriend, and his mother all testified that they were home throughout the weekend. Because Mr. Zora's bedroom was far from the front door, there was a possibility he had been unable to hear the doorbell from his room.

Strictly speaking, the dispute in *Zora* turned on the *mens rea* required for the criminal offence of failure to comply with a bail condition under s 145(3) of the Criminal Code.[65] Yet the Supreme Court took the opportunity to comment on "broader considerations about the functioning of our complex bail system."[66] Writing for a unanimous Court, Martin J. cited a substantial body of evidence showing that accused people are typically released on bail saddled with onerous conditions of release, which are often not tailored to the individual accused nor connected to the statutory risks outlined in s 515(10). She wrote: "Courts and commentators have consistently described a culture of risk aversion that contributes to courts applying excessive conditions."[67]

The imposition of restrictive bail conditions interacts with s 145(3) "to create a cycle of incarceration, especially among the most vulnerable in our population."[68] As the Court explained: "Most bail conditions restrict the liberty of a person who is presumed innocent. Breach can lead to serious legal consequences for the accused and the large number of breach charges has important implications for the already over-burdened justice system."[69]

Moreover, the Court recognized that these issues have a disproportionate impact on vulnerable and marginalized accused – including those living in poverty and people with addictions or mental illnesses – and on Indigenous people, who are overrepresented in the criminal justice system. As Martin J. noted:

> People with addictions, disabilities, or insecure housing may have criminal records with breach convictions in the double digits. Convictions for failure to comply offences can therefore lead to a vicious cycle where increasingly numerous and onerous conditions of bail are imposed upon conviction, which will be harder to comply with, leading to the accused accumulating more breach charges, and ever more restrictive conditions of bail or, eventually, pre-trial detention.[70]

Against the backdrop of these realities, the Supreme Court confirmed that all those involved in the bail system must respect the principles of restraint and review. Under the principle of restraint, any bail conditions must be "minimal, necessary, reasonable, the least onerous in the circumstances, and sufficiently connected to a risk listed in s. 515(10)."[71] Likewise, the principle of review requires everyone in the criminal justice system to "carefully scrutinize" bail conditions.[72] Conditions will be unreasonable if the accused cannot realistically comply or if they are disproportionate to the risks.[73]

Martin J. cautioned that courts should be "wary" of conditions that may target symptoms of mental illness – including abstinence conditions for accused people who struggle with addictions. As she concluded, "rehabilitating or treating an accused's addiction or other illness is not an appropriate purpose for a bail condition."[74] Likewise, the Court raised concerns about other potentially problematic conditions:

- Behavioural conditions such as "attend school" or "attend counselling or treatment."[75]
- The requirement to "keep the peace and be of good behaviour."[76]
- The requirement to follow or be amenable to the rules of the house or to respect the rules of a residential facility, particularly for youth.[77]

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[65] When Mr. Zora was charged in 2015, s 145(3) of the *Criminal Code* established the offence of failing to comply with a condition. Bill C-75 split the offence into two subsections, now addressed at ss 145(4) and 145(5). However, these changes did not meaningfully alter the substance of the failure to comply offence.
[66] *R v Zora*, 2020 SCC 14, at para 5.
[67] *Ibid* at para 76.
[68] *Ibid* at para 6.
[69] *Ibid* at para 5.
[70] *Ibid* at para 57, citing *Set Up to Fail*, along with other key studies from both academics and civil society organizations.
[71] *Ibid* at para 24.
[72] *Ibid* at para 6.
[73] *Ibid* at para 87.
[74] *Ibid* at para 92.
[75] *Ibid* at para 93.
[76] *Ibid* at para 94.
[77] *Ibid* at para 95.

- Conditions that may have unintended consequences – such as "red zone" conditions which prohibit an accused from entering a certain geographical area, but which "can isolate people from essential services and their support systems."[78]

- Conditions that impact other *Charter*-protected rights, such as requiring the accused to submit to police searches of their person, vehicle, phone or home without a warrant.[79] Such conditions, the Court concluded, are "constitutionally suspect."

Finally, the Supreme Court emphasized that the obligation to uphold the principles of restraint and review falls on *everyone* involved in crafting bail conditions.[80] The Crown, defence counsel, and judicial officials all bear a professional responsibility to scrutinize bail conditions and ensure they are truly necessary and appropriate – *even* in cases where the Crown and defence have negotiated a consent release.

2.1.2 Legislative Reform

Like the Supreme Court, Parliament has taken notice of the increasingly clear consensus that the practice of bail in Canada has departed from the principles embedded in the *Charter* and the *Criminal Code*. In December 2019, significant changes to Part XVI of the *Criminal Code* took effect – the first comprehensive amendments to the bail provisions in the *Criminal Code* since the *Bail Reform Act* of 1972. These amendments formed part of a broader legislative package, Bill C-75, which aimed to modernize the criminal justice system and reduce delays.[81] In introducing Bill C-75, the government acknowledged that the bail system "uses a disproportionate amount of resources" and "perpetuates a cycle of incarceration."[82] This framing reflected a dual focus on efficiency and the rights of accused people.

Bill C-75's most significant amendments affecting the bail system can be grouped into three areas: the codification of principles governing bail; the introduction of judicial referral hearings; and modifications to bail in intimate partner violence cases.[83]

Principles Governing Bail

Bill C-75 introduced two broad statements of principle governing the operation of bail. Section 493.1 of the *Criminal Code* now explicitly sets out the "principle of restraint," whereby courts must "give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances."[84] In addition, s 493.2 directs decision-makers to "give particular attention" to the circumstances of Indigenous accused and "accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part."[85]

In addition, the bill added language reinforcing the "ladder principle," whereby more restrictive forms of release are only to be considered after less restrictive forms of release have been found to be inappropriate . Section 515(2.01) now highlights that release conditions may only be ordered if the Crown shows cause why "any less onerous form of release would be inadequate." Likewise, s.515(2.03) instructs justices not to require surety supervision unless satisfied that a surety release is "the least onerous form of release possible for the accused in the circumstances."

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[78] *Ibid* at para 97.

[79] *Ibid* at para 98.

[80] *Ibid* at para 101.

[81] In 2015, the Prime Minister's mandate letter to the Minister of Justice and Attorney General of Canada included a commitment to undertaking "modernization efforts to improve the efficiency and effectiveness of the criminal justice system." These efforts were to include, *inter alia*, "exploration of sentencing alternatives and bail reform." Minister of Justice and Attorney General of Canada Mandate Letter (November 12, 2015), online: <https://www.pm.gc.ca/en/mandate-letters/2015/11/12/archived-minister-justice-and-attorney-general-canada-mandate-letter>.

[82] *House of Commons Debates*, 42nd Parliament, 1st Session, Vol 148, No 300 (24 May 2018).

[83] While we have chosen to focus on three major themes, Bill C-75 introduced other changes to Part XVI. In particular, the bill included new procedural requirements for sureties (a signed declaration acknowledging the responsibilities that come with being a surety), changes to s 525 dealing with bail reviews, and changes to ss 498 and 499 giving peace officers (not just officers-in-charge) the ability to release accused people from custody.

[84] *Criminal Code*, RSC 1985, c C-46, s 493.1.

[85] *Ibid*, s 493.2.

For the most part, these provisions did not introduce novel legal standards. Rather, they served to confirm and codify principles that were already well established in Canadian case law.[86] Indeed, the Supreme Court of Canada had already emphasized and clarified the principle of restraint in numerous decisions that were released prior to the legislative changes.[87] As the Court noted in *Zora*, the "principle of restraint… has always been at the core of the law governing the setting of bail conditions."[88] Similarly, courts have for years applied the principles underlying *Gladue* when determining bail for Indigenous accused.[89] Nonetheless, s 493.1 does broaden the lens by directing courts to consider the circumstances affecting *other* vulnerable populations.

Judicial Referral Hearings

Bill C-75 created a new mechanism for handling administration of justice offences – dubbed the "judicial referral hearing." This new mechanism was explicitly proposed as a response to the proliferation of restrictive release conditions and the criminalization of conduct that would otherwise be lawful. In the House of Commons, the Minister of Justice acknowledged: "Across Canada, accused people are routinely burdened with complex and unnecessary bail conditions that are unrelated to public safety and that may even be impossible to follow, such as when a curfew is broken by an accused because he or she missed the bus in a remote area."[90] She argued that the judicial referral hearing would combat these issues by providing a "more efficient" alternative to laying new criminal charges for failure to comply. Ultimately, this would "help prevent indigenous persons and marginalized Canadians from entering the revolving door of the criminal justice system."[91]

A judicial referral hearing is available where an individual has allegedly failed to attend court or comply with a summons, appearance notice, undertaking or release order – provided that the individual has not caused physical or emotional harm to a victim, property damage, or economic loss. Both peace officers[92] and the Crown[93] have the discretion to choose this route instead of laying or prosecuting charges for failure to comply. At a judicial referral hearing, the court must review the individual's release conditions, and then may decide to take no action, release the individual on new conditions, or order detention.[94] Regardless of the court's decision, the presiding justice or judge must dismiss any administration of justice charges that were laid.

Shortly after Bill C-75 came into effect, the Supreme Court commented on the promise of the judicial referral hearing. In *Zora*, the Court explained that the bail-related amendments in Bill C-75 were intended "to address mounting concerns about the imposition of excessive and unfair bail terms and the overuse of criminal sanctions for the failure to comply with conditions of bail."[95] The Supreme Court emphasized the intent behind the amendments, particularly the creation of the judicial referral hearing. This change, the Court noted, "further emphasizes that prosecutions and conviction under s. 145(3) should be a last resort measure to primarily address harmful intentional breaches of bail conditions where the remedies available through bail review and revocation would not be sufficient."[96]

Intimate Partner Violence

Finally, Bill C-75 added a new reverse onus aimed at "providing better protection for victims" of intimate partner violence.[97] The *Criminal Code* now reverses the burden when an accused who has previously been convicted of intimate partner violence stands charged with a new offence involving violence against an intimate partner[98] – in essence, shifting the responsibility to the accused to show why they should be granted bail pending trial. This

[86] See e.g. *R v Muminawatum*, 2020 MBQB 75 at para 30: "Arguably both provisions are, in effect, codification of the common law that existed beforehand. Section 493.1 is effectively from *Antic* and section 493.2 is from the application of *Gladue* principles to the bail provisions of the *Criminal Code*. However, as sometimes happens in the development of the common law, difficulties arose in recognizing and consistently applying these principles before the sections were proclaimed into law."

[87] *R v St-Cloud*, 2015 SCC 27 at para 25; *R v Antic*, 2017 SCC 27 at para 29.

[88] *R v Zora*, 2020 SCC 14 at para 26.

[89] *R v Robinson*, 2009 ONCA 205 at para 13: "It is common ground that the principles enunciated in the decision of the Supreme Court of Canada in *R v Gladue*…have application to the question of bail."

[90] *House of Commons Debates*, 42nd Parliament, 1st Session, Vol 148, No 300 (May 24, 2018) at pp 19603 and 19606.

[91] *Ibid*.

[92] *Criminal Code,* RSC 1985, c C-46, s 496.

[93] *Ibid*, s 523.1(2).

[94] *Ibid*, s 523.1(3).

[95] *R v Zora*, 2020 SCC 14 at para 18.

[96] *Ibid* at para 70.

[97] *House of Commons Debates*, 42nd Parliament, 1st Session, Vol 148, No 300 (May 24, 2018).

[98] *Criminal Code*, RSC 1985, c C-46, s 515(6)(b.1).

change was consistent with the Prime Minister's commitment to "toughen criminal laws and bail conditions in cases of domestic assault… with the goal of keeping survivors and children safe."[99]

Expert and Community Views on C-75

When Bill C-75 was tabled, a number of experts and practitioners provided comment before committees in the House of Commons and the Senate. Many opined that the amendments represented a step in the right direction, but that Bill C-75 did not go far enough and would not result in meaningful changes on the ground. Simply "tinkering" with the bail provisions in the *Criminal Code* would not be sufficient to dislodge the culture of risk aversion among justice system actors.

In particular, several experts predicted that the judicial referral hearing would not be effective, given that police officers and prosecutors already had the discretion not to pursue charges or prosecution for failures to comply. Many noted that the new mechanism relies on individual discretion, whether by police or Crown prosecutors. Professor Nicole Myers expressed concern that judicial referral hearings might become a "parallel process" that could "end up reproducing the very challenges and problems that we are currently seeing."[100]

The new reverse onus for charges of intimate partner violence was particularly contentious. Experts argued that the provision would have an adverse effect on Indigenous women and other marginalized communities, particularly since the practice of "dual charging" often means that both parties in a domestic violence context receive criminal charges.[101] Several organizations highlighted that bail courts are already required to consider an accused person's criminal record and any risk to public safety, making the new provision unnecessary and potentially harmful.[102]

2.2 Provincial, Territorial and Local Initiatives

Different levels of government share responsibility for Canada's bail system. While Parliament bears responsibility for the *Criminal Code*, the administration of justice is the jurisdiction of the provinces and territories.[103] The day-to-day experiences of people navigating the justice system are shaped by policies, practices, and resources that often differ widely between provinces and territories – and even from one courthouse to another.

Over the past decade, across Canada, provinces and territories have introduced specific policy and operational changes that have had significant impacts on the bail system. In some cases, these changes reflected evolving political priorities and values. Other changes came in response to the COVID-19 pandemic, which shuttered courthouses across the country and required many courts to rapidly adopt remote procedures for bail matters.

Unfortunately, it can be difficult to access comprehensive information about changes in court administration, Crown training, and social services related to the justice system. We requested meetings and information regarding bail-related initiatives from the judiciary and the relevant governmental ministries in the jurisdictions under study – British Columbia, the Yukon, Manitoba, Ontario and Nova Scotia. Only one government, British Columbia, provided an official briefing on their work in relation to the bail system. This section provides a high-level overview of noteworthy provincial and territorial bail-related initiatives, with a focus on our five jurisdictions of study.

2.2.1 Administration of Justice and Social Service Changes: 2014-2020

Like the federal government, many provinces and territories in the mid-2010s took note of the research, federal legislative changes, and judicial pronouncements criticizing Canada's overly risk-averse bail system. Provincial and territorial governments attempted to address the situation through changes to the administration of justice.

[99] Minister of Justice and Attorney General of Canada Mandate Letter (November 12, 2015), online: <https://www.pm.gc.ca/en/mandate-letters/2015/11/12/archived-minister-justice-and-attorney-general-canada-mandate-letter>.

[100] Canada, Parliament, House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 42nd Parl, 1st Sess, No 106 (September 19, 2018) at 20.

[101] Canada, Parliament, House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 42nd Parl, 1st Sess, No 104 (September 17, 2018) at 28. See also Cassandra Richards, "Learning From Those on the Ice: The Impact of Bill C-75 on Nunavummiut" 51:1 *Ottawa Law Review* (2020), criticizing the reverse onus provision, with a specific focus on Nunavut as the jurisdiction with the highest rates of intimate partner violence in Canada.

[102] Canada, Parliament, House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 42nd Parl, 1st Sess, No 106 (September 19, 2018) at 23.

[103] *Constitution Act, 1867*, ss 91(27) and 92(14).

Operational Initiatives

In 2016, Ontario announced additional resources aimed at making the criminal justice system "faster and fairer" – including a package of changes that targeted the bail system.[104] Specifically, Ontario's plan included the following measures:

- Hiring experienced Crown attorneys to serve as "bail vettors" at high-volume courthouses.
- Funding Legal Aid Ontario to provide experienced duty counsel to serve as bail coordinators at high-volume courthouses.
- Embedding Crown counsel at police stations to provide advice and support on bail decisions. These Crowns were specifically tasked with working with community agencies on "meaningful alternatives to criminal charges for vulnerable, low-risk accused who do not belong in the criminal justice system." One embedded Crown counsel was located at 51 Division in Toronto and another was placed with the Ottawa Police Service.
- Hiring on-site duty counsel at six provincial correctional facilities, including the Ottawa Carleton Detention Centre, to provide advice and assist with bail hearings.[105]
- Funding to expand Ontario's existing Bail Verification and Supervision Program – expanding eligibility, adding locations, and adding weekend court locations.
- Making more "bail beds" available for accused people who require supervision and housing.

In 2017, Ontario launched a pilot project where Provincial Court judges, instead of justices of the peace, would preside over bail court in two locations (Ottawa and College Park in Toronto).[106]

While many of Ontario's initiatives were ambitious and promising, the province's follow-through and implementation has been inconsistent. For instance, the government has failed to publicly release any reports evaluating the pilot project that placed Provincial Court judges in bail court. Meanwhile, an evaluation found that embedding Crown prosecutors in police stations did have positive outcomes, but Ontario has chosen not to expand the project beyond the initial locations.[107] Without rigorous evaluation and a commitment to funding successful initiatives, it will be impossible to make sustained change across the justice system.

Ontario's Ministry of the Attorney General (MAG) has also spearheaded initiatives aimed at better serving Indigenous clients caught up in the bail system. As of November 2021, there were 16 Indigenous bail verification and supervision programs (BVSPs) across Ontario, with some programs covering multiple fly-in communities. The province also expanded funding for Indigenous bail bed programs in Toronto, Timmins, Kenora and Pikangikum First Nation. Indigenous BVSPs operate differently than conventional bail programs, which typically have eligibility criteria and policies that can exclude Indigenous clients. As one interviewee explained:

> [That] really was the impetus for the Indigenous bail programs. They are all facilitated by Indigenous organizations and communities. Generally speaking, the vast majority of the staff are Indigenous. They are all connected to other Indigenous organizations and able to create culturally appropriate referrals. The Indigenous programs do not have these strict criteria of eligibility. So that is to say, they [can] offer supervision to somebody with a criminal record… If they feel they can supervise the person, then we encourage them to do so. Part of the reason there is that it's a recognition that a past record of compliance with bail is not a future predictor when the person previously did not have the right supports.

In recent years, as the leadership of provincial governments has changed, so too have their priorities and initiatives in relation to the bail system. For instance, since a Progressive Conservative government took power in Ontario in

[104] Attorney General of Ontario, "Ontario Making Criminal Justice System Faster and Fairer" (1 December 2016), online: <https://news.ontario.ca/en/release/42901/ontario-making-criminal-justice-system-faster-and-fairer>; Attorney General of Ontario, "Ontario Making Criminal Justice System Faster and Fairer in Eastern Ontario" (25 January 2017), online: <https://news.ontario.ca/en/release/43473/ontario-making-criminal-justice-system-faster-and-fairer-in-eastern-ontario>.

[105] Attorney General of Ontario (30 October 2017), online: <https://news.ontario.ca/en/backgrounder/46817/progress-on-ontarios-plan-for-faster-fairer-criminal-justice>.

[106] Jacques Gallant, "Judges to preside over bail hearings at two courthouses" (13 September 2017), online: Toronto Star <https://www.thestar.com/news/gta/2017/09/13/judges-to-preside-over-bail-hearings-at-two-courthouses.html>.

[107] Office of the Auditor General of Ontario, Annual Follow-Up on Value-for-Money Audits (December 2021) at 285, online: <https://www.auditor.on.ca/en/content/annualreports/arreports/en21/AR_FU_en21.pdf>.

2018, the province focused on increasing resources for law enforcement and prosecutors. In August 2018, Ontario announced funding to combat firearms and gang-related offences – including teams of bail compliance officers and Crown attorneys focused "exclusively on ensuring violent gun criminals are denied bail and remain behind bars."[108] Subsequently, the province promised to "expand[] the ability of Crowns to assess bail positions quicker across Ontario."[109]

Significant decisions emanating from lower courts also prompted changes to the administration of the bail system. Cases such as *Balfour and Young*, regarding systemic delays in accessing bail in northern Manitoba, and *Simonelli*, which addressed systemic bail delay in Ontario, prompted courts to change scheduling practices and allocate additional resources to the bail system. These cases and their impacts are further explored below, in Part 4.

In 2021, Nova Scotia adopted regulations introducing a bail supervision and support program for adults in the Halifax region.[110] Based on interviews we conducted shortly after the program launched, in 2022, the program has 10-15 spots and does not offer housing. The program operates as a partnership between the provincial Correctional Service and the John Howard Society, which provides supervision and services aimed at re-engaging people with community resources and services. Some participants may be required to have electronic monitoring, whether through a mobile app or (at the highest level) a GPS ankle bracelet. Throughout the province, there are other programs – with and without housing – that defence counsel may access when putting together a release plan. However, interviewees noted that government funding for various bail programs has been inconsistent, such that the availability of services has ebbed and flowed.

While CCLA's research for this report focuses on British Columbia, the Yukon, Manitoba, Ontario and Nova Scotia, there have also been noteworthy developments and policy changes affecting the bail system in other provinces and territories.

In Alberta, the government commissioned a report examining systemic issues in the bail system in 2016. One of the report's major recommendations was to end the practice of police officers running bail hearings.[111] In a subsequent reference, the Alberta Court of Queen's Bench confirmed that police officers lack the authority to conduct bail hearings where the accused stands charged with an indictable offence.[112] As a result, in 2017, Crown prosecutors replaced police officers for all bail hearings in Alberta. These changes resulted in significant systemic delay, and provincial statistics showed an increase in the number of accused people held for more than 24 hours, contrary to s 503 of the *Criminal Code*. This delay was the subject of subsequent judicial scrutiny in *Reilly*, discussed in Part 4 below.

In 2021, Quebec became the first jurisdiction in the country to use electronic monitoring to help enforce mobile "no go" bail conditions, such as those requiring an accused stay a certain distance away from the complainant. In contrast to more standard electronic monitoring systems, which have been used for many years to help enforce house arrest conditions or static geographic restrictions, this form of electronic monitoring is designed to ensure an accused person does not get too close to another person. According to media reports, in Quebec's program, complainants carry a receiver, which monitors their location in relation to the accused person. Complainants also have access to a mobile application that allows them to monitor the accused person's movements.[113] It was not clear if this monitoring consists only of alerts when a person is about to or does violate their bail condition, or if

[108] The province referred to these teams, somewhat hyperbolically, as "legal SWAT teams." Office of the Premier, "Ford Government Takes Real Action on Guns and Gangs," (9 August 2018), online: <https://news.ontario.ca/en/release/49856/ford-government-takes-real-action-on-guns-and-gangs>.

[109] One press release trumpeted: "Toronto's Intensive Firearm Bail Team was established in October 2018. Since that time, the team has conducted 378 bail hearings and 43 bail reviews, which resulted in a detention order in 64 per cent of the cases. Attorney General, "Ontario Supporting More Communities in their Fight Against Guns and Gangs" (26 August 2019), online: <https://news.ontario.ca/en/release/53459/ontario-supporting-more-communities-in-their-fight-against-guns-and-gangs>; Attorney General of Ontario, "Ontario Introduces New Measures to Address Court Backlog" (29 October 2021), online: https://news.ontario.ca/en/release/1001076/ontario-introduces-new-measures-to-address-court-backlog.

[110] The program "includes electronic monitoring of selected accused persons, to be coupled with collaborative support services delivered by community agencies." *Adult Bail Supervision and Support Program Regulations*, NS Reg 88/2021 (26 May 2021), online: <https://novascotia.ca/JUST/regulations/regs/coradult.htm>.

[111] Nancy Irving, "Alberta Bail Review: Endorsing a Call for Change" (29 February 2016), online (pdf): <https://open.alberta.ca/dataset/2532e913-c5c6-4316-842d-b1cf39217994/resource/4c134128-7c59-4057-8fdd-dbd0ce0a9ae8/download/albertabailreview-report.pdf>.

[112] *Hearing Office Bail Hearings (Re),* 2017 ABQB 74.

[113] Sidhartha Banerjee, "Quebec to expand tracking-bracelet program for domestic violence suspects in 2023" (29 December 2022), online: *Toronto Star* <https://www.thestar.com/politics/2022/12/29/quebec-to-expand-tracking-bracelet-program-for-domestic-violence-suspects-in-2023.html>.

more frequent location monitoring is possible. Other provinces have also indicated that they are looking at similar technology, or have undertaken other enhancements to their existing electronic monitoring capabilities.[114]

Updates to Crown Policy Manuals

Since 2014, several jurisdictions have revised their Crown policy manuals, updating the high-level guidance given to prosecutors when preparing for and conducting proceedings related to bail.

In Ontario, the provincial government commissioned three experts to provide advice on how to modernize provincial Crown policies related to bail.[115] A revised bail section in Ontario's Crown policy manual was released in 2017 with the explicit intention of bringing bail decisions back in line with the law and reducing pre-trial custody.[116] The revised policy manual, which is still in effect today, includes new language emphasizing the right to reasonable bail. These changes were particularly necessary – Ontario's previous Crown policy manual on bail contributed to risk aversion by focusing almost exclusively on the risks that may be posed by accused persons and when Crown counsel should seek detention orders.[117] Unfortunately, however, Ontario has not updated its policy manual since Bill C-75 was passed; it makes no reference to judicial referral hearings or other recent legislative changes.

Other jurisdictions' Crown policy manuals have been updated more recently to include reference to C-75 and recent appellate decisions.

The Public Prosecution Service of Canada, which prosecutes all *Criminal Code* charges in the territories and drug offences under the *Controlled Drugs and Substances Act* across most of the country, modified their prosecutorial Deskbook in 2020 and included new sections on judicial referral hearings and the Supreme Court's decision in *Zora*.[118] The Deskbook also addresses other fundamental principles of bail, including the ladder principle, the principle of restraint, and the fact that conditions should not be implemented to "punish the accused or [to] reform the accused." It specifically references CCLA's 2014 report when explaining the wide-ranging impacts of conditions of release on accused persons.

Similarly, British Columbia's Crown policy on bail was updated in January 2021. (It was again updated in November 2022 – developments that are reviewed below.) The policy now discusses the new statutory provision introduced in C-75 to pay particular attention to the circumstances of "accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release."[119] In addition to detailed discussions of the need for Crowns to exercise restraint in the bail process, the policy specifically mentions that "Crown Counsel cannot predict the future actions of the accused with certainty, and thus cannot eliminate all risks." It states that "when Crown Counsel make principled decisions in accordance with this policy, regardless of the outcome, the BC Prosecution Service and the Assistant Deputy Attorney General will support their decisions."[120] Curiously, the policy does not reference judicial referral hearings, even though there is a section discussing reasonable alternatives to pursuing a prosecution for an alleged breach of bail.

Unfortunately, Manitoba does not make the bail portion of its Crown policy manual available to the public and as a result we were unable to track relevant policy changes.[121] Based on publicly available information, Nova Scotia does not provide any policy guidance to Crowns regarding standard adult bail processes.[122]

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[114] Molly Hayes, "Provinces looking at using GPS trackers for domestic violence offenders" (2 September 2022), online: *The Globe and Mail* <https://www.theglobeandmail.com/canada/article-intimate-partner-violence-gps-tracker>.

[115] For context on the process leading to the new Crown guidelines, see Joe Lofaro, "Ontario issues new bail policy to ease strain on jails" (30 October 2017) online: *CBC* <https://www.cbc.ca/news/canada/ottawa/attorney-general-changes-ontario-bail-policy-1.4378273>. See also Attorney General of Ontario, "Ontario Unveils New Bail Directive to Reduce Pre-Trial Custody" (30 October 2017), online: <https://news.ontario.ca/en/release/46820/ontario-unveils-new-bail-directive-to-reduce-pre-trial-custody>.

[116] Ministry of the Attorney General, "Crown Prosecution Manual, D.24: Judicial Interim Release (Bail)" (14 November 2017), online: <https://www.ontario.ca/document/crown-prosecution-manual/d-24-judicial-interim-release-bail>.

[117] Ministry of Attorney General, "Crown Policy Manual" (21 March 2005), online (pdf): *Province of Ontario* <https://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/BailHearings.pdf>.

[118] Office of the Director of Public Prosecutions, "Deskbook: 3.18 Judicial Interim Release" (3 January 2020), online (pdf): Public *Prosecution Service of Canada* <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf>.

[119] *Criminal Code,* RSC 1985, c C-46, s 493.2(b).

[120] British Columbia Prosecution Service, "Crown Counsel Policy Manual" (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>.

[121] Manitoba Department of Justice Prosecutions, "Prosecution Policies" (August 2017), online: <https://www.gov.mb.ca/justice/crown/prosecutions/policy.html>.

[122] Nova Scotia, "Crown Attorney Manual: Prosecution and Administrative Policies for the PPS" (2021), online: <https://novascotia.ca/pps/crown_manual.asp>. Nova Scotia does have a publicly available section on bail reviews under s 525 of the *Criminal Code*, last updated in 2002. Nova Scotia Public Prosecution Service, ""Bail Reviews" – Criminal Code Section 525" (2 September 2002), online: <https://novascotia.ca/pps/publications/ca_manual/AdministrativePolicies/BailReviewProtocol.pdf>.

2.2.2 Impact of the COVID-19 Pandemic: 2020-2022

Beginning in 2020, COVID-19 and the public health measures imposed in response to the pandemic had a dramatic impact on the administration of the bail system, pre-trial detention, and the availability of social services.

Provincial and territorial jails are uniquely challenging environments for attempting to contain and mitigate the spread of COVID-19. People in custody live in congregate settings, typically in overcrowded conditions, with constant turnover of staff and prisoners. Authorities struggled – and more often than not failed – to maintain social distancing or effective cohorting, isolation for those exposed, and sanitary measures such as masks and hand washing.

In the initial weeks and months of the pandemic many jurisdictions saw concerted efforts to reduce jail populations by releasing more individuals at the bail and post-sentencing stages, and decreasing the number of people arrested and held for a bail hearing.[123] Substantive legal analysis in bail courts was also impacted, as many courts grappled with how the pandemic affected the bail decision, including how the pandemic shifted the primary, secondary, and tertiary ground analyses.[124]

Perhaps most significantly, many courts across Canada were forced to quickly pivot to remote hearings.[125] The impact of the pandemic varied across jurisdictions. By the time our research took place, in the summer of 2022, the Yukon, Manitoba, and Nova Scotia had returned to hybrid bail proceedings in most locations.[126] Judges and justices of the peace, court staff, and counsel typically attend in person for all bail matters. In all three jurisdictions, however, accused people continue to attend their bail appearances by audio or video link from police detachments and remand facilities.

The impact on court operations was both significant and long lasting in Ontario and British Columbia, the two largest jurisdictions of study. Throughout the COVID-19 pandemic, the Ontario Court of Justice conducted bail hearings remotely, using Zoom videoconferencing capabilities. As of January 2023, a notice indicated that accused people would continue to appear for contested bail hearings by video "unless otherwise directed."[127] Based on information from criminal counsel, some court locations have reverted to in-person bail hearings, in part due to challenges in coordinating video appearances with the remand institutions where accused people are detained.

In British Columbia, the COVID-19 pandemic sharply accelerated the pace of efforts to modernize the justice system. With the outbreak of the pandemic in March 2020, the Provincial Court began hearing all bail matters by video or audioconference, unless a judge or justice ordered otherwise. The provincial government soon began working with the Provincial Court and other stakeholders to coordinate and improve many of the *ad hoc* measures that arose in the early days of the pandemic. In April 2021, the Provincial Court launched a virtual bail pilot project in the Northern Region – a region chosen specifically because of its vast size and geographically dispersed communities.[128] Under the Northern Bail Pilot Project, the Court adopted a centralized bail model. All weekday bail appearances for adults and youth take place in two "virtual courtrooms," with judges, court staff, counsel and accused people dialing in via Microsoft Teams.[129] Video terminals were installed at the Prince George Regional Correctional Centre and in RCMP detachments across northern British Columbia, to allow accused people to attend their bail hearings remotely.

The province hoped that the Northern Bail Pilot project would facilitate timely bail hearings and improve access to justice. One interview participant from British Columbia explained:

[123] Howard Sapers, "The case for prison depopulation: Prison health, public safety and the Pandemic" (2020) 5:2 Journal of Community Safety and Well-Being.

[124] See e.g. Lisa Kerr and Kristy-Anne Dubé, "Adjudicating the Risks of Confinement: Bail and Sentencing During COVID-19" in *Criminal Reports* (2020).; Lisa Kerr and Kristy-Anne Dube, "the Pains of Imprisonment in a Pandemic" (2021) 46:2 Queen's LJ.

[125] Nicole M Myers, "The More Things Change, the More They Stay the Same: The Obdurate
Nature of Pandemic Bail Practices" (2021) 46:4 Can J Sociol 11., speaks to 80 days of observation and a number of issues with the transition.

[126] See Appendix B for details regarding the day-to-day practice of bail in British Columbia, the Yukon, Manitoba, Ontario and Nova Scotia.

[127] Ontario Court of Justice, "Notice to the Public and to the Profession – Interim Guidelines re Mode of Appearance for Ontario Court of Justice Criminal Proceedings" (18 March 2022, updated 14 January 2023), online at: https://www.ontariocourts.ca/ocj/covid-19/criminal-appearance-guidelines. See also Ontario Court of Justice, "COVID-19: Ontario Court of Justice Protocol Re Bail Hearings" (11 May 2020, revised 22 April 2021 and 4 April 2022), online at: https://www.ontariocourts.ca/ocj/covid-19/covid-19-ontario-court-of-justice-protocol-re-bail-hearings.

[128] Interview with British Columbia government official.

[129] Zena Olijnyk, "Virtual bail pilot for northern communities launched by Provincial Court of British Columbia" (29 April 2021), online: *Canadian Lawyer* <https://www.canadianlawyermag.com/practice-areas/criminal/virtual-bail-pilot-for-northern-communities-launched-by-provincial-court-of-british-columbia/355480>.

> In the north, very frequently, if a person was arrested in a location where there wasn't a court sitting that day… they [might] have to wait for a long period of time to be transported. They might get transported and then put over, end up in a correctional centre, eventually have this hearing, only to be released eight or more hours away from their home community with no way of returning home – having experienced many negative impacts to their personal life, their family life, their employment, etc.

By facilitating bail appearances from the community where an individual was arrested, the virtual bail project aimed to reduce the need to detain accused people overnight and transport them long distances across northern British Columbia.

Over the past two years, British Columbia has moved forward with its remote bail project and has expanded the initiative to new regions. By early 2023, the Provincial Court had fully implemented the virtual model for all weekday bail appearances in the Northern Region, the Interior Region (including Kamloops and Kelowna) and Vancouver Island (including Victoria).[130] By contrast, at the time of our research, bail hearings in downtown Vancouver had returned to a hybrid format. Judges and defence counsel had resumed attending in person at the Main Street courthouse for all bail matters, while the majority of accused people continued to appear by video from police stations and detention facilities.

c. Across all jurisdictions, reflections on the utility and challenges of remote bail proceedings have been mixed. An examination of the impacts of remote bail proceedings is examined more fully in Part 4, below. Recent Calls for Bail Reform: 2022-2023

Over the past year Canada's bail system has again made headlines – propelled, in part, by high-profile discussions around crime and community safety. Politicians and media outlets have focused attention on the bail system as the perceived source of a recent increase in violent crime. A wide range of issues have been linked to the bail system, including concerns about random assaults in public places, the deaths of on-duty police officers, and "repeat" or "prolific offenders."

Across the country there was intense media and political focus on the bail system following the fatal shooting of an Ontario Provincial Police constable in December 2022. It was widely reported that one of the individuals charged with first-degree murder in the death of Constable Greg Pierzchala was on bail and facing firearms-related charges at the time of the shooting.[131] The accused had initially been denied bail in December 2021, but after a bail review in June 2022, he was released on strict conditions – including surety supervision and electronic monitoring.

The day after Constable Pierzchala's death, the OPP Commissioner told reporters he was "outraged" that the suspect had been released on bail. Ontario Premier Doug Ford echoed these comments, urging the federal government to "address the revolving door of violent criminals caused by our country's failed bail system."[132]

On January 13, 2023, all thirteen provincial and territorial premiers wrote to the Prime Minister, calling on the federal government to "strengthen Canada's bail system to better protect the public and Canada's heroic first responders." The letter specifically urged the federal government to create a reverse onus for the offence of possession of a loaded prohibited or restricted firearm under s 95 of the *Criminal Code* – and to review other firearms-related offences to determine whether they should also attract a reverse onus.[133]

Although the death of Constable Pierzchala was the most high-profile catalyst, the various responses built on a series of earlier calls to make Canada's bail system less lenient. In April 2022, police associations from across Canada travelled to Ottawa to lobby for legislative changes to the *Criminal Code* provisions governing bail.[134] In May 2022, the Toronto Police Association pursued bail reform in a deputation to the Toronto Police Services Board, stating:

[130] Provincial Court of British Columbia, "CRIM 14 Practice Direction: Northern, Interior, and Island Bail Pilot Project" (9 January 2023), online: <https://www.provincialcourt.bc.ca/downloads/Practice%20Directions/CRIM%2014%20Northern%20Bail%20Pilot%20Project.pdf>.

[131] Daniel Otis, "Are Canadian bail rules tough enough? Experts weigh in after officer killed" CTV News (6 January 2023), online: https://www.ctvnews.ca/canada/are-canadian-bail-rules-tough-enough-experts-weigh-in-after-officer-killed-1.6216708.

[132] *Ibid*.

[133] Christian Paas-Lang, "Premiers urge Trudeau to tighten Canada's bail system" CBC News (14 January 2023), online: <https://www.cbc.ca/news/politics/premiers-letter-trudeau-bail-reform-firearms-1.6714245>.

[134] Toronto Police Association, "Toronto Police Association asks the Toronto Police Services Board to support its call for Bail Reform and Other Legislative Changes aimed at curbing Gun & Gang Violence" (2 May 2022) online: *GlobeNewswire* <https://www.globenewswire.com/news-release/2022/05/02/2434016/0/en/Toronto-Police-Association-asks-the-Toronto-Police-Services-Board-to-support-its-call-for-Bail-Reform-and-Other-Legislative-Changes-aimed-at-curbing-Gun-Gang-Violence.html>.

"With respect to bail and sentencing specifically, we believe that significant enhancements are needed to ensure that the process considers the seriousness of gun and gang crimes and keeps violent, often repeat, offenders out of our communities."[135] These advocacy efforts had an impact. A few weeks prior to Constable Pierzchala's death, for example, Ontario Premier Doug Ford responded to safety concerns at a high school by placing blame on the federal government and their "weak" stance on issues like bail, saying he had "heard police express frustration about the quick release of those accused in such crimes as shootings."[136]

In British Columbia, politicians have been particularly vocal about the need for restrictive bail reform over the past year. In 2022, several British Columbia mayors began raising concerns about crime in their communities, including seemingly random acts of violence and crimes committed by "prolific offenders." Members of the Legislative Assembly raised similar issues in the provincial legislature. In response to criticism, the province's Attorney General laid the blame on the COVID-19 pandemic and the changes to the *Criminal Code* introduced through Bill C-75.[137] Media attention increased throughout the summer, and the issue became a central feature of municipal elections in late 2022. The province commissioned a study to examine concerns about public safety. The report, which was released in September 2022, did not recommend significant changes to the bail system.[138] Nevertheless, the link between crime, bail and C-75 had been publicly aired, and by October, British Columbia's new attorney general was squarely placing the blame for any increase in violent crime, random violence, and "repeat offenders" being on the streets at the feet of the federal government's Bill C-75.[139]

In November 2022, the British Columbia Prosecution Service revised its Crown policy manual. The province added language regarding "repeat violent offenders" – defined as "anyone with one or more recent convictions for an offence against the person… or an offence involving a weapon."[140] When such individuals are charged with an offence against the person or an offence involving a weapon, Crown counsel are now required to seek detention "unless they are satisfied… that the risk to public safety posed by the accused's release can be reduced to an acceptable level by bail conditions."[141] Five months later, the Prosecution Service released preliminary data based on seven weeks of bail proceedings.[142] While the data were not comprehensive, both politicians and media outlets seized on the results to advocate for legislative reform at the federal level. *The Globe and Mail*, for instance, argued that attempts at the provincial level to make bail practices more restrictive – and thus "keep repeat violent offenders behind bars while awaiting trial" – would be ineffective unless the *Criminal Code* was amended. The pressure was on the federal government to act.

In May 2023, the federal Minister of Justice tabled Bill C-48 – which he explicitly framed as a response to calls for bail reform from the provinces and territories.[143] Consistent with the premiers' January 2023 letter, Bill C-48 proposes adding several firearm-related offences – including s 95 – to the list of offences that trigger a reverse onus.[144] The bill also introduced a new reverse onus in cases where an individual is charged with a serious offence involving violence and the use of a weapon, where the person has a previous conviction (within the previous five years) for an offence that meets the same criteria.[145] In addition, Bill C-48 proposed directing bail courts to consider whether an accused person has previous convictions for offences involving violence.[146] Justices would be required

135 *Ibid*.

136 Ian Bailey, "Politics Briefing: Doug Ford Calls on federal government to get tougher on bail reform" (2 December 2022) online: *The Globe and Mail* <https://www.theglobeandmail.com/politics/article-politics-briefing-doug-ford-calls-on-federal-government-to-get-tougher>.

137 Binny Paul, "'Every excuse in the book': Attorney general under fire over B.C.'s handling of prolific offenders" (*Toronto Star*, 6 April 2022), online at: https://www.thestar.com/news/canada/2022/04/06/every-excuse-in-the-book-attorney-general-under-fire-over-bcs-handling-of-prolific-offenders.html.

138 Amanda Butler & Doug LePard, *A Rapid Investigation into Repeat Offending and Random Stranger Violence in British Columbia* (September 2022), online: https://news.gov.bc.ca/files/InvestigationRecommendations.pdf.

139 Bhinder Sajan, "Violent, repeat offenders being released on bail due to 'unintended consequences', online at https://bc.ctvnews.ca/violent-repeat-offenders-being-released-on-bail-due-to-unintended-consequences-b-c-attorney-general-1.6105990.

140 British Columbia Prosecution Service, *Crown Counsel Policy Manual: Bail – Adults* (November 22, 2022) at 3, online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/bai-1.pdf.

141 *Ibid* at 3-4.

142 British Columbia Prosecution Service, "BC Prosecution Service releases preliminary bail data," (Victoria, April 24, 2023), online: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/media-statements/2023/23-08-bcps-releases-preliminary-bail-statistics.pdf

143 Department of Justice Canada, "Strengthening Canada's bail system to help keep communities safe" (May 16, 2023), online: https://www.canada.ca/en/department-justice/news/2023/05/strengthening-canadas-bail-system-to-help-keep-communities-safe.html.

144 C-48, *An Act to amend the Criminal Code (bail reform)*, 1st Sess, 44th Parl, 2023.

145 *Ibid*, cl 1(4).

146 *Ibid*, cl 1(1). The *Criminal Code* already requires justices to consider "whether the accused has been previously convicted of a criminal offence," but the provision does not include specific language about offences involving violence: s 515(3)(b).

to state explicitly on the record that they have considered "the safety and security of the community." when making the bail decision.[147]

In September 2023, Bill C-48 passed all three readings in the House of Commons on the same day and was sent directly to the Senate, bypassing the committee process. Bill C-48 was subsequently amended to include a provision that a justice to state on the record how they determined if s. 493.2 applied to an accused, and if so, how they considered the accused's circumstances.

The past year has demonstrated how intense political pressure and contentious debates can easily politicize an issue such as bail policy. It is appropriate to reflect on what lessons can be learned from high-profile, tragic incidents. It is equally important, however, to ensure that the broader policy conversations are informed by evidence, not emotion or anecdotes.

Criminal justice policy needs to be based on careful research, qualitative and quantitative evidence, and in-depth consultations. Over the past year politicians, law enforcement, and media outlets were quick to assert that Canada's bail system had become too lenient. These assertions are contradicted by decades of research documenting the operation of the bail system and the impact of pre-trial detention. The evidence shows that Canada's bail system is indeed facing a crisis – but it is a crisis of over-detention and over-criminalization, not leniency.

The evidence shows that Canada's bail system is indeed facing a crisis – but it is a crisis of over-detention and over-criminalization, not leniency.

[147] *Ibid*, cl 1(13). The *Criminal Code* already requires justices to state that they have considered "the safety and security of every victim of the offence": s 515(13).

PART 3

PART 3

Results

Over the last decade, the law and practice of bail have received significant attention from the Supreme Court of Canada, Parliament, and policy-makers across the country.[148]

In a series of landmark decisions, the Supreme Court sounded the alarm that practices in bail courts across Canada have diverged from the principles embedded in the *Charter* and the *Criminal Code*. In 2017, the Court's watershed decision in *Antic* reaffirmed that, in Canadian law, release on bail is generally the presumption and pre-trial detention the exception. The Court emphasized the "ladder principle," which requires bail courts to impose "the least onerous form of release on an accused unless the Crown shows why that should not be the case."[149] Three years later, in *Zora*, the Court took aim at the imposition of restrictive bail conditions and the criminalization of bail breaches, which interact "to create a cycle of incarceration, especially among the most vulnerable in our population."[150]

On the legislative front, Bill C-75 introduced amendments to Part XVI of the *Criminal Code* aimed at promoting greater efficiency and fair decision-making in bail court. In particular, s 493.1 now explicitly sets out the "principle of restraint," whereby courts must "give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances."[151]

Given the wide range of legal, policy, and operational changes affecting Canada's bail system since 2014, CCLA sought to understand whether and how practices and outcomes in bail courts across the country have shifted. Between November 2021 and November 2022, CCLA re-created the empirical research that underpinned our 2014 findings in *Set Up to Fail*.[152] To allow for meaningful comparisons, we focused on the same five jurisdictions – British Columbia, the Yukon, Manitoba, Ontario and Nova Scotia. We conducted 79 days of bail court observation, tracking exactly what happened in the courtroom each day. To complement these in-court observations we conducted semi-structured interviews with 33 professionals with experience working in the bail system, including duty counsel, defence counsel in private practice, government officials, and bail program staff.

Drawing on CCLA's empirical research, this section identifies and assesses the changes that have occurred and the challenges that persist in bail courts across Canada.

[148] Parts 2 and 3, above, provide a detailed overview of CCLA's 2014 report *Set Up to Fail*, significant case law from the Supreme Court of Canada, bail-related amendments to the *Criminal Code* introduced in C-75, and policy and operational changes affecting the bail system.

[149] *R v Antic*, 2017 SCC 27 at para 4.

[150] *R v Zora*, 2020 SCC 14 at para 5.

[151] *Criminal Code*, RSC 1985, c C-46, s 493.1.

[152] Appendix A, below, provides a detailed description of our research methodology.

3.1 'Fixing' Bail by Providing Social Services and Social Supports

Research has consistently highlighted the ties between social services and supports (or lack thereof), the factors that drive individuals into conflict with the law, and their ability to navigate the bail system.

People in bail court are often facing multiple intersecting crises in different 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."[153]

These issues were clearly reflected in the interviews we conducted for our 2014 report – and they emerged again as major themes in our most recent research. In many interviews, justice system professionals emphasized the intersections between poverty, poor health, inadequate social supports, and the bail system. They provided concrete examples of the ways in which the criminal legal system reflects and magnifies failings in other areas of society. For instance, a defence lawyer in Manitoba told us:

The lack of adequate, accessible social services and community supports drives people into bail court and has a direct impact on their trajectory through the criminal legal system.

> The fact of the matter is that I'm dumbfounded frequently by the stuff that my clients go through to survive. By way of example, there was a young man who was a client of ours in Winnipeg. Young, I think 22, Indigenous… And so bright and such a lovely and warm person. To have met him would be to trust him…
>
> He didn't have a very long record and had done really, really well in life… He finished school and he was doing really well. And then something incredibly traumatic happened to him at a really young age and he used and everything went down from there. He didn't have a very bad record and he didn't come in on new substantive offences, really. It would mostly be breaches, [and] the substantive charges would be things like mischief, break and enter…
>
> When you actually sit down and talk to him and [ask], *"Oh, you're here again, why? What's brought you back into custody?"* It would be the most pragmatic answers… The break and enter, in one instance, was just a break and enter into a stairwell of a parkade, so that he could sleep. Because the last time he went to a homeless shelter, he got jumped and beat up. And he's a slight person. He's not a big guy… And it very much to him felt like a necessity to find somewhere warm to sleep. I mean, we're thinking about Winnipeg in the middle of winter. And the mischief was him using a flashlight to essentially dumpster dive for food…
>
> Stuff like that breaks your heart and you try to communicate that to the bench or to the Crown. And it's sometimes a hit or miss whether or not they're going to really listen to that… You're dealing with these people who are just [going] through trauma after trauma after trauma. Whether it's drug use or crime or sex work, whatever it is that they're out there doing that's getting them caught up in the system, it's about survival. And it's these people, obviously, who don't have the persuasive bail plans. And it's these people who probably won't get bail.

Courts have insisted that pre-trial detention "should not be used as a substitute for shelter, food, mental health or other social measures."[154] Yet, in practice, the lack of adequate, accessible social services and community supports drives people into bail court and has a direct impact on their trajectory through the criminal legal system. Multiple interviewees felt it would be impossible to change the bail system in a meaningful way without simultaneously providing other resources to assist people when they are released.

[153] Independent Review of Ontario Corrections, *Segregation in Ontario* (Queen's Printer for Ontario, March 2017) at 1, online: https://hsjcc.on.ca/wp-content/uploads/IROC-Segregation-Report-2017-03.pdf.

[154] *R v Gibbs*, 2019 BCPC 335 at para 21.

An interviewee in Nova Scotia framed the issue this way:

> By decarcerating more people, you're kind of assuming that there's something else there for them instead – and there isn't. So I guess that's my big final answer… support people at the front end so that when something goes wrong, the police have something they can do other than charge them… Releasing everybody with no home, no plan, no income, no whatever… They're going to come back. Sometimes on purpose, because they have nowhere else to go, which is incredibly depressing.

Other interviewees had witnessed firsthand how housing, health care, and social services can help clients exit the revolving door of bail and pre-trial detention. For instance, a defence lawyer in Nova Scotia spoke about a client with an extremely long criminal record:

> Ultimately, I was able to get him what's called – we call it a "place of safety" placement. And basically, it's like an apartment, a fully furnished apartment, and you have money for groceries or whatever… He hasn't had any new charges in three and a half months. And that is the longest period of his entire life that he has not picked up any new criminal charges. And the reason for that is because he has a home, he has money for groceries, he has a TV, he has a phone. He has all of these basic things that we all need to live.

Counsel in Nova Scotia also highlighted programs such as MOSH (Mobile Outreach Street Health), which "provides accessible primary health care services to people who are homeless, insecurely housed, street involved and underserved in our community."[155] For one client, receiving dental care through MOSH provided the catalyst for envisioning a different life. As the interviewee explained, accessing services in the community can make all the difference for her most vulnerable clients: "They have so many other issues and problems that they need to work on. The criminal justice system is really not their biggest problem."

Indeed, for one interviewee in British Columbia, the links between social services and the bail system were so clear that she questioned the utility of further legislative reform altogether:

> I don't think change at this point needs to happen at the criminal justice level. I think it needs to happen at the services level. I think we just have a dearth of actually effective and accessible services for most people. And I think trying to keep fixing these issues at this level is like putting a Band-Aid on a burst pipe… These conversations need to be happening upriver and trying to effectively make sure that people aren't put in these positions where they feel like they have to do what they have to do to survive…
>
> I don't know how you could possibly codify or legislate your way out of the fact that marginalized folks don't fare well in bail court. I think it comes down to having good services within the community.

3.2 Rule of Law and the Inconsistent Impact of Supreme Court of Canada Decisions

> *[T]here is an inherent comfort in "doing things" as they have been done for years. Change is uncomfortable. However, much like the* Jordan *decision called for a change to the culture of complacency and delay, the* Antic *decision signals the need for a change in our bail culture. The message is clear. We need to do things differently.*
>
> – *R v Tunney*, 2018 ONSC 961 at para 57

In its recent bail decisions, the Supreme Court of Canada called for a renewed commitment to principled, rights-respecting bail practices across the country. With such clear guidance coming from Canada's highest court, we might expect justice system actors to shift their approach to bail – placing greater emphasis on the presumption of unconditional release, relying less categorically on surety supervision, and imposing fewer conditions of release.

CCLA sought to evaluate whether and how the Supreme Court's bail decisions are affecting practices in courtrooms across the country. Have there been noticeable changes in how criminal justice actors exercise their discretion? Has the Supreme Court's guidance percolated down to bail courts? Have outcomes for accused people improved?

[155] Nova Scotia Health Authority, *Mobile Outreach Street Health*, online: http://www.cdha.nshealth.ca/primary-health-care/mobile-outreach-street-health-0.

In our interviews, many defence lawyers opined that the Supreme Court's decisions in *Antic* and *Zora* gave them stronger tools to advocate for their clients. An Ontario lawyer in private practice noted: "I think it's easier for us as defence counsel to argue that the court should consider releasing our client on their own recognizance. We have a bit more support and ability to argue that – and certainly that's often the way that the courts ultimately go." She elaborated:

> It used to be that everybody knew, like five years ago or ten years ago, that you needed a surety. Your client got arrested and you would propose a plan and it necessarily had a surety, because you knew otherwise it would be a contested hearing, or even if it was contested, that you'd have a tough time arguing for anything else. I think today, at least, defence counsel are not going in and by default just acquiescing to a surety release. So that makes some difference for sure ultimately. But I find probably too often we still have to run a contested bail hearing if we don't have a surety.

Other lawyers suggested that the Supreme Court decisions pushed bail courts to scrutinize their decision-making – even where, strictly speaking, the Court did not break new ground, but rather reaffirmed long-standing legal principles. One lawyer practicing with Legal Aid in Nova Scotia, noting that *Zora* served as a reminder that bail conditions must have a nexus between the individual accused and their perceived risk, stated: "There has been a difference. It's been better. It's funny, I had one Crown say to me, literally, "*Ever since* Zora*, it's a lot harder to put conditions on people that don't have anything to do with the charges."* Well, that was always the case!"

At the same time, our research reveals ongoing concerns about the interpretation and application of the Supreme Court's guidance.

Some interviewees felt that justice system actors are resistant to change, even when there is clear direction from appellate courts. One participant in British Columbia noted: "I mean, the Supreme Court of Canada could come out with 20 other decisions and judges in Prince George [wouldn't] think that applied to them. The Supreme Court of Canada, as far as they're concerned, might just as well be the Klingon High Council."

In both Manitoba and Ontario, interviewees argued that the ladder principle reaffirmed in *Antic* has been interpreted – or perhaps misinterpreted – in a manner that penalizes people who breach their bail conditions. Some have interpreted the ladder principle as requiring ever more stringent, restrictive bail conditions each time a person comes back on a breach. Instead of scrutinizing the original bail order to determine whether it was appropriate, each breach demands another automatic "step up the ladder". To quote one lawyer:

> In Manitoba, it feels like *Antic* is – okay, you were released on an undertaking or PTA [promise to appear], you've re-offended, now we're going to put you on a curfew... And then from there, do you have cash, do you have a surety?... It's a constant step up, step, step, step. And it doesn't matter if you're just breaching abstain conditions or if you're actually substantively re-offending.

Similarly, a defence lawyer practicing in Toronto observed:

> There seems to be, frankly, a misunderstanding of the ladder principle, where it's believed that if you violate the conditions or you breach, that means we have to go to the next step in the ladder and it needs to get stricter. But it shouldn't be viewed – and I don't think it's intended to be viewed – as a need to escalate... You kind of have to flip that around and say, "*What's the lowest form of release that is appropriate in these circumstances?"* And is it really not only necessary to escalate, but perhaps there was a problem with the conditions in the first place.

Moreover, many interviewees observed that the case law on bail has not fundamentally changed how justice system actors perceive risk. For instance, a lawyer in Manitoba argued that decision-makers often misconstrue the secondary ground and deny bail because of relatively minor breaches – rather than a genuine danger to public safety. He explained:

> In *Morales*, it says that you have to deny bail where there's a substantial likelihood to re-offend *and* where that likelihood to reoffend can either damage the administration of justice or lead to public safety issues.

> I can't tell you how many times I have run bails [and] been denied because my client – there's a substantial likelihood they're going to breach…
>
> I ran a bail a couple weeks ago where the Crown even said, *"There is no safety risk here, but this guy is going to reoffend by breaching this no-contact. And even though there's been no violence and no threats, that's still a breach."* And the JJP [judicial justice of the peace] was like, I agree, he might reoffend. Therefore, denied. And when you constantly are applying the wrong test… you will constantly capture people in a much bigger net than if you apply the law properly. And it's amazing how few Crowns will actually articulate in their submissions, *"I'm opposed on secondary ground because they drink, and in this case, when they drank, it led to this concern that might be violent and therefore that's that."* As opposed to, "*He's drinking, he breached and therefore denied."*

Interviewees in every jurisdiction emphasized that the changes affecting the bail system have been variable and uneven in their impact. Counsel consistently observed that the impact of *Antic*, *Zora*, and other landmark cases varies from one decision-maker to another. Outcomes in bail court typically depend on a range of practical factors, including the individual Crown, justice of the peace or judge making decisions; local court practices and procedures; and the availability of resources and social services.

For instance, counsel practicing in Ontario commented: "There has been change, although at times it feels glacial and at times it feels incremental… One of the most frustrating parts about our system is that the playing field seems completely devised or determined on who is in court that day. And what they're willing to do."

Similarly, a defence lawyer in Manitoba concluded: "Yes, I would say I have seen some changes. But unfortunately, it depends on the judge and it depends on the Crown. That eternal saying that the Crown speaks with one voice is unfortunately just not true."

A lawyer working as duty counsel in Ontario provided an anecdote to emphasize that the application of Supreme Court jurisprudence often depends on the Crown or justice in question. The interviewee had been negotiating over email with the bail vetting Crown, who initially was seeking a release with bail program supervision for an accused person. However, the interviewee pushed back, since the client had no criminal history and the allegations were not extremely serious. He reflected: "We had a justice from out of town. I happen to know that this justice is pretty good. And the Crown wrote to me an email, '*Yes, this JP is seriously hard-core on applying* Antic*, so I'm going to agree with you.*'"

3.3 Continued Issues with Bail Processes, Procedures and Systemic Delay

In 2014, CCLA sounded the alarm about systemic delay in the bail system. Our research highlighted issues related to scheduling, inefficient use of court time, and frequent adjournments in bail court. Building on previous studies, we observed that bail courts make remarkably few bail decisions each day. Rather, most accused people are adjourned to another day – thereby spending at least one more night in detention. We raised concerns about a "culture of adjournment"[156] in bail court, whereby an adjournment is the most expected and accepted outcome. Despite court decisions that had recognized and condemned systemic delay in the bail system in Ontario, we concluded that these problems remained entrenched.

Our in-court observations and interview findings confirm that, over the past decade, bail courts have continued to struggle to find sustainable solutions that ensure that all accused people have access to a timely bail hearing. Participants in all the jurisdictions we studied recognized that avoidable adjournments are common in bail court. Our interviewees shared insights, detailed below, into the reasons why individuals may be forced to spend days or weeks in custody before the determination of their bail.

Over the past decade, bail courts have continued to struggle to find sustainable solutions that ensure that all accused people have access to a timely bail hearing.

[156] Nicole Marie Myers, "Who Said Anything About Justice? Bail Court and the Culture of Adjournment" (2015) 30:1 *Canadian Journal of Law and Society* 127.

Issues related to systemic delay have also continued to plague the bail system. Notably, trial courts in several provinces have affirmed the existence of ongoing, unconstitutional delays at various stages of the bail process (see Textbox 1). These delays occur in spite of clear statutory timeframes in the *Criminal Code* aimed at ensuring accused people can access a prompt, meaningful bail hearing. As the Supreme Court of Canada has recognized: "Delays in routine bail and detention matters are a manifestation of the culture of complacency denounced by this Court in *Jordan*, and must be addressed."[157]

Issues around scheduling and court efficiency are particularly acute in parts of Ontario and Manitoba – although our interviews did suggest that recent efforts to ensure timely bail hearings have had some impact. The situation in Ontario and Manitoba is explored more fully in the sections below.

Textbox 1: Court decisions addressing, and impacting, systemic delays in the bail system

Since 2014, there have been numerous lower court decisions that have identified, and attempted to provide remedies for, systemic delays in the bail system.

Alberta

In *Reilly*, in 2018, the Provincial Court of Alberta ordered a stay of proceedings – a remedy reserved for "the clearest of cases" – in response to egregious, ongoing delays in the bail system.[158] The Provincial Court found that accused people in Alberta were routinely detained for more than 24 hours before having their first bail appearance before a justice. "Over-holding" an individual beyond 24 hours not only violates s 503(1) of the *Criminal Code* – it also breaches the individual's rights under ss 7, 9 and 11(e) of the *Charter*. Indeed, the Court emphasized that 24 hours is the "outer limit." The objective should be to release individuals as quickly as possible.

The Provincial Court canvassed evidence that the number of people "over-held" for more than 24 hours had increased sharply since Alberta began assigning prosecutors, rather than police officers, to represent the Crown at the initial bail hearing before a JP.[159] For instance, in Edmonton, data showed that 13% of people who were arrested were detained more than 24 hours before an appearance before a justice. Judge Cochard found that the evidence before her was indicative of "a widespread systemic problem not being addressed." She wrote: "It is also indicative of an unacceptable willingness to trample on *Charter* rights and provisions set out in the *Criminal Code*."

Ontario

In *Simonelli*, the Ontario Superior Court of Justice took the extraordinary step of staying the proceedings against two individuals facing extremely serious charges who had waited 12 days for a bail hearing.[160] Justice D.E. Harris emphasized that Ontario had been criticized for years for systemic problems in ensuring timely bail hearings – particularly "special" bail hearings, i.e. those anticipated to take longer than two hours. He concluded:

> [A] reasonable, informed member of the public would be offended and shocked by the long-standing problem of delays in having special bails heard in Brampton and the probability that these delays will continue. In view of the fundamental importance of section 11(e), fair play and decency have not been maintained. Bail delays of the nature and extent demonstrated are a blot on the administration of justice. Pervasive, substantial delays in adjudicating on the accused's liberty after arrest, a vital judicial function, lie very high on the scale of egregiousness. A system that cannot provide an accused with the basic entitlement of a bail hearing with reasonable promptitude is broken on the most fundamental level.

[157] *R v Myers*, 2019 SCC 18 at para 38.

[158] *R v Reilly*, 2018 ABPC 85, at para. 58, affirmed 2020 SCC 27.

[159] Alberta introduced these changes in response to a systemic review of the Alberta bail system and a reference before the Court of Queen's Bench that concluded that police officers did not have the authority to conduct bail hearings where individuals were charged with indictable offences: *R v Reilly*, 2018 ABPC 85 at paras 8-12.

[160] *R v Simonelli*, 2021 ONSC 354.

Manitoba

In northern Manitoba, the decision of *Balfour and Young* shone a spotlight on issues of systemic delay and routine breaches of procedural rights at different stages of the bail process. In the decision, Justice Martin of the Manitoba Court of Queen's Bench did not mince words: "This is a disturbing chronicle of a dysfunctional bail system."[161]

Justice Martin concluded that accused people in northern Manitoba frequently had to wait weeks to have a Legal Aid lawyer appointed and securing a bail hearing. He noted that bail matters often "timed out" because the court was unable to hear all cases before the end of the day. Justice Martin was clear that the chronic issues noted in his decision have harsh consequences for accused people – particularly Indigenous people from remote communities and reserves. He explained:

> Particularly in northern Manitoba, being in remand custody awaiting some court process or trial is physically and emotionally stressful for many reasons, especially for first offenders and young offenders.
>
> Northern Manitoba residents who are held waiting for bail are moved repeatedly, often driving great distances while locked in crammed vans and in foul weather. It is unsafe for Sheriffs and accused alike, and adds to the chaos of the northern justice system as personal or video appearances are unreliable. Many accused do not stay in remand in the north but are transferred to central or southern Manitoba. Almost all are away from their home community such that personal visits with their counsel, family, children or supports are few and far between, if at all. Telephone communication to lawyers or families is difficult, infrequent and expensive. Accused are housed with all manner of inmates from a mix of backgrounds and temperaments – some of whom are violent, addicted to drugs or alcohol, or have mental health issues. Lawyers deposed that many clients have lost their employment, or have been attacked or threatened, while in remand waiting for bail hearings. Some accused consider pleading guilty just to get out of remand custody.

The Court concluded that "the violations of Ms. Balfour's and Mr. Young's *Charter* rights were directly related to long-standing and glaring systemic issues." The two matters had been resolved by the time *Balfour and Young* was heard, so Justice Martin granted costs – a rare occurrence in criminal litigation.

3.3.1 Court Processes and Scheduling Issues in Ontario and Manitoba

Ontario has faced long-standing, widespread problems providing individuals with timely bail hearings. Our interviews showed that, although concerted efforts by some local courts have improved the situation,[162] there remain significant concerns regarding the provision of timely bail hearings and releases.

Several Ontario interviewees highlighted logistical and procedural practices in their jurisdictions that frequently stand in the way of timely, efficient bail hearings – leaving accused people to spend unnecessary time in custody. For instance, multiple interviewees in one mid-sized city raised concerns about complacency and inefficient court procedures. In that area there was an assumption that new arrests *will not* receive a same-day bail hearing. The interviewees indicated that the local court rarely stayed open past 4:00 or 4:30 PM – meaning that bail matters are frequently adjourned simply because the court runs out of time. As one interviewee noted: "That often results in people sitting at the police department for 28 hours, 30 hours. I mean, if they're arrested at 11:00 in the morning, they may not appear in court until 3:00 the next day." Counsel indicated that it is difficult to seek remedies for accused people who have been over-held, because, contrary to the practice in many other parts of Ontario, the local arrest lists and charge sheets often do not specify the time of arrest.

[161] 2019 MBQB 167 at para 1.

[162] A lawyer in southern Ontario, for example, felt there have been improvements in recent years: "It's at least fathomable to have a same-day bail hearing now – whereas even three years ago I don't think I ever could successfully get someone to hear my bail hearing on the same day the person was arrested." Similarly, in Thunder Bay, counsel indicated that the Provincial Court has made significant efforts to free up resources and ensure that accused people have access to same-day bail hearings.

Numerous Ontario interviewees also mentioned the impact of the Superior Court decision in *Tunney*.[163] Following *Tunney*, some locations across Ontario have adopted truncated hearings in cases where the Crown and defense have agreed that the individual is releasable, but there is some dispute about the details of the release – for instance, where the defence is proposing an “own recognizance” release, but the Crown insists on surety supervision. One defence lawyer, who has practiced in numerous locations around Ontario, indicated: “They’re distinguished from a contested hearing and certainly can be done in a lot less time than a contested hearing would take. In most jurisdictions, [they are] working fantastically well.”

Jurisdictional variation, however, is noteworthy, as some court locations have not adopted practices to help streamline bail matters. As related by another Ontario interviewee:

> The court practice [in my area] is that if there’s any disagreement between defence counsel and the Crown, that is deemed a contested hearing. Even if it’s only with respect to whether a surety is needed or with respect to certain conditions – a curfew or whatever – that would also be scheduled for its own day… whereas in most other jurisdictions, it can be done in that moment.

Thus, even within the same province, the impact of significant court decisions can vary from location to location. Procedural innovations aimed at facilitating faster, more efficient bail hearings may take hold in one courthouse, but not in another court location.

Similarly, the situation in Manitoba varies by location. One lawyer practicing in Winnipeg noted: “We typically have bail hearings heard faster than in other jurisdictions, at least it’s my understanding… I would say more often than not that it’s possible that a client could go for bail the next day after being arrested and brought into custody.” However, as demonstrated by the *Balfour and Young* case (see Textbox 1), for several years the court scheduling practices in northern Manitoba were creating delays of weeks – or even months – in having bail matters heard.

Our interviews with counsel in Manitoba confirmed the facts underlying the decision in *Balfour and Young*. As one interviewee observed:

> The problem that happened in northern Manitoba, if you get arrested on a Thursday and the police are opposed to your release, you’re so screwed. You’re sitting in jail Thursday, Friday, Saturday, Sunday and waiting till Monday for you to get transported in. Even that wasn’t guaranteed because, you know, transports were unpredictable and they don’t work on the weekends. So, all of that was nonsense. And then Monday was so overbooked, you get adjourned to Tuesday.

Following *Balfour and Young* the Provincial Court introduced significant changes, including sitting in Thompson five days a week, instead of three. Interviewees in Manitoba indicated that the situation has improved in the wake of these procedural changes. As one lawyer noted: “We went to doing court five days a week instead of three. And that, you know, that did a lot to get people out quicker.”

Despite improvements, however, concerns about court scheduling and bail persist. Counsel, for example, highlighted consistent delays when attempting to schedule bail reviews in northern Manitoba. For a time, the Court of Queen’s Bench only scheduled s 520 reviews once each month. “So, you’d file your notice of application, get your transcript in, and the first available date they’d give you is a month away… When I ask for earlier dates, they’re like, “*This is the way we’ve always done it*.”” In 2020, the Court released a practice directive indicating that bail reviews are available every Monday and Thursday in the north.[164] However, one interviewee observed: “In practice, again, that doesn’t happen. They don’t offer you every Monday and Thursday dates. They say, well, when a Monday and Thursday’s available. We have no justice available for the next month. So, it’s the same...”

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[163] *R v Tunney*, 2018 ONSC 961.

[164] Court of Queen’s Bench of Manitoba, “Detention Review Hearings under Sections 520 and 525 of the Criminal Code – Thompson and The Pas Judicial Centres” (March 5, 2020), online: https://www.manitobacourts.mb.ca/site/assets/files/1152/practice_direction_-_thompson_and_the_pas_bail_review_mar_5_20.pdf.

Numerous interviewees in Manitoba and Ontario highlighted particular challenges in scheduling "special sittings" – that is, bail hearings that are anticipated to run over a certain length of time.[165] In these provinces, interviewees indicated that special sittings could take weeks to schedule – in violation of s 516 of the *Criminal Code*, which prohibits adjournments beyond three clear days without the consent of the accused. The practice in Ontario was successfully challenged in *Simonelli* (see Textbox 1). Interviewees reported that, after the decision came out in early 2021, there were significant changes in court scheduling practices: "Suddenly, people are definitely getting their bail hearings within three days because they're not going to allow a stay to happen." Despite this promising change, more recent information reveals that over the past year special bail hearings and bails involving firearms charges are again taking weeks to schedule, at least in some courthouses.

Numerous interviewees in Manitoba and Ontario highlighted particular challenges in scheduling "special sittings" – that is, bail hearings that are anticipated to run over a certain length of time.

Despite the existence of clear case law regarding delays in the bail system, it can be challenging for defence counsel to vigorously defend their clients' rights. One defence lawyer in Manitoba recounted a situation where he successfully pushed back on the Provincial Court's attempt to schedule a bail hearing in several weeks, relied on s 516, and refused to consent to an adjournment beyond three clear days. The judge agreed with counsel and refused to order an adjournment beyond three days. The interviewee has shared the decision within the defence bar, hoping to encourage more counsel to invoke s 516 and insist on the application of the law.[166] Still, he noted that many defence lawyers are poorly equipped to push back against the Provincial Court's scheduling policies. He explained:

> How many lawyers are going to do a *habeas corpus*? On the moment, without Legal Aid funding likely, or a cash client potentially paying. You have to order the transcripts… which takes at least three days in Manitoba to get done, if you can afford it. Then you have to wait for that, get before a Queen's Bench justice that's going to hear it and actually agree with you.

3.3.2 Adjournments

Alongside issues related to scheduling and efficient use of court time, previous studies[167] have highlighted concerns about the number of adjournments requested, or imposed, in bail court. Our research for this report confirmed that the issue of frequent adjournments in bail court has not been resolved. Indeed, our court observations showed that the proportion of bail appearances in which the matter is adjourned has remained relatively consistent over time.

Of the court appearances that we observed, 65.6% of cases were adjourned to another day.[168] The frequency of adjournments varied considerably between jurisdictions – in British Columbia, 38.7% of bail matters were adjourned, compared to 74.0% of cases in Ontario.[169] It is important to remember that each adjournment is effectively a short detention order – the accused is required to remain in detention until the next appearance, and there is no guarantee that a bail decision will be made on their next appearance. As such, adjournments directly contribute to an increased pre-trial detention population.

[165] According to the Ontario Court of Justice: "Special bail hearings are bail proceedings of such length that they cannot be accommodated in regularly scheduled bail courts." Ontario Court of Justice, "COVID-19: Ontario Court of Justice Protocol Re Bail Hearings" (May 11, 2020; revised April 22, 2021 and April 4, 2022), online at: https://www.ontariocourts.ca/ocj/covid-19/covid-19-ontario-court-of-justice-protocol-re-bail-hearings. Based on our interviews, the exact definition of a "special sitting" can vary by location – which can cause inconsistency and frustration for counsel. In Manitoba, "any contested bail application that is anticipated to be longer than 30 minutes or for which materials have been submitted for review, will be dealt with by way of a special sitting before a Judge of the Provincial Court." Provincial Court of Manitoba, "Contested Bail Applications before Judicial Justices of the Peace (JJPs)" (9 November 2020), online at: https://www.manitobacourts.mb.ca/site/assets/files/1175/notice_-_contested_bail_applications_before_judicial_justices_of_the_peace_jjps_-_e.pdf.

[166] Counsel noted that the decision was not reported – nor had he ordered a written transcript. Rather, he gave colleagues the accused's name, the judge, the courtroom, and the date. This information allowed defence lawyers to listen to the digital audio recording of the judge's decision. Of course, the absence of written or reported bail decisions makes it difficult to consistently challenge systemic issues.

[167] Nicole Marie Myers, "Who Said Anything About Justice? Bail Court and the Culture of Adjournment" (2015) 30:1 *Canadian Journal of Law and Society* 127.

[168] See Appendix B.

[169] In *Set Up to Fail*, we found that an average of 54.2% of all cases were adjourned to another day. The frequency of adjournments ranged from 30.7% in Manitoba to 68.6% in the Yukon – although we noted that our results for Manitoba needed to be interpreted with caution, given the court's unique triage procedures in Winnipeg.

Our research also tracked the justification provided to the court for adjourning a matter. A substantial number of adjournments (30.2%) were granted without any justification being provided to the court.

In *Set Up to Fail*, we raised serious concerns about cases where the accused was ready to proceed, but was adjourned simply because the court ran out of time. In some previously documented examples, cases were adjourned because of limited court resources: at the end of the standard court day, all bail matters still pending would be adjourned without further consideration to the next available court date. Unfortunately, this issue does not appear to have abated. In this round of research, 6.1% of appearances were adjourned when counsel was ready to proceed with a bail hearing, but the court was out of time to hear the matter. This was most common in Ontario, where 43 accused were returned to custody because the court ran out of time to conduct their bail hearing – representing 9.1% of observed adjournments.[170]

Our interviewees also spoke of this problem. In the Yukon,[171] for example, interviewees generally felt that the Territorial Court was able to handle its caseload without undue delay. At the same time, several participants noted that the Court only hears bail matters for an hour each day – 1:00-2:00 PM on weekdays – leading to adjournments that could be avoided if the court were willing to handle bail matters later in the afternoon. One interviewee noted: "Frequently I've seen – more so as of late – [situations] where the justice of the peace will be like, '*Oh, time's up. We're going to have to continue tomorrow.*' Instead of just pushing through, sitting late, or canvassing with other judges [who might be able to assist]."

Such adjournments are particularly problematic when the accused has been arrested in a community outside Whitehorse. Communities outside Whitehorse do not have adequate facilities to house detainees overnight, so individuals whose matters are adjourned are transported to Whitehorse. Once in Whitehorse, even after the individual is released, the Territory does not take responsibility for the individual's travel back to their home community. An interviewee explained: "Now, literally only for the reason that the justice of the peace is refusing to sit late or they don't want to delay another court, the person's now going to be brought in to Whitehorse – and then you have to figure out how to get them back to their home."

Previous studies have shown that the majority of adjournments in bail court are requested by defence counsel. Our current findings are consistent with this body of research – nearly two-thirds of requests for an adjournment (63.3%) came from defence counsel or the accused.[172] In 5.2% of adjournment requests, the Crown asked for the adjournment and a further 16.2% came from the presiding justice. Crown and court-initiated adjournments suggest that the justice system is not ready to proceed with the bail hearing.

In some cases, adjournments may be appropriate and necessary to allow defence counsel to put together a release plan. In Ontario, 13.7% of adjournment requests were for the purposes of finding an appropriate surety for release and a further 18.1% were to develop the plan of release. In Nova Scotia, 20.0% of adjournments were to develop a release plan and 8.4% were to locate a surety.

It is important to be mindful that while most adjournment requests come from defence counsel, they are often for the purposes of meeting the Crown's requirements for a consent release or due to other systemic factors. In our interviews, many defence lawyers emphasized that adjournments are necessary because of the challenges in communicating with their clients, seeking instructions, and connecting with potential sureties or community supports. Interviewees in every jurisdiction noted that the COVID-19 pandemic has exacerbated these challenges. In the past, when clients were brought to the courthouse for their bail hearing, counsel could quickly go down to the cells to speak with their clients – for instance, to identify and contact potential sureties. This type of problem solving is much harder to achieve over the phone, with limited access to clients.

For instance, a lawyer in Ontario explained:

> For defence, our current most pressing reason for the number of adjournment requests – and it's only been exacerbated by COVID – is a lack of access to our clients in order to properly formulate bail plans. It's almost required a necessity to bring them into a courtroom, even if that's virtually, just so that we have some ability

[170] In *Set Up to Fail*, 5.4% of adjournments were because the court ran out of time to hear any more matters. That figure was 12.7% in Ontario.

[171] Note that we were unable to conduct in-court observations for the Yukon Territorial Court. See Appendix A, Methodology, for more detail.

[172] In *Set Up to Fail*, 70.4% requests for an adjournment came from defence counsel or the accused; 9.5% from the Crown; and 6.7% from the presiding justice.

> to access them and talk to them, even… one minute shouting back and forth at each other on the record to try and get something… If you're really lucky, a JP will actually put you in a breakout room on Zoom with your client [and] give you a minute to talk to them.

In British Columbia, a defence lawyer explained that adjournments often result from difficulties obtaining information and communicating with clients. Indeed, she raised particularly acute concerns about the timing and sufficiency of disclosure in her jurisdiction. She indicated that duty counsel only receive disclosure for new arrests around 11:00 or 11:30 AM – leaving them very little time to cobble together a bail plan before the afternoon court session begins at 2:00 PM. Complicating matters is the reality that duty counsel typically only receive a short RCMP synopsis with key information often missing. She stated: "I'm not effective counsel without disclosure. And then I feel like every time I walk into a courthouse with that pathetic little piece of disclosure, I am setting my clients up for failure even before I open my mouth." The interviewee also highlighted the logistical challenges of communicating with clients in RCMP cells – particularly in small towns, where there may not be a dedicated police officer in the cellblock to facilitate calls with counsel. She explained:

> If I'm trying to coordinate bail and negotiate back and forth with [the] Crown, I might need to talk to someone three or four times… One day I kept track of the time. One day we lost 37 minutes of court time in the afternoon waiting for police officers… So, we're just all sitting on the court line watching court time tick away and then your client's matter gets adjourned for lack of court time.

Similarly, a lawyer in Nova Scotia argued that the major reason for adjournments in bail court is simply the time-consuming "footwork" that goes into constructing a bail plan. These challenges are amplified for the most marginalized clients. She explained:

> I have to call a certain amount of people and community organizations to determine whether or not… [a] bail plan can be put together. Then I'm depending on other people getting back to me, and a lot of the time that just doesn't happen in time. Or it may be that I am only able to complete a certain amount of that [work] depending on how many people are relying on me that day…
>
> What ends up taking the most time is trying to put together a plan for somebody where… the proposed sureties are saying no and I'm trying to find a bed for them in the community. People can put over their bail hearing by consent for *months*… It's finding resources that sometimes feels like you have to create something from nothing.

Counsel in British Columbia commented:

> There seems to be a misconception about unrepresented people getting access to counsel if we adjourn their bail hearing… So, you've got duty counsel who maybe can't get instructions or doesn't have full disclosure or can't have a coherent conversation with [the accused]. I've had to go before a judge and said, I have no meaningful instructions, and everyone is just motivated to close their computers and be done in court for the day… So, the easiest thing to do is just to make this someone else's problem tomorrow… But so many times I see that person come back again tomorrow and be adjourned again. There is no pixie dust. There's no lawyer waiting for them at the courthouse… We're adjourning people, but we're not helping people. We're just kicking them into the system and saying, '*Good luck.*'

Textbox 2: Impacts of delays in bail hearings and releases

In *Set Up to Fail*, we emphasized that unjustifiable adjournments and those that are caused by systemic delays in the court system are unconstitutional. Lengthy waits in custody for bail hearings have a serious impact on accused people – including lost jobs, lost housing, and disruptions to families and communities. Moreover, individuals face pressure to agree to onerous bail conditions or plead guilty in order to secure their release.

These concerns persisted in our more recent interviews. Many interviewees emphasized that justice system actors should not downplay the impact of spending an unnecessary night in jail. One lawyer in Ontario explained:

> You know, it's 3:30 in the afternoon for you and you may want to go and do something fun. But that means this person who may have never been in jail ends up spending a night somewhere, at the very least, very inconvenient and stressful. And at most [it] could be potentially dangerous if the person's also dealing with health issues and they're not going to get immediate access to medication and they're not going to get immediate mental health supports. So, it's a big decision to just adjourn someone and it doesn't seem to bother a lot of people.

Another lawyer in Ontario highlighted the impact of unnecessary adjournments on individual clients: "Well, that's somebody losing their housing, somebody losing their job, somebody losing their contacts and family supports. Yeah, adjournments are a big deal."

Textbox 3: Section 525 of the *Criminal Code* and the Impact of *Myers*

Section 525 of the *Criminal Code* provides for a mandatory bail review when an individual has spent 90 days in pre-trial detention. In 2019, the Supreme Court of Canada underscored the importance of the automatic 90-day review in *Myers*.[173]

The Court's decision was clear and categorical – s 525 operates to "meaningfully safeguard the accused person's liberty" by preventing accused people from languishing in pre-trial custody and helping ensure a prompt trial. Bail reviews provide an opportunity for the reviewing judge to scrutinize whether the accused person's continued detention is justified and to make any necessary orders to expedite the individual's trial. The Supreme Court emphasized in *Myers* that reviews are particularly important for unrepresented accused, "who may not have had the means, the capacity or the awareness" to apply for a bail review under other provisions of the *Criminal Code*.

Despite the Court's clear guidance, our research indicates that the impact of *Myers* has been uneven at best.[174] Indeed, the extent to which different jurisdictions have complied with *Myers* appears to depend largely on resources and administrative procedures in different locations.

Some locations have implemented structured procedures intended to ensure that accused people receive meaningful, timely bail reviews at the 90-day mark. For instance, Toronto has a dedicated Crown who follows up on *Myers* applications. In addition, Toronto has established a specialized *Myers* review court – a scheduled day where accused people indicate whether they would like a full *Myers* hearing. Although the initial hearing is automatic, if the individual exercises his or her right to a substantive hearing, the full *Myers* review is adjourned to another day.

[173] 2019 SCC 18.

[174] *Set Up to Fail* did not canvass all bail-related procedures and did not include a substantial exploration of the role of bail reviews under sections 520, 521 and 525 of the *Criminal Code*. For this report, given the Supreme Court's decision in *Myers*, our interviews with justice system participants did address the role and practice of bail reviews.

By contrast, in other locations, we learned about procedural roadblocks and breakdowns in the section 525 process. One interviewee in the Yukon had previously practiced in another jurisdiction. Upon arrival in the Yukon, they were surprised to learn that there were no procedures in place to inform prisoners they were entitled to a 90-day detention review: "It seems there'd been some atrophy of that muscle here."

In Thunder Bay, an interviewee told us that 90-day reviews never occurred prior to *Myers*. Yet even after *Myers*, the Superior Court began requiring a judicial pre-trial before conducting a detention review. In most cases, defence counsel choose not to attend the 90-day detention review and simply waive the hearing. As such, the interviewee argued, the Superior Court is not providing adequate supervision of the lower court.

A defence lawyer practicing in southern Ontario recounted:

> In Hamilton, I had a case where 90 days came and went and I inquired about [a] detention review with the Crowns and with the jail. I didn't even hear back from either of them. I had to bring a *Charter* application to request a detention review that's supposed to be completely automatic. Finally, after several weeks the detention review was scheduled for weeks later than that. So, it was really delayed. And it may not have happened if I hadn't intervened, which is contrary to how it's supposed to be, which is automatic.

The lawyer indicated that the judge in Hamilton treated the *Myers* review as a summary hearing – no *viva voce* evidence, no written reasons. He concluded: "So it appeared to me that the judge was treating the hearing as more summary in nature than it should be – because none of those things are things that the Supreme Court has said and I couldn't find any support for that in other jurisprudence."

In Manitoba, an interviewee explained that his clients typically receive their *Myers* hearings long after the 90-day period has elapsed, because of scheduling procedures in the Court of Queen's Bench: "Every 90-day hearing in Manitoba is a 120- to 140-day hearing."[175] He argued: "they create so many procedural obstacles that an accused can't even exercise the right for a review."

Another lawyer in Manitoba explained that defence counsel must meet a stringent threshold – more demanding than the law actually requires – to qualify for Legal Aid funding for *Myers* reviews. Consequently, not many defence lawyers manage to secure funding and actually run 90-day reviews. He explained:

> Legal Aid Manitoba puts a higher standard on defence counsel to get authorization to do the 525 than the test actually is. And, therefore, our poorest individuals are the ones that actually don't get to do it, because Legal Aid says we are not going to pay, because we don't think you're going to get out.

3.4 The COVID-19 Pandemic and Virtual Bail Proceedings

Across Canada, the COVID-19 pandemic ushered in swift and significant changes to the bail system and pre-trial detention. As described above, many courts across the country experimented with different types of remote operations. In the bail setting, these developments were not entirely new. Various jurisdictions, particularly those with significant rural and fly-in populations, had already developed procedures to have some bail matters determined without the accused, sureties and/or counsel physically appearing in court. Most of these jurisdictions already facilitated the first bail appearance – which must occur within 24 hours of detention – via video or telephone. These options, however, were not universally available, and the norm in most jurisdictions prior to the pandemic was to have counsel, the accused person, and often the surety appear in court in person. In many courts across the country, the pandemic reversed this presumption. Moving forward, some jurisdictions are poised to make virtual bail appearances a permanent feature of their justice system.

In our interviews, participants spoke about both the advantages and drawbacks of conducting bail appearances remotely. On one hand, COVID-19 forced the justice system to pivot quickly and determine new, efficient ways of doing business. Some of the significant advantages interviewees identified included:

- **Fostering faster, more efficient releases.** Virtual proceedings may allow individuals to be released from the police detachment in their community rather than being transported and admitted to jail. This can be

[175] This interviewee had a client who reached 90 days in detention on February 19, 2022. During our interview on February 25, 2022, the lawyer pulled up an email he had recently received from the Provincial Court, offering timeslots on the following dates – March 17, March 24 and March 31.

particularly impactful for accused people from rural and remote communities, who would otherwise be transported long distances to jails and courthouses far from home.

- **Facilitating access to justice.** Virtual hearings can make it easier and cheaper for defence counsel to handle multiple matters without needing to travel between different courthouses. A defence lawyer in private practice in Ontario provided the following example:

  > I mentioned this client of mine who had mental health issues. I must have done ten bail hearings for him over the course of a few months, just because he was clearly going through a mental health crisis… I don't think I could have done all those bail hearings if I had to drive out to [the courthouse] each time. He could never have afforded it in the first place… But I was able to do all of these things and represent him on all his bail hearings because I was able to do it remotely.

On the other hand, many interviewees have seen real downsides to conducting virtual bail appearances – or at least the manner in which some virtual systems were set up during the pandemic:

- **Logistical and technological challenges,** including poor audio quality and malfunctioning video connections.
- **Less effective advocacy.** Some defence counsel have found it harder to negotiate, brainstorm solutions, and find common ground with Crown prosecutors. Others feel they are less effective as advocates when they cannot observe the judge's body language, establish a human connection, and convey their arguments in the courtroom.
- **Lack of access to clients in custody.**[176] In every jurisdiction of study, defence counsel and service providers emphasized that it has become exceptionally difficult to connect with clients in custody. Police detachments and remand facilities often lack the staff and the space to bring detainees to a phone or video conference terminal when needed. In jails across the country, these issues have been exacerbated by frequent lockdowns. One defence lawyer in Ontario told us that, when she sets up Access Defence calls, "there's a 50/50 chance that your client's actually brought to the phone."
- **Challenges communicating with clients and building a trusting rapport over phone or video** – particularly clients with disabilities or mental health issues.

When defence counsel cannot communicate effectively with their clients, there are serious repercussions for the entire bail process. Putting together a bail plan often requires a significant amount of back-and-forth with the client – for instance, if a potential surety falls through, lawyers must circle back to the client to discuss other options. When bail hearings take place in a courthouse, lawyers can go to the holding cells to troubleshoot with their clients. However, that type of quick problem solving becomes much more difficult in the virtual context. These issues can lead to adjournments, delays, and a waste of court time.

When defence counsel cannot communicate effectively with their clients, there are serious repercussions for the entire bail process.

According to defence counsel in southern Ontario:

> Even getting contact with your client by phone is near to impossible. And so, you're relying on these [Zoom] court appearances… to hopefully just get a breakout room with them or to at least exchange a few sentences on the record so that they know what the hell is going on. I think that's an unfortunate reality that will only be fixed if inmates are given meaningful access to telephones without the need for collect calls, video suites where we can talk to our clients away from ranges that are noisy, where clients don't want to speak fulsomely and openly with their lawyer on the phone because they don't know who's listening.

Similar issues exist in the Yukon:

> We have to call the Whitehorse Correctional Centre to connect with [our clients] and they're appearing by video for their hearings at 1:00… They're always on lockdown. Such a nightmare trying to get through to them.

[176] See e.g. Jonathan Duncan, "Guelph lawyers say they've seen 'disturbing' trend of lack of access to clients in custody," Guelph Mercury Tribune (15 March 2022), online at: https://www.thestar.com/local-guelph/news/2022/03/15/guelph-lawyers-say-they-ve-seen-disturbing-trend-of-lack-of-access-to-clients-in-custody.html.

> Sometimes you can't talk to them until 20 minutes before 1:00… You can call the WCC and leave a message at 8:30 AM and say, '*Please have Joe Blow call me. We need to connect. I need to talk to him about his bail plan and get the number for his surety and get some more information*'. And you don't hear back. You keep calling back every hour and they're in lockdown… I've had times where I've said, '*You know what, I'm just going to go to the jail and I'm going to appear by video with my client in the video room*.' Because that's the only way I can talk to them. And even then, you can't talk to them because they're like, '*Well, everyone's on lockdown*'.

A lawyer in the Toronto region indicated:

> It's more difficult to interview them. It's more difficult to develop that rapport and the trusting relationship, especially people who have significant mental health issues. When you are just another voice on the phone, it's not very helpful in ensuring that there's a trust there that you would be working in their best interest.

Another interviewee in Ontario emphasized that remote court operations have been particularly challenging for vulnerable clients. She noted: "When we're interviewing people, we can't see if they're going through active withdrawal. We can't see if they're responding to auditory stimulus over the phone – like we don't have those little pieces of information that create a better picture of the puzzle." Some of her clients have missed virtual court appearances because they have limited access to the phone and internet. Others struggle to understand what is happening when they do dial in. She concluded:

> Even just navigating going to court on a regular day is confusing. It's a different language, it's process and institutional. But then you put on the veil of mental health and you put on the veil of addictions and you put on the veil of generational trauma and abuse. And then you have to do that on the phone – and you can't see who you're looking at. You don't have any context to what's actually happening. Most of the lawyers don't even come on screen. All of these things have contributed to, I would say, the downfall of some of our justice system. It's really made an inaccessible system even more inaccessible, because virtual does not work for folks who are already struggling.

Many of the issues raised by our interviewees echoed the findings of academic research examining the impact of remote bail operations in Ontario. A study published in 2021 reported on observations from 80 days of virtual bail court across 11 Ontario court locations.[177] The study found that – perhaps counter-intuitively – remarkably little changed in how the court operated and processed bail matters. Virtual bail courts demonstrated many of the same characteristics, challenges and themes as in-person bail proceedings – including a culture of adjournment, reliance on surety supervision and numerous conditions of release.

The study highlighted significant technological issues, which not only frustrated the processing of bail matters but also gave rise to additional inefficiencies and inequities.[178] While virtual appearances minimized in-person contact and physical transportation, there were challenges with sound quality and facilitating private conversations between legal counsel and accused people in police cells, correctional institutions, and rural and remote communities. The ability to access private space, computer hardware and reliable internet varies across people and contexts – creating additional barriers for the most marginalized accused people.

[177] Nicole M Myers, "The More Things Change, the More They Stay the Same: The Obdurate Nature of Pandemic Bail Practices" (2021) 46:4 Can J Sociol 11.
[178] *Ibid*.

Textbox 4: COVID-19 and Pre-Trial Detention

Across Canada, the early days of the COVID-19 pandemic saw concerted efforts to reduce jail populations. Many recognized that people in jails, prisons and penitentiaries were uniquely vulnerable to the spread and impacts of COVID-19. Living conditions in prisons and jails are unsafe, unsanitary, and crowded at the best of times. The crowded, congregate living conditions in carceral settings made it difficult to ensure public health precautions such as physical distancing and adequate hygiene. Moreover, the prison population presents risk factors that make it particularly vulnerable to severe complications from COVID-19.[179] In an effort to prevent outbreaks, many provinces and territories sought to reduce their jail populations. The bail system played a key role in these efforts, as many jurisdictions worked to find alternatives to pre-trial custody for as many individuals as possible and to limit the movement of people in and out of provincial and territorial jails. Between March and June 2020, the number of adults in prisons and jails across Canada saw an "unprecedented" decline.[180] As described in Appendices C and D, the provincial/territorial custody rate per 100,000 adults in the population declined in 2020/21 – although it is uncertain how long-lasting these changes may be.

Our interviews shed light on the system-wide efforts behind the statistics. An interviewee in northern Ontario explained: "There were prosecutors here who took quite seriously the fact that COVID-19 represented a risk to people in congregate care settings, such as custodial institutions… Prosecutors were actually trying hard in almost all circumstances to release individuals, and to release them repeatedly, during the pandemic."

Nova Scotia stands out for its initial response to the COVID-19 pandemic. Multiple interviewees from Nova Scotia commented on the remarkable effort among all justice system actors to work together and shrink carceral populations at the beginning of the pandemic. During the first wave of the pandemic, Nova Scotia reduced its carceral population by 41%, more than any other jurisdiction in Canada.[181] The unique cooperation between different agencies and justice system actors helped ensure the release of people to the community. However, after the first wave the number of people in custody began to rise again – overshadowing some of the positive steps taken early in the pandemic.

Subsequent waves of the pandemic had a particularly harsh impact on people incarcerated in Canada's prisons and jails. By July 2020, the number of people held in Canada's prisons and jails began increasing again – putting the health of prisoners and staff at risk.[182] Research produced by CCLA and academic partners shows that prisons and jails were significant vectors of COVID-19 transmission during the second wave of the pandemic, with an unprecedented spike in infections among prisoners and staff.[183]

It has become increasingly clear that the COVID-19 pandemic exacerbated the harsh and inhumane nature of pre-trial detention. In their attempts to limit the spread of COVID-19 and deal with staffing shortages, prison authorities resorted to isolation and quarantine periods; cancelled programs, outdoor time, and visits; and imposed frequent lockdowns.[184] These measures had devastating impacts on the mental and physical health of incarcerated people.

Many interviewees commented on the impact of lockdowns, mandatory quarantine periods and inadequate health and sanitation measures in detention. As a service provider in Ontario observed:

> And again, the conditions of that incarceration is really challenging… [Many] people are reporting to us that they're not getting out of their cells for days on end. That a lot of them are not getting access to showers, they're not getting access to counsel, which then is putting more delays because of isolations and COVID restrictions.

[179] Howard Sapers, "The case for prison depopulation: Prison health, public safety and the pandemic" (2020) 5:2 Journal of Community Safety and Well-Being 79.

[180] Statistics Canada, The Daily, "After an unprecedented decline early in the pandemic, the number of adults in custody rose steadily over the summer and fell again in December 2020" (July 8, 2021), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/210708/dq210708a-eng.htm>.

[181] Adelina Iftene, "COVID-19, Human Rights and Public Health in Prisons: A Case Study of Nova Scotia's Experience During the First Wave of the Pandemic" (2021) 44:2 Dal LJ 477.

[182] Prison Pandemic Partnership, "Update on COVID-19 and prison settings" (19 March 2021), online: Canadian Civil Liberties Association <https://ccla.org/wp-content/uploads/2021/06/2021-03-19-Prison-COVID-report-FINAL-REVISED.pdf>.

[183] "There is still a prison pandemic" (March 7, 2022) *Policy Options*.

[184] Justin Piché, Kevin Walby and Abby Deshman, "There is still a prison pandemic" () *Policy Options*, online: <https://policyoptions.irpp.org/magazines/march-2022/prison-covid-19-cases>.

3.5 Forms of Release, Conditions of Release and Breaches

When individuals secure bail, the form of release and the conditions to which they are subject can have a tremendous impact on their lives and their trajectory through the criminal justice system. Under the *Criminal Code*, the default form of release in most situations is a release order without conditions, unless the Crown can demonstrate why further restrictions on liberty are justified.[185] Where justified, courts may order more onerous forms of release – including a release order with conditions, a promise to pay a specified amount if the accused breaches a condition of their release, a release with surety supervision, and an obligation to deposit money (frequently called "cash bail").[186]

Despite the legal presumption of unconditional release, research has shown that most individuals who secure bail are released with restrictions on their liberty. In particular, *Set Up to Fail* highlighted concerns about the overuse of surety release and the imposition of restrictive bail conditions. We emphasized that two jurisdictions, Ontario and the Yukon, had a "costly obsession" with surety supervision – where a friend or family member agrees to supervise the accused in the community and forfeit a specified sum of money if bail conditions are violated.

Despite the legal presumption of unconditional release, research has shown that most individuals who secure bail are released with restrictions on their liberty.

In recent years, these concerns have been taken up by the Supreme Court of Canada and by Parliament. In *Antic*, the Supreme Court cited concerns that some Canadian courts were over-relying on surety release and improperly imposing cash bail. The Court has repeatedly reaffirmed the ladder principle, which requires a justice to impose "the least onerous form of release on an accused unless the Crown shows why that should not be the case."

Similarly, Bill C-75 codified the principle of restraint – long established in judicial decisions – by adding section 493.1 to the *Criminal Code*. The *Code* now directs courts to "give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances."[187] Bill C-75 also added language specifically directing courts only to impose surety supervision where satisfied that it constitutes "the least onerous form of release possible for the accused in the circumstances."[188]

3.5.1 Forms of Release and Surety Supervision

Given the clear guidance from the Supreme Court and Parliament, our research sought to determine whether there have been meaningful changes in the form of release ordered in bail court. In total, we observed 333 bail releases – 290 cases where the Crown consented to the individual's release and 43 releases after a show cause hearing.[189] Across all courts, the most common form of release was on the accused's own recognizance – 37.8%, the same proportion (38.6%) as in 2014.

Despite this consistency, our findings suggest there *have* been shifts in bail practices since our last report, with fewer accused requiring a surety compared to earlier studies. Overall, surety supervision accounted for 18.3% of releases, down from 29.1% in 2014. By contrast, the proportion of releases that required bail program supervision was 28.8% in this round of court observations, compared to 18.0% in 2014. In total, nearly half of all individuals released on bail (in both 2014 and 2022) were required to have some form of supervision in the community – whether a surety or a bail program.

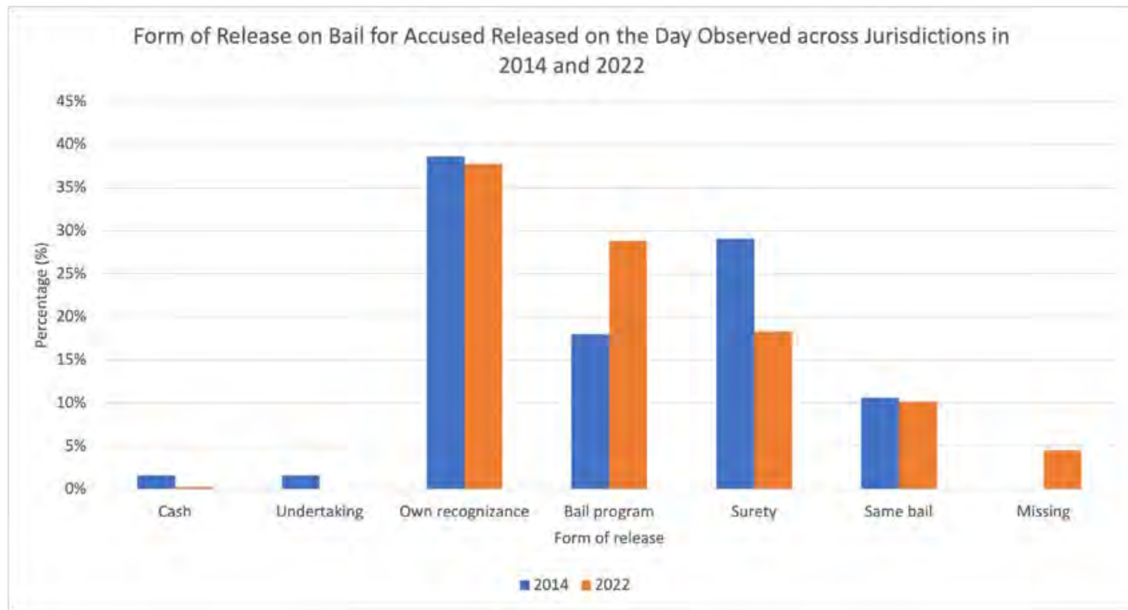
[185] There are some situations where the burden of proof is reversed and the accused is required to show that they should not be detained.

[186] Prior to 2019 amendments, s. 515 of the Criminal Code used the terms "undertaking" (a promise made by the accused with no monetary component) and "recognizance" (an acknowledged indebtedness to the Crown). While the current version of the Criminal Code no longer employs these terms, they are still commonly used in bail court. As such, we have chosen to continue using the term "own recognizance" to refer to a release where the accused promises to pay a specified amount of money if they fail to comply with the conditions of their release – corresponding to s. 515(2)(b) of the Criminal Code.

[187] Section 493.1.

[188] Section 515(2.03).

[189] See Appendix E.



Broadly speaking, our results align with a recent empirical study that analyzed 480 bail hearings in Ontario that occurred before and after *Antic*.[190] The study concluded that justices were more attentive to the ladder principle following the Supreme Court decision. After *Antic*, more accused were released on their own recognizance and there was a reduction in the use of certain behaviour-modifying conditions, but bail supervision programs were used more frequently.

Looking at each jurisdiction individually, we observed noteworthy shifts in Ontario, Manitoba, and British Columbia. Table 1 shows the form of release we observed in each jurisdiction in both *Set Up to Fail* and our most recent court observations.

		Cash	Undertaking	Own Recognizance	Bail Program	Surety	Same Bail	Missing	Total
British Columbia	2014	0.0%	4.5%	45.5%	29.5%	0.0%	20.5%	0.0%	100.0%
	2022	0.7%	0.0%	30.3%	49.0%	1.4%	16.6%	2.1%	100.0%
Manitoba	2014	0.0%	0.0%	84.0%	12.0%	0.0%	4.0%	0.0%	100.0%
	2022	0.0%	0.0%	70.0%	0.0%	30.0%	0.0%	0.0%	100.0%
Ontario	2014	3.8%	1.3%	12.5%	22.5%	56.3%	3.8%	0.0%	100.0%
	2022	0.0%	0.0%	36.0%	20.2%	28.9%	7.0%	7.9%	100.0%
Nova Scotia	2014	0.0%	0.0%	55.0%	0.0%	25.0%	17.5%	0.0%	100.0%
	2022	0.0%	0.0%	50.0%	3.7%	37.0%	3.7%	5.6%	100.0%
Overall	2014	1.6%	1.6%	38.6%	18.0%	29.1%	10.6%	0.0%	100.0%
	2022	0.3%	0.0%	37.8%	28.8%	18.3%	10.2%	4.5%	100.0%

In Ontario, 28.9% of individuals were released with surety supervision, compared to 56.3% in 2014. Over a third of individuals (36.0%) were released on their own recognizance, compared to 12.5% in 2014. These data suggest that substantially more accused are being released on their own recognizance and fewer accused require a surety. Ontario has historically been an outlier among Canadian jurisdictions, drawing criticism for an overuse of surety supervision. Our results suggest that bail practices in Ontario have inched closer to cross-country averages – with

[190] Schumann R, Yule C. Unbreaking Bail?: Post-Antic Trends in Bail Outcomes. *Canadian Journal of Law and Society*. 2022;37(1):1-28.

28.9% of Ontario releases requiring surety supervision, compared to an average of 18.3% across all jurisdictions we studied.

In contrast with Ontario, the bail system in Manitoba has not historically relied heavily on surety supervision. Indeed, previous studies have found that the bail courts in Winnipeg release a relatively large proportion of individuals on their own recognizance.[191] In our latest round of court observations, we again found that a high percentage of releases were on the accused's own recognizance (70.0%). At the same time, we observed an increase in surety supervision – 30.0% of all releases, up from zero surety releases in 2014. Surety releases were imposed both with the Crown's consent and after a show cause hearing. Moreover, we did not observe any bail program releases, whereas in 2014 there were a small number.

In British Columbia, our data suggest there have been shifts in the proportion of individuals held for a bail hearing who secure release and a corresponding shift in the form of release. Our data suggest there are several factors contributing to this shift – fewer adjournments, fewer detention orders, and more releases, with an increase in releases with bail supervision.[192]

In 2014, British Columbia had a relatively high proportion of observed appearances that resulted in a detention order at 12.8%. This was second only to Manitoba among the jurisdictions we studied. In our latest round of court observations, the proportion of bail appearances resulting in a detention order in British Columbia (2.8%) is comparable to the percentage across all jurisdictions (1.9%). Meanwhile, the proportion of cases that resulted in a release order grew from 20.1% to 51.4%. We also observed a noteworthy drop in the percentage of adjournments, from 61.2% to 38.7%.

These figures may suggest greater efficiency in the British Columbia courts, such that a greater proportion of court appearances are resulting in a meaningful outcome – i.e. release – as opposed to an adjournment. Indeed, British Columbia stood out among the jurisdictions we studied for the relatively low proportion of observed bail appearances that were adjourned – 38.7% of cases we observed in British Columbia were adjourned, compared to over 70% in every other jurisdiction.

Looking at the form of release, British Columbia rarely requires surety supervision (0.8% percent). At the same time, in both rounds of research, British Columbia imposed bail program supervision in a higher proportion of cases than any other province. Indeed, the data from British Columbia suggest that *more* accused persons are being released with bail program supervision – 49.0% of releases, compared to 29.5% in 2014. Correspondingly, the proportion of individuals released on their own recognizance was 30.3% in our latest round of court observations, compared to 45.5% in 2014. In other words, among those released in British Columbia, *more* individuals are being subjected to bail program supervision and *fewer* are being released on their own recognizance, compared to 2014.[193]

Our quantitative findings align with the observations of many of the justice system actors we interviewed. In Ontario, numerous interviewees have observed a decreased reliance on sureties in recent years, although most indicated that Ontario still has room for improvement. For instance, one defence lawyer described a meaningful shift in attitudes among JPs – particularly newer justices, who may have received training post-*Antic* emphasizing the principle of restraint. He observed: "Whereas surety was the sort of default release pre-*Antic*, with rare exceptions, that's no longer the case – although there is still certainly an overreliance on sureties."

Similarly, counsel in Thunder Bay felt that the Supreme Court's recent jurisprudence has resulted in "a significantly decreased reliance on sureties." When he began practicing in Thunder Bay years ago, there was an expectation in any remotely serious matter that the person would need to propose sureties to secure release. Today, he observed: "It's gotten better because Crowns have taken much more reasonable positions with respect to bail. It's gotten better because they've ceased relying so doctrinally on the presence of sureties."

[191] Note that comparisons to our 2014 research in Manitoba should be approached with caution, since in 2014, we did not monitor the Winnipeg intake or triage court. Myers and Ireland conducted bail court observations in Winnipeg in 2017. Of the releases they observed, both on consent and after a show cause hearing, 11.8% required surety supervision. They did not observe any bail program releases. In most releases (83.5%), the accused was released on their own recognizance.

[192] Note that we were able to expand the ambit of our court observations in British Columbia. In 2014, we observed 10 days of bail court (n=224 appearances) in downtown Vancouver. In 2023, the introduction of virtual bail allowed us to conduct observations of bail proceedings in the Northern Region (11 days) as well as Vancouver (10 days, n=189 appearances).

[193] Some differences may be connected to the fact that we observed different British Columbia courts in our two studies. In 2014, our researchers only observed bail court in downtown Vancouver, whereas the recent introduction of virtual bail hearings allowed us to widen our lens and observe proceedings in northern British Columbia.

In 2014, *Set Up to Fail* highlighted the heavily reliance on sureties in the Yukon. For this report, we canvassed the issue of surety supervision with interview participants in the Yukon, although we were unable to gather quantitative data through in-court observations. Interviewees indicated there is still an assumption that people require a surety to secure release, where a residential surety is treated as the "default." One lawyer provided the following example:

> I've had clients come to me after they've been released from custody. For example, I had a fellow who was charged with drug trafficking. No record, no history, not a large amount of drugs. And he had surety, curfew, all kinds of things. And I was a bit concerned and I said, '*Why do you have a surety?'* And he's like, '*I don't know. I just got out and it was consent release and that's all I cared about'.* I'm like, '*No, I don't think this is good'.* So, I contact the Crown and say, '*Listen, we need to remove the surety'.* And then they would agree, you know, eventually. So, I think sometimes people are released with sureties when they shouldn't have them.

This expectation is particularly difficult for clients who do not have sureties available. "There are some cases where a person will have breach after breach after breach and no new substantive offences. And then they say they want a surety… They don't *have* a surety. There's no hope for them, and then they just kind of get stuck in custody."

Participants in the Yukon also mentioned that bail orders involving a financial component are common: "Frequently it is a promise to pay, but not infrequently it is actual cash." Interviewees acknowledged that JPs and Crown prosecutors are "fairly sensitive to the limited means of most individuals [who] are coming before the Court." However, the requirement to pay a cash deposit can create logistical barriers for accused people. Multiple interviewees noted that the Court only accepts certain forms of payment. If an individual was arrested without their wallet or does not have family members who can attend court to complete the payment, they may find it logistically impossible to pay the amount required – particularly if they are represented by Legal Aid counsel, who are not permitted to handle funds for clients.

Interviewees in both Manitoba and Ontario mentioned procedural adjustments that have helped streamline and speed up the surety process – particularly the increased reliance on surety declaration forms or remote appearances.[194] As a result, sureties are no longer regularly required to attend court and testify in person. A lawyer in Manitoba explained:

> So ultimately, I think that it has expedited the process and made it a lot more efficient because the relevant questions are in the *Code*. The challenge, on the other hand, though, is that some judges still want the person to be in court. And since, especially in Manitoba, a lot of our bails can involve Indigenous people that need to come from different locations around reserves. Obviously, in particular, you might be asking, for example, the grandmother to drive in an hour to court so that they can be asked five questions… Some judges accommodate phone-in appearances, which has been assisted by COVID, not by any court process. And so that's something that has been very helpful.

3.5.2 Conditions of Release

Alongside concerns about an over-reliance on sureties, *Set Up to Fail* criticized the frequent imposition of restrictive bail conditions. Previous research has found that individuals are regularly released on bail with onerous bail conditions that have little or no relationship to the statutory grounds for detention or the facts of the alleged offence.[195] Some of these conditions may be overly vague, far-reaching, or difficult to comply with for the duration of the time it takes a case to be resolved. Bail conditions, when imposed in large numbers for long periods of time, are often violated, leading to additional criminal charges. In 2014, we observed 196 individuals released on bail – yet among the cases where the number of conditions was known, there was not a single unconditional release. Individuals were subjected to an average of 7.1 (median 6.5) bail conditions. We raised particular concerns about abstinence and treatment conditions, geographic restrictions, and sweeping conditions such as "keep the peace and be of good behaviour" and "abide by the rules and discipline of the home."

[194] Bill C-75 legislated the requirements for a named surety, including a form for sureties to complete (Form 12). Section 515.1(1) now provides that potential sureties "shall provide the judge, justice or court with a signed declaration under oath, solemn declaration or solemn affirmation in Form 12." The *Code* enumerates the details to be included in the declaration – including "information demonstrating that they are suitable to act as a surety for the accused, including financial information" (515.1(1)(b)) and "their acknowledgment that they understand the role and responsibilities of a surety and that they assume these voluntarily" (515.1(1)(g)). The declaration can be provided "by a means of telecommunication that produces a writing" (515.1(3)).

[195] N.M. Myers & S. Dhillon (2013). The Criminal Offence of Entering Any Shoppers Drug Mart in Ontario: Criminalizing Ordinary Behaviour with Youth Bail Conditions. *Canadian Journal of Criminology and Criminal Justice*, *55* (2), 187-214.

Since the publication of our 2014 report, the overuse of bail conditions has been identified as a systemic problem by both Parliament and the Supreme Court of Canada. Following the amendments introduced in Bill C-75, the *Criminal Code* explicitly instructs justices not to order release conditions unless the Crown shows cause why "any less onerous form of release would be inadequate."[196] The Supreme Court of Canada tackled the issue of bail conditions in the landmark 2020 decision *Zora*, which emphasized that bail conditions must be "minimal, necessary, reasonable, the least onerous in the circumstances, and sufficiently connected to a risk listed in s. 515(10)."[197]

Since the publication of our 2014 report, the overuse of bail conditions has been identified as a systemic problem by both Parliament and the Supreme Court of Canada.

Our research for this report suggests that although there have been significant shifts in the ways that justice system actors approach conditions of release, the changes are both inconsistent and imperfect. Many interviewees commented that the Supreme Court's decision in *Zora* has propelled a better approach to bail conditions. While some interviewees felt that courts are exercising more restraint with respect to bail conditions, they typically indicated that the situation depends on the specific judge, justice, or Crown in bail court.

Counsel in Manitoba observed:

> As far as onerous conditions, again, I think that that's really judge-dependent. Some judges... are alive to some of the challenges and the specific direction that we've been given from the Supreme Court time and time again, as far as [imposing] the least onerous conditions possible. Some judges are definitely on board with that. I think that a lot of judges, unfortunately, are still imposing far more conditions than necessary.

Similarly, counsel in the Yukon commented that there is more recognition that conditions must be appropriate for the individual accused: "We have a lot of homeless people that are vulnerable and simply cannot have a reside condition, or [they are] unable to report because they don't have phones. I do notice some of the JPs taking that into consideration. Yeah, I do notice some change, but I think we still have so much work to do."

Counsel in British Columbia observed that Crown counsel and court staff in British Columbia employ a standard "pick list" – a numbered list of standard bail conditions.[198] Resources of this nature can help support efficiency and consistency across the province. At the same time, one interviewee suggested that the pick list may make it easier for prosecutors and judges to simply "tick off" conditions that are not truly necessary. Indeed, in *Zora*, the Supreme Court of Canada observed: "There is no problem with referring to checklists to canvass available conditions. The problem arises if conditions are simply added, not because they are strictly necessary, but merely out of habit, because the accused agreed to it, or because some behaviour modification is viewed as desirable. Bail conditions may be easy to list, but hard to live."[199]

Our observational data suggest that bail courts continue to impose a significant number of conditions on individuals released on bail, although they may be exercising somewhat more restraint. Across all jurisdictions, a mean of 5.9 and a median of 5.0 conditions were imposed on each accused person released (compared to a mean of 7.1 and a median of 6.5 in 2014). Notably, once again, we did not observe *any* releases where the number of conditions was known and the accused was released unconditionally.

We also tracked the specific conditions imposed. We observed 270 cases where the conditions imposed were known. Overall, there appears to be a general reduction in the types of conditions imposed and the frequency with which certain types of conditions are imposed. Looking at individual jurisdictions, however, there are local perspectives on the appropriateness of certain conditions of release.

[196] Section 515(2.01).
[197] Para 24.
[198] Provincial Court of British Columbia, online at: https://www.provincialcourt.bc.ca/downloads/criminal/picklists/BAIL%20PICKLIST.pdf.
[199] Para 88.

A wide variety of conditions were routinely imposed on release orders. Across the courts, the most common conditions included:

- Conditions prohibiting the possession of weapons (42.2%, compared to 45.9% in 2014);
- Conditions not to attend a particular address or addresses, usually the address of the alleged offence(s) (37.0%, compared to 30.2% in 2014);
- Conditions not to enter a boundary around an address or person (57.4%, compared to 40.1% in 2014); and
- Conditions not to contact any victim or witness (70.4%, compared to 51.2% in 2014).

"Keep the Peace" and "Be Amenable to the Rules"

In a departure from *Set Up to Fail*, where nearly half (43.0%) of all release orders where the conditions were known required the accused to "keep the peace and be of good behaviour" and a quarter (25.6%) required the accused to "be amenable to the discipline and rules of the home," these conditions were rarely imposed at 0% and 5.2%, respectively.

These shifts may be linked to the Supreme Court of Canada's instructions in *Zora*, which cast doubt on the appropriateness of both types of conditions. The Court insisted that "keep the peace" conditions "should be rigorously reviewed when proposed as a condition of bail."[200] Similarly, the Court cautioned that "broad conditions requiring an accused to follow or be amenable to the rules of the house or follow the lawful instructions of staff at a residence may be problematic, especially for accused youth."[201]

Residency Conditions, "No-Go" Conditions and Curfews

Looking across all jurisdictions, it is clear the courts are concerned about where the accused lives when they are released on bail. In 10.7% of releases (26.2% in 2014), the accused was required to reside with their surety. Other frequently imposed conditions included the requirement to reside at an approved address (3.0%, compared to 43.0% in 2014), to reside at a specified address (26.3%, not captured in our 2014 report), or to report their address to police (31.5%, compared to 44.2% in 2014). Overall, 71.5% of accused had some form of residency condition imposed on their release.

Many of our interviewees highlighted that residency conditions can create barriers for accused people dealing with poverty and homelessness.

Many of our interviewees highlighted that residency conditions can create barriers for accused people dealing with poverty and homelessness. While many justice system participants are sensitive to these impacts, particularly in the wake of *Zora*, our interviews suggest that securing bail remains challenging for people who are precariously housed. An interviewee in Ontario put it this way:

> If someone is homeless, for example, and the court is insisting that the person have an address to go to, that's essentially preventing them from having a release, even though they may very well be compliant with their bail conditions if they're at a shelter or even if they choose to live in a tent under a bridge. Routine conditions such as report your address to the police where you are of no fixed address. Those are always tricky and those are conditions that I know I always object to. Some are more receptive to that objection than others.

Similarly, an interviewee in eastern Ontario noted: The court "is very big on having no change of address without a bail variation – which just is so cumbersome, especially for folks of no fixed address… We often have to challenge the Crown's office to say, '*It is not in the* Criminal Code *anywhere where it says that you have to be housed to be*

[200] *Zora* at para 94: KPBGB conditions "should be rigorously reviewed when proposed as a condition of bail." "Given the breadth of the condition, it is difficult to see how imposing an additional prohibition on the accused for violating any substantive law, whether a traffic ticket or failure to licence a dog, could be reasonable, necessary, least onerous, and sufficiently linked to [the grounds for detention]." See also changes to Crown Policy Manuals.

[201] *Zora* at para 95.

eligible for bail.'" The interviewee highlighted the insidious stereotypes baked into the assumption that people with a fixed address are more likely to attend court:

> We've had clients who are university professors or work… in the military, and they don't show up for court. And then we've had people who are experiencing paranoid schizophrenia and live in a tent behind our building, and they show up every day for their appointments and they go to every court hearing. So, there is no indication that that will actually produce court attendance.

Likewise, in Manitoba, multiple interviewees raised concerns about conditions related to residency. They observed that, in many cases, the Crown will insist on a stable address and a condition requiring "permission to move" – whereby the individual must obtain the permission of a judge or Crown prosecutor to change their address. Securing this permission requires paperwork and navigating a bureaucratic court process, which is unrealistic and unnecessarily restrictive for people who are precariously housed. One defence lawyer explained:

> Our judges are certainly alive to the fact that there are a number of clients where we're proposing bails where it's a shelter bail… But the reality is, do I think that clients are sitting in custody longer because we can't establish an address? Yes. Do I think that, especially in domestic violence situations, the Crown by default will ask for "permission to move" conditions, as opposed to a notify? And that obviously presents significant challenges when we have somebody who's living in a shelter, because… there's no reliability in terms of where they're going to sleep that night, because the shelter might be full.

Another lawyer in Manitoba observed that the requirement to reside at one specific address is not culturally sensitive for many Indigenous accused, who often come from close-knit communities and are used to living with kin (aunties, uncles, cousins, grandparents) for periods of time. She commented: "It's just so silly. Oh, so they weren't residing where they were supposed to be. Well, were they hurting anybody? Were they hurting themselves? Why does it matter?"

Our interviews also highlighted concerns about conditions barring people from specific locations or even from entire communities – commonly called "no-go" conditions. As noted above, prohibitions against attending at a particular address or entering a boundary around an address or person were among the most common conditions we observed. However, these conditions can have unintended impacts, particularly for marginalized accused people.

Our interviews also highlighted concerns about conditions barring people from specific locations or even from entire communities.

For instance, an interviewee from Ontario raised a concrete example. In 2022, a local agency was concerned about an increase in court-ordered conditions prohibiting attendance at a health-care hub for vulnerable people. The health-care hub houses numerous life-saving services, including the only safe consumption site in the community. The agency wrote to local counsel and court staff:

> We have had a few people… with conditions not to attend the [health-care hub] in the last few days and I would ask you to consider an exception to use [safe consumption] services. With the current drug poisoning issues in our community and the fact that all of these clients identified current substance use as an issue; not having access to this service could very likely result in a fatal overdose.

Moreover, the same facility is co-located with a homeless shelter. The agency explained: "I am concerned that restricting access to the lowest barrier shelter in our community amidst an extreme housing crisis will set people up for failure."

In British Columbia and Manitoba, interviewees described how challenging curfew conditions can be for their clients. A lawyer in Manitoba explained:

> So, the accused is bound by these conditions that they can't even [realistically] contest. Next thing you know, they're breaching these conditions over and over and over and over… I had a youth who was charged throughout the pandemic with breaching his curfew condition. He was arrested for aggravated assault in

> September, and he was arrested in the course of January to September 2020, 17 or 18 times for breaching his curfew. Crown [is] now opposed to his release. What was the purpose of having a curfew?

Behaviour Modification

Set Up to Fail raised concerns about the frequent imposition of conditions aimed at behaviour modification. In our 2014 research, close to a third (28.5%) of all accused released on bail were required to attend treatment or counselling; abide by a curfew (23.8%); not purchase, possess or consume drugs (25.0%) or alcohol (27.3%); and/or report to a program (27.2%). Treatment conditions at the bail stage appeared to be largely an Ontario phenomenon, with 57.3% of all releases requiring the accused to attend treatment or counselling. Treatment conditions were rarely imposed in British Columbia and Manitoba and were never imposed in Nova Scotia.

In this study, treatment conditions were rarely imposed in Ontario or elsewhere. By contrast, our research shows that courts continue to impose conditions not to purchase, possess, or consume alcohol. Across jurisdictions, alcohol abstention conditions were imposed in 14.4% of releases, with Manitoba and Nova Scotia imposing this condition most often.[202]

While there have been improvements, there is still work to be done. For instance, a lawyer in Ontario observed:

> I've seen a reduction in conditions to stay away from substances, which is a good thing. But those still are sometimes imposed or when they're not imposed as a complete prohibition on the use of substances, it can be something like "Don't leave your house when you're not sober," which again, for someone with an addiction issue, it's a bit of a problem.

Textbox 5: Pressure to Accept Restrictive Conditions

Many defence lawyers told us that their clients face pressure to accept restrictive bail conditions, and thereby secure a consent release, rather than rolling the dice on a contested bail hearing. A lawyer in Manitoba described the situation in this way:

> Your client will very likely be agreeing to far more onerous conditions than are otherwise necessary – whether that be a curfew being added or abstain conditions or even some no-contact type conditions, [which] may not actually be necessary when we look at it from a primary, secondary, tertiary ground, fundamental basis. But ultimately the risk of running an opposed bail, [of] having the client be denied bail, as opposed to the certainty that is received with a consent release. Most clients will obviously choose the consent release with the more onerous conditions.

Another lawyer in Manitoba raised a similar point: "Obviously, they're going to agree to whatever just to get out of jail and not take the gamble… Of course, we work for our clients. We have to relay everything that the Crown says, whether we think it's in their best interest or not."

3.5.3 Breaches of Bail Conditions

Individuals who breach a bail condition or miss a court appearance are subject to section 145 of the *Criminal Code*, which makes these actions a criminal offence even if the underlying conduct would not otherwise constitute a crime. As our research in *Set Up to Fail* highlighted, these criminal charges, which exist only by virtue of the operation of the criminal justice system itself, have serious consequences. By criminalizing otherwise ordinary conduct, including in many instances behaviours linked to mental illness, substance use and poverty, they directly contribute to the "revolving door" of release on bail, re-arrest, and detention. Administration of justice offences are a major source of inefficiency in the justice system, adding complexity to cases and extending time to case resolution.

202 Note that we observed a relatively small number of releases in Manitoba and Nova Scotia. As such, these data should be interpreted with caution.

> Administration of justice offences are a major source of inefficiency in the justice system.

Bill C-75 attempted to address the preponderance of administration of justice charges by providing a clear alternate route to deal with alleged breaches of bail conditions: the judicial referral hearing. As summarized in Part 2, above, the judicial referral hearing is available where an individual has allegedly failed to attend court or comply with conditions of release – provided that the individual has not caused physical or emotional harm to a victim, property damage, or economic loss. Both peace officers[203] and the Crown[204] have the discretion to choose this route instead of laying or prosecuting charges for failure to comply. The court must review the individual's release conditions, and then may decide to take no action, release the individual on new conditions, or order detention. Regardless of the court's decision, the presiding justice or judge must dismiss any administration of justice charges that were laid.

Data from Statistics Canada's Integrated Criminal Court Survey[205] indicate that charges against the administration of justice[206] comprised 38.2% of charges with a decision in 2020/21 and failing to comply with a court (bail) order specifically comprised 20.2%.[207] Both are proportions that have remained relatively consistent over time. The percentage of cases in adult criminal court with a decision, in which the most serious offence in the case was an administration of justice offence (AOJO) was 26.8% in 2020/21 and failing to comply with a (bail) order specifically was 11.9%. The percentage has declined moderately, from 30.4% in 2013/14 at the time of *Set up to Fail*.

One of the reasons there has not been an appreciable decline in administration of justice charges or cases in Canada could be that judicial referral hearings appear to be extremely rare occurrences. The majority of individuals we interviewed had never seen or heard of judicial referral hearings taking place. The remainder reported that a handful of judicial referral hearings had taken place, but the hearings have not been widely adopted.

For instance, a participant from Ontario with experience working as duty counsel commented: "That's a sad topic because it was very promising. I remember first reading the legislation and saying, '*This is amazing, we can do so much with this.'*" They continued:

> The first few months I think [my courthouse] saw about four occasions where the police issued an appearance notice to an individual for either fail to appear or fail to comply. In each of those four or so cases, the Crown did not then proceed… In one of the cases, the [bail] conditions were actually changed on consent to either allow for contact with written revocable consent or something to alleviate the concern that brought the person before the court on that breach to begin with. But that stopped very quickly. And from what I heard… the police decided to not use that mechanism. And so, the whole thing essentially disappeared.

Defence counsel in Ontario felt this was truly a missed opportunity:

> Unfortunately, it hasn't been used – and I wish it would be. I wish we had some mechanism of bringing everyone together and saying, '*Hey, let's use this.'* We have such a problem with backlogs right now. And there are all these administration of justice offences which we have a mechanism to deal with and we're completely ignoring.

Many interviewees agreed that the mechanism was "well-intentioned but perhaps ill-conceived." Several emphasized that the discretion to initiate a judicial referral hearing lies with the police and the Crown – neither the defence nor the court have the ability to invoke the mechanism. Yet the prosecution has little incentive to proceed with a judicial referral hearing, as opposed to simply laying breach charges and deciding – at some point before the matter goes to trial – to withdraw the charges, perhaps as part of negotiating a guilty plea to other charges. There is little incentive to alter long-standing Crown practices, which include the ability to exercise discretion about whether and when to discontinue prosecution. Preserving discretion serves the interests of the Crown, while

[203] *Criminal Code*, s. 496.

[204] *Criminal Code*, s. 523.1(2).

[205] Statistics Canada, Adult criminal courts, number of cases and charges by type of decision, Table 35-10-0027-01. https://www150.statcan.gc.ca/t1/tbl1/en/cv.action?pid=3510002701

[206] Administration of justice offences includes failure to appear, failure to comply with an order, failure to comply probation, being unlawfully at large and other administration of justice offences.

[207] All *Criminal Code* charges, excluding traffic offences.

keeping the charges hanging over the head of the accused. Moreover, other than the Public Prosecution Service of Canada, current Crown policy manuals make no mention of judicial referral hearings.

Another challenge with judicial referral hearings is there is no way to ensure they serve the purpose of diverting people, as opposed to widening people's involvement in the justice system.

Across the board, interviewees in each jurisdiction observed that there was no process or administrative structure for judicial referral hearings to take place (e.g. dedicated court time). Other interviewees noted that, for the court system, the judicial referral hearing does not save time or reduce court appearances: "For the [court] system, there's no kind of reward for doing it because you're still standing in courtroom using all the same resources."

Indeed, several interviewees raised concerns that the option of judicial referral hearings would increase the burden on the court system, rather than reduce it. Counsel in Nova Scotia observed:

> Much like wellness courts, it increases the temptation to send something into a courtroom, even if it… could have been dealt with by the police exercising discretion to basically do nothing… I see it as being helpful when somebody's got too many conditions. They were set up to fail. They've come up against it. It's almost a way to do a condition variation hearing instead of criminalizing them. But then why don't you just do the hearing and not charge them?

Counsel in Ontario noted:

> I have had cases where it seemed like exactly the kind of case for which the legislator intended that such hearings would be used. So that's not happening. In fact, I think breach cases remain a problem in terms of how they are dealt with, perhaps in particular by the Crown prosecutors, because really it all starts from the position that they take on breach cases…
>
> New charges are laid and people are detained on bail even when the breach is very minor. In fact, in one case, I had a client not only self-report to the police, but self-report the breach, which nobody had complained about, nobody had identified… It was a communication he had sent in the midst of [a] mental health episode… He attended the police station and reported that he had posted something he wasn't supposed to. And in those cases, not only is… there a contested bail hearing that ensues, but in my experience, the position by default of the Crown attorneys is that the conditions have to be stricter as a result.

Indeed, the use – or failure to use – judicial referral hearings ties into larger questions about how police and the courts are handling breach charges more broadly. Some interviewees felt that law enforcement and Crown prosecutors have taken a more balanced approach to situations where an individual has failed to appear or breached a bail condition, but has not committed a new substantive offence. Others felt that minor breaches continue to be unnecessarily criminalized. In the end, the limited use of judicial referral hearings underscores that police and Crowns have wide discretionary powers to use – or not use – optional mechanisms to respond to breach allegations, with the tendency being to rely on tools they previously had.

A lawyer in Manitoba described a situation she found extremely frustrating. Her client missed a court date and was charged with failure to appear. He had contacted counsel the morning of his court date, but by the time counsel connected with him, it was early afternoon. The lawyer explained: "I reached out to the Crown immediately to inform them of what had happened. He had COVID and he had mobility issues preventing him from actually getting physically to court." However, by that point, the warrant had already been issued. When the client was arrested on the warrant, the Crown agreed to release him – but the failure to appear charge was still pending when our interview occurred.

The lawyer concluded: "I guess I'm setting that one for trial, right? At a certain point, I have no difficulty doing that, but it seems like an awful use of court resources."

3.6 Systemic Discrimination and Bail

In *Set Up to Fail*, we highlighted the ways that the bail system perpetuates systemic discrimination. We emphasized that the revolving door of pre-trial detention – arrest, release with conditions, re-arrest for breach of conditions – has its most devastating impacts on individuals with marginal social support, who are already struggling with health problems, substance use, poverty and discrimination.

Since 2014, there has been increasing recognition of the need to address the ways that the bail system exacerbates pre-existing forms of marginalization. In C-75, Parliament added a new statement of principle to the *Criminal Code*:

> In making a decision under this Part, a peace officer, justice or judge shall give particular attention to the circumstances of
>
> (a) Aboriginal accused; and

(b) accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part.[208]

In *Zora*, the Supreme Court of Canada recognized:

> People with addictions, disabilities, or insecure housing may have criminal records with breach convictions in the double digits. Convictions for failure to comply offences can therefore lead to a vicious cycle where increasingly numerous and onerous conditions of bail are imposed upon each conviction, which will be harder to comply with, leading to the accused accumulating more breach charges, and ever more restrictive conditions of bail or, eventually, pre-trial detention.

Given the clear direction from Parliament and the Supreme Court, our research canvassed whether interviewees felt there had been meaningful changes for individuals.

3.6.1 Mental Health, Substance Use and Socioeconomic Status

Numerous interviewees emphasized that changes in the bail system have not made a meaningful difference for the most marginalized accused people. Securing bail for clients who do not have resources, stable housing, or social supports remains exceptionally challenging.[209] These individuals are unlikely to have a support network that can assist in preparing a bail release plan or friends or relatives who can serve as sureties. Interviewees in every jurisdiction mentioned challenges linked to the lack of affordable housing and the lack of treatment options for people struggling with mental health issues or substance use.

Securing bail for clients who do not have resources, stable housing, or social supports remains exceptionally challenging.

Some interviewees noted that they have employed s 493.2 of the *Criminal Code* to advocate for clients facing different forms of marginalization. For instance, a defence lawyer in Ontario noted that she has invoked s 493.2 for Black clients, as well as clients dealing with substance use: "I try to be creative because I think it is really a broadly worded, purposely so, term – 'overrepresentation.' [...] I used it once in the context of drug addicted clients, [where] we just kind of use jail as a container for our society's drug problem as opposed to actually dealing with the drug problem from a grassroots perspective."

Interviewees highlighted the ongoing challenges of securing bail for clients dealing with substance use. For instance, a defence lawyer in Nova Scotia commented: "I have homicide clients who are out on bail, right? But I'll have people who are substance users who can't secure bail." For people who are in frequent contact with the justice system, e.g. people who are "just stealing to support drug habits and things like that," she concluded: "I don't think there's been much change."

[208] Section 493.2.

[209] We recognize that mental health issues, substance use, and socioeconomic disadvantage do not always co-occur. Individuals caught in the bail system may be facing none, one, or several of these challenges. Interviewees, however, often spoke about these issues together, as many of their clients are facing multiple intertwined forms of marginalization.

Counsel in the Yukon provided an example:

> I had a recent file where a woman with no criminal record whatsoever was suffering from drug addiction. No prior record. She failed to appear for three court appearances, and she had a theft of makeup at our local Shoppers Drug Mart. She was stealing because she was addicted to drugs and she was planning to sell this makeup. [I] ran the bail hearing for her… The big concerns for the Crown were the primary grounds… I wanted to offer a reporting condition that she stay connected to her bail supervisor to help her come to court. She didn't have a cell phone, but she could still go into the place… Anyway, she was detained. This was a recent hearing, just a few weeks ago. I did bail and I was like: *"Oh my God, seriously?"* I never thought… The Crown said they would have consented to her release maybe if she was able to come up with some more money – [but she] doesn't have any money, she has nothing – or a surety. She has nobody in town. Nobody to be a surety…
>
> She was desperate to get out of custody. So, what do we do? We go straight to sentencing a few days later. Of course, she got a good resolution offer. But this is what happens in some of these cases where people are detained. They want to get out, get out, get out.

Almost every interviewee in the Yukon mentioned the interaction between the housing crisis and the bail system – a recurring theme from *Set Up to Fail* in 2014.[210] There are limited options for individuals who could be released on bail, but who require affordable or supportive housing. For instance, there is a "halfway house" for men located in a converted wing of the Whitehorse Correctional Centre. However, it can take many weeks to secure approval for a spot at the halfway house. One interviewee noted: "So your person's sitting in jail waiting all that time to see if they're going to be found suitable for that – *if* there's any beds available… Housing is a huge issue in the Yukon right now. So without stable housing, it's harder to get bail."

3.6.2 Rural and Remote Communities

Many of the justice system professionals we interviewed work with clients from rural and remote communities. They highlighted a range of challenges these clients face in navigating the bail system, including:

- Communication challenges, such as poor phone connectivity;
- Transportation issues, particularly when clients are release on bail in a community far from home;
- Logistical challenges complying with bail conditions or attending court; and
- Release conditions that can have a disproportionate impact on people living in smaller communities.

In some locations, interviewees indicated that the court system, correctional authorities, and law enforcement have found appropriate logistical solutions to mitigate these challenges. However, new challenges arise frequently and funding is often inconsistent.

In the Yukon, British Columbia, northern Ontario, and northern Manitoba, interviewees all spoke about transportation issues facing people from remote communities. Individuals are frequently arrested in small communities, transported far distances to a remand facility, and then released on bail far from home – with no means of getting back to their home community. From our research, it appears that these issues can be more or less acute depending on the availability of transportation options and the policies of the Crown and/or correctional authorities.

In northwestern Ontario, people arrested in fly-in communities are regularly transported to Kenora and Thunder Bay for their bail hearings. One interviewee observed: "You can imagine the delays, the additional trauma and dislocation – and once they are released, having to get them home." In the past, the Crown did not take responsibility for transporting individuals back to their communities upon release. An interviewee from Thunder Bay explained: "A plane ticket back to Summer Beaver would probably cost you 800 bucks, which is a pretty significant ask if your

[210] See Part 4, above, for a discussion of the impact of residency conditions on individuals in several jurisdictions of study.

annual income is $10,000." Another lawyer observed: "People would literally get stranded in Thunder Bay, Kenora, Timmins, Cochrane – all over the north."

The bail process often has a discriminatory impact on people from Indigenous communities across Ontario. An interviewee explained that, even in southern Ontario, many First Nations reserves lack reliable transportation links to larger centres: "So somebody arrested in Six Nations would have been transported to Brantford. In Brantford, they would have had their bail hearing... They would get released from the courthouse – sometimes with no wallet, no phone, no way to get home."

At the time of our research, interviewees indicated that the province had begun covering the cost of transporting individuals back to fly-in communities in northwestern Ontario. However, research conducted by the Ministry of the Attorney General found that over half of the people who were removed from their fly-in communities and subsequently released never received any assistance from the Crown – either because they did not know help was available, or because they did not want to approach the Crown.

Similarly, numerous interviewees in Manitoba and the Yukon reported their clients from remote communities face significant geographic and transportation barriers. An interview participant in the Yukon confirmed: "I literally have talked to people that who came to Whitehorse [...] to attend any number of appointments, including court appearances. They were going to get back to their community by going to Walmart and waiting to run into somebody from the community and asking them for a ride home. That's a big issue." There are no reliable public transportation options connecting Whitehorse to outlying communities. The situation is even more challenging for individuals returning home to Old Crow, which requires a flight.

These transportation barriers exacerbate the negative impact of unnecessary adjournments. If an individual arrested outside of Whitehorse cannot secure release on consent or by phone on the first day after their arrest, they are transported to the Whitehorse Correctional Centre. An interviewee explained:

> Then, if you get them out a day later, they have no way to get home. They got to purchase an airplane ticket to get back to Old Crow or they got to drive 500 kilometers to their town – and they might not even have their wallet or their coat... You end up in Whitehorse. What are you going to do? You're going to go to the shelter, which is not a dry shelter. It's not great for being able to follow your conditions and stay out of trouble.

3.6.3 Indigenous Peoples

It has been over 25 years since the Supreme Court of Canada recognized, in *Gladue*, the crisis of Indigenous over-representation in the criminal justice system. Research shows that Indigenous people are *even more* significantly overrepresented in admissions to remand. The Supreme Court of Canada has recognized that Indigenous people "are more likely to be denied bail, and make up a disproportionate share of the population in remand custody."[211] In *Zora*, the Court found: "Indigenous people, overrepresented in the criminal justice system, are also disproportionately affected by unnecessary and unreasonable bail conditions and resulting breach charges."

Research shows that Indigenous people are *even more* significantly overrepresented in admissions to remand.

For instance, data from Ontario show that, in 2019/20, Indigenous people represented 12.7% of admissions to provincial custody on sentence – but 16.6% of admissions on remand. As one interviewee told us:

> Generally speaking, Indigenous people are detained at a higher rate. If they are released, the releases are on onerous conditions. They're generally more likely to be required to have some level of supervision, whether it be surety or bail program. If they are released, they tend to spend longer in custody awaiting bail before a plan of release can be made. If they're being proposed as a surety, Indigenous people are less likely to be approved by the court as an adequate surety.

[211] *Summers*, 2014 SCC at para 67.

Gladue

When *Set Up to Fail* was published in 2014, some courts had recognized that the principles from *Gladue* and *Ipeelee* should be incorporated into the bail analysis.[212] Still, there was relatively little case law or academic commentary explaining how the principles from *Gladue* – which arose in the context of sentencing – should be applied at the bail stage, when accused people are presumptively innocent.

Over the past decade, courts and commentators have paid greater attention to the principles governing the bail process for Indigenous accused people. In 2019, Bill C-75 codified the application of *Gladue* principles in the context of bail hearings. Section 493.2(a) of the *Criminal Code* now directs peace officers, judges and justices to "give particular attention to the circumstances of… Aboriginal accused." A failure to consider *Gladue* principles at a bail hearing involving an Indigenous accused person will constitute a serious, reviewable error of law.[213]

However, there are ongoing challenges in implementing *Gladue* in a consistent, appropriate and rights-respecting manner at the bail stage.

Bail decisions require judges and justices to make forward-looking predictions about risk, including the likelihood that an individual will miss court appearances or commit new substantive offences. Yet some Indigenous accused people may appear "riskier" because of background factors arising directly from colonialism and systemic discrimination – such as poverty, inadequate housing, under- and unemployment, higher rates of substance use, and displacement from one's community. Academic research has concluded that bail proceedings frequently become an occasion to impose "treatment" on Indigenous people through surety supervision and restrictive conditions.[214] In this way, courts often apply *Gladue* and *Ipeelee* in a manner that erodes the presumption of innocence and may actually contribute to rising remand rates.[215]

One of our interviewees explained that, at sentencing, the *Gladue* factors typically serve to diminish an individual's moral culpability. He explained:

> The challenge is when you apply that to bail, moral culpability is not relevant, right? In fact, if you take those same circumstances for somebody in sentencing – survivor of the residential school system, abuse, homelessness, all those things – when we look at that through the bail lens, all of those things present risk. They actually are aggravating at a bail analysis… [As a result,] the *Gladue* analysis [at] bail can actually work *against* Indigenous people.

In recent years, some courts have provided guidance aimed at applying *Gladue* at the bail stage without penalizing Indigenous people for aspects of their lives that may have directly resulted from colonialism, trauma, and discrimination.

Courts have recognized that Indigenous accused people may not have friends or family members able to come forward as potential sureties.[216] Colonialism and discrimination have resulted in the fragmentation of many families and communities.

Courts have also recognized that an individual's criminal record must be "seen through a *Gladue* lens" in the bail context.[217] Courts must place the Indigenous accused person's criminal record "within the context in which it has been accumulated, one that corrects for possible systemic biases, stereotypes and assumptions."[218] In *Papequash*, the Ontario Superior Court of Justice recognized: "These impairments can originate from the dislocation and hardship caused by colonialism and residential schools. While this does not extinguish the secondary ground concerns, it provides an explanation and a context for this accused."[219] Thus an Indigenous person's criminal record

[212] *R v Robinson*, 2009 ONCA 205 at para 13: "Application of the *Gladue* principles would involve consideration of the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts."

[213] See e.g. *R v Papequash*, 2021 ONSC 727 at para 7.

[214] Jillian Rogin, "Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017) 95:2 Can Bar Rev 325.

[215] In *R. v. EB*, 2020 ONSC 4383, the Ontario Superior Court of Justice recognized: "Applying Gladue principles to the bail context without due regard to the important distinction between bail and sentencing can do significant violence to the presumption of innocence" (34).

[216] See e.g. *R v Papequash*, 2021 ONSC 727, at para. 20.

[217] *R v Papequash*, at para 22, cited with approval in *R v King*, 2022 ONCA 665, at para 187.

[218] *Ibid*.

[219] *Papequash*, at para 22. See also *EB* at para 37 and *R. v. Vickers*, 2021 ONSC 3895, at paras 58-61.

may reflect systemic factors stemming from colonialism – such as poverty, substance abuse, and institutional bias in the justice system (e.g. over-policing and over-charging).

In particular, past convictions for failure to comply should be viewed through the lens of systemic discrimination. In 2015, the Supreme Court of the Northwest Territories recognized that an Indigenous person's background can help explain a record of breaching bail conditions:

> An examination of the intergenerational impact of the residential school system, cultural isolation, substance abuse, family dysfunction, inadequate housing, low education levels and un- or underemployment on an Aboriginal offender may inform questions about *why* an accused has an extensive criminal record and, if applicable, *why* that person has demonstrated an inability to comply with pre-trial release conditions in the past.[220]

Our interviews confirmed that bail courts are increasingly taking *Gladue* factors into consideration – but there are both practical and doctrinal barriers to giving full effect to *Gladue* at the bail stage.

First, many counsel indicated that it can be difficult eliciting information about an individual's Indigenous identity and background at the bail stage – where timelines are necessarily compressed and counsel often have not had an opportunity to build trust with their clients. One interviewee explained:

> For a lot of Indigenous folks, that's information that's been lost because of colonialism. I have a client who lost touch with his Indigenous side of the family because of the legacy of the residential schools. And so that information just doesn't exist. Requiring it sets up a bar that is so high.
>
> And also it means that an accused person… every time they see themselves before the court, we need to divulge the most traumatic aspects of their lives to the court just to get released. It's a high toll to be paid just for your liberty. That someone who is dealing with the traumas of colonialism, someone who as a result sees yourself before the court, more than once, every time at sentencing and bail hearings must continually dig deep into your traumas before the court and bare your soul. It just seems inappropriate. Especially since sometimes you do all that, and then the result doesn't even change.

Some counsel felt that decision-makers did not always know how to apply *Gladue* appropriately. Courts must take judicial notice of the unique circumstances of Indigenous people.[221] Still, our interviews suggest that some decision-makers insist on specific evidence about the accused person's background and its connection to the alleged offence:

> Even though justices of the peace are sometimes trying to be alive to *Gladue* issues, they often insist on there being specific *Gladue*-related information before them that explains [the] specific life circumstances of an accused person… and how the legacy of colonialism has brought them before the court or how their lack of release is going to affect them. That's oftentimes very difficult information to have at the bail stage, because it's so early.

Numerous interviewees also highlighted the challenges of meaningfully applying *Gladue* in the absence of adequate resources and alternatives to remand detention. A participant in the Yukon observed: "People talk about *Gladue*, but what are we doing about it? If you want to implement *Gladue*, then you definitely need alternatives – like a halfway house for women or a counselling service. More services so that you can say, look, there's an alternative to prison."

Finally, our interviews made it clear that expectations around a "good" bail plan continue to perpetuate systemic discrimination against Indigenous accused people.[222] In Manitoba, two interviewees mentioned a requirement – real or

[220] *R v Chocolate*, 2015 NWTSC 28, at para. 50.

[221] *Ipeelee* at para 60.

[222] See, for example, *R v Tikivik*, 2020 ONSC 7549. The accused was an Inuk man living in the south without stable housing. On a bail review application, the Superior Court of Justice emphasized that Mr. Tikivik had limited ties to the Ottawa community and was accused of breaching bail conditions that required him to live at a specific address. The Court concluded that these factors gave rise to primary ground concerns – without considering that Mr. Tikivik's lack of community ties and unstable living situation could be linked to colonial dislocation.

perceived – for sureties to own their home.[223] Both explained that this requirement disadvantages clients whose potential sureties live on First Nations reserves and do not own their homes. For instance, one lawyer described a client who wished to live with his grandfather on the Long Plain reserve. The grandfather had lived in his house for many years, but did not own the property, and thus was unable to qualify as a surety. Another lawyer raised the same issue:

Expectations around a "good" bail plan continue to perpetuate systemic discrimination against Indigenous accused people.

> Finding out that sureties have to own the home and the land it's on, which is definitely a big thing to always have to say to people… You still have that misunderstanding where a client will say: '*Well, my mum, it's her house*.' It's like: '*No, it's the band's house.*' And so that's a big challenge because what that does instantly is force us to do a named surety and have all those problems that we mentioned before, whereas if somebody did have real property, they get the shoe-in [to be released on bail].

There is no legal requirement for a surety to own a home or even possess substantial assets. Placing such a requirement, either through law or customary practice, is problematic and prejudicial. More significantly, imposing this "requirement" is an example of the colonial and systemically racist practices in the criminal legal system. Indigenous peoples who live on reserve do not, according to Canada's laws, "own" their own property. Excluding them from acting as sureties on this basis reinforces colonialism and assists in maintaining the over-incarceration of Indigenous peoples. It is also deeply offensive to tell Indigenous peoples that they do not qualify as a surety because they do not own the land that was stolen from them.

3.6.4 Black and Other Racialized Accused

In recent years, Canadian courts and policy-makers have paid increasing attention to the devastating reality of anti-Black racism in the criminal legal system. In particular, the courts have recognized that the unique history and social context of Black communities in Canada can and should inform the sentencing process. Concretely, some jurisdictions have begun employing Impact of Race and Culture Assessments (IRCAs) at the sentencing stage.[224] Similar to *Gladue* reports, IRCAs are pre-sentencing reports that aim to shed light on how systemic and background factors have contributed to bringing a Black individual before the court. In 2020, the federal government committed $6.64 million in funding for the preparation of IRCAs for Black and other racialized people.[225] In so doing, the government acknowledged that Black adults are over-represented in custody – including in admissions to pre-trial detention. However, to date, the case law and academic scholarship has largely focused on sentencing, not on judicial interim release.

A handful of courts have considered the newly added s 493.2 as it applies to Black and other racialized accused people seeking release on bail.[226] This will increase with the addition of s. 515(13.1) of the *Criminal Code*, requiring an explanation on the record of how s. 493.2 was considered in every bail decision. Moving forward, more research is necessary to evaluate whether and how bail courts are using s 493.2 and legal principles from the sentencing context to inform bail decisions for Black accused people – and whether such measures are having any impact on the over-representation of Black individuals in remand detention.

[223] To our knowledge, there is no explicit legal requirement for sureties in Manitoba to own their home. Section 515(2.02) does refer to "reasonably recoverable assets," which the Supreme Court has defined as "assets that could be recovered by the Crown by way of a forfeiture proceeding such that the risk for the accused and sureties of losing the assets is meaningful": *Antic* at footnote 3. In *R v Phillips*, 2020 ONSC 6189, Justice D.E. Harris criticized the decision of a JP who denied bail in part because of uncertainty about the proposed sureties' access to funds. "This proceeding flirted with a return to the regressive overuse of cash bail which prejudices those sureties who do not have the means to own real estate… A fair and equitable bail system, attune[d] to issues of income inequality and the notion that those who do not own a house should not be unfairly prejudiced, demands a more rigorous process than what occurred here" (paras 29 and 33, emphasis added). Perhaps there is an assumption in Manitoba that potential sureties will not have enough financial "collateral" if they do not own their homes. An information pamphlet that the province published in 2014 tells potential sureties to provide "written proof of your income and/or proof that you own property." Similarly, the surety application form asks for financial information, which can include land title and mortgage information.

[224] See e.g. *R v Anderson*, 2021 NSCA 62; *R v Morris*, 2021 ONCA 680; *R v Chol*, 2022 ABPC 41. See also Maria C. Dugas, "Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders" (2020) 43:1 Dal LJ 103.

[225] Department of Justice Canada, "Federal funding to help sentencing judges in Ontario understand impacts of race and discrimination on offenders" (March 3, 2023), online: <https://www.canada.ca/en/department-justice/news/2023/03/federal-funding-to-help-sentencing-judges-in-ontario-understand-impacts-of-race-and-discrimination-on-offenders.html>.

[226] See e.g. *R v EB*, 2020 ONSC 4383; *R v Raheem-Cummings*, 2020 SKQB 342; *R v LWB*, 2021 ONSC 6152.

PART 4

PART 4

Conclusion and Recommendations

> *We have these unanimous decisions coming from the Supreme Court time and time again. Every few years, we've got a big, hot case that tells us bail is the default. Detention is a measure of last resort. Meanwhile, our jails are still over-populated. People are still double- and triple-bunking. And that played into how significant the COVID pandemic was on our inmates and the number of lockdowns that occurred in Manitoba in our jails, because of the sheer number of people... What else can we tell our judges? What else can we tell our Crowns? I don't know.*
>
> – Defence counsel in Manitoba

It is clear the Supreme Court's decisions, Bill C-75, and policy changes across Canada have not resulted in a large-scale culture shift in bail courts across Canada. While there have been concerted efforts and some areas of noteworthy change, our empirical research suggests that many issues facing the bail system remain entrenched.

Looking at statistical data, it is apparent that Canada has not solved its remand problem.[227] Our criminal legal system is premised on the presumption of innocence and the right to reasonable bail – yet increasing numbers of people are serving time before they have been found guilty. Every year since 2005/6, across Canada, there have been more people in pre-trial detention than in sentenced provincial and territorial custody after a finding of guilt.[228] In recent years – despite decreases in the overall custodial population in the context of the COVID-19 pandemic – the proportion of provincial and territorial prisoners in pre-trial detention has continued to rise. When *Set Up to Fail* was published, CCLA sounded the alarm that 54.5% of people detained in Canada's provincial and territorial jails were in pre-trial custody, legally innocent and awaiting trial or the determination of their bail. By 2021/22, that figure had risen to 70.5%.[229] In every jurisdiction we studied, more than 70% of people in provincial or territorial custody are now remand prisoners. In Ontario, the proportion is a staggering 78.9%.[230] Indeed, the rate of pre-trial detention has more than doubled in past 40 years and the number of people in pre-trial detention has quadrupled over the same time period. If Canada's bail system was broken when *Set Up to Fail* was released in 2014, the crisis has only deepened in the intervening years.

In every jurisdiction we studied, more than 70% of people in provincial or territorial custody are now remand prisoners.

CCLA's court observations and interviews with justice system actors shed greater light on the points of change and consistency affecting the bail system in five jurisdictions across Canada. While we observed significant variation across and within jurisdictions, there were several noteworthy themes.

227 See Appendix C for more detailed statistical information.

228 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.

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

230 *Ibid*. For 2021/2022, the proportions were 70.7% in British Columbia, 74.1% in the Yukon, 72.4% in Manitoba, 76.35% in Nova Scotia, and 78.9% in Ontario.

Some improvements aimed at facilitating timely bail hearings – but widespread recognition of persistent, systemic issues. Since 2014, trial courts in Alberta, Manitoba and Ontario have highlighted the existence of ongoing, unconstitutional delays affecting different stages of the bail process. Our research confirmed that issues around scheduling and court efficiency remain acute in parts of Manitoba and Ontario, although efforts to enhance court efficiency and ensure timely bail hearings have borne some fruit. Frequent adjournments in bail court remain a concern – indeed, our court observations show that the proportion of bail appearances in which the matter is adjourned has remained relatively consistent over time.

Challenges ensuring access to justice in the wake of procedural changes adopted in response to the COVID-19 pandemic. In every jurisdiction we studied, the COVID-19 pandemic resulted in the adoption or expansion of virtual or hybrid bail appearances. While lawyers, judges, justices of the peace, and court staff have returned to the courtroom in-person in many locations, many accused people continue to attend their bail appearances by audio or video link from police detachments or detention facilities. Across all jurisdictions, interviewees emphasized that virtual bail operations have created significant challenges accessing and communicating with clients in custody.

Less reflexive reliance on surety release. Our data suggest that there has been a decreased reliance on surety supervision – particularly in Ontario. Comparing our court observation data from 2022 to 2014, substantially more accused individuals in Ontario were released on their own recognizance and fewer were required to have sureties. Indeed, our interviews with justice system actors suggest that, in Ontario, there is a less reflexive expectation that surety release is the “default.” At the same time, we observed an increase in the proportion of individuals released with bail program supervision – such that, in total, nearly half of all individuals released on bail were required to have some form of supervision in the community.

Greater awareness of the need for appropriate, tailored bail conditions. Our bail court observations and interviews indicate that bail courts are making less use of certain problematic bail conditions that set people up to fail – including “keep the peace” conditions and treatment conditions. While bail system actors may be exercising more restraint, they continue to impose a significant number of conditions on individuals released on bail. As in 2014, we did not observe any releases where the number of conditions was known and the accused was released unconditionally.

Little uptake of the judicial referral hearing and ongoing concerns about the criminalization of bail breaches. The judicial referral hearing was intended as an “off-ramp,” allowing the courts to respond to allegations that an individual has breached their bail conditions without requiring charges or convictions for failure to comply. Unfortunately, the judicial referral hearing has not lived up to its promise. Our interviews suggest that the mechanism has not been widely adopted in the jurisdictions we studied.

Continued discriminatory impacts. Since 2014, both Parliament and the Supreme Court have recognized that the bail system disproportionately disadvantages Indigenous accused, Black accused and members of other racialized groups, people who are unhoused, those living in poverty, and people dealing with mental illness and substance use. With the additions of s. 493.2 and s. 515(13.1) to the *Criminal Code*, decision-makers *must* pay heed to the circumstances of Indigenous accused and members of groups that are over-represented in the justice system. While these developments are significant, there are ongoing challenges attempting to alleviate the discriminatory impacts of the bail system.

Looking forward, how can Canada take action and combat the ongoing issues facing the bail system?

Achieving transformative change within the justice system is challenging – yet it is possible. Experts have highlighted that the development and introduction of the *Youth Criminal Justice Act* (YCJA) provides a model of effective, large-scale criminal justice reform.[231] The YCJA was developed in response to a clear problem – Canada’s youth incarceration rates were alarmingly high compared to peer nations. In the 2000s, when the YCJA was introduced, Canada saw a dramatic decline in the number of youth charged with offences, brought to court, and sentenced to prison. Scholars argue that the YCJA galvanized change because it was presented and viewed as a completely

[231] 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. Webster, Doob and Sprott (2019). The Will to Change: Lessons for Canada’s Decarceration of Youth. Law & Society Review, 53(4), 1092-1131. Myers, N.M. (forthcoming 2023). Principled Guidance and Radical Change: Lessons Learned from Youth Bail Practices and the YCJA. The Criminal Law Quarterly: Commemorating the 20th Anniversary of the Youth Criminal Justice Act (YCJA).

new regime, which helped "open up space for cultural change."[232] Moreover, the principles, objectives and rules outlined in the YCLA were made as explicit as possible, in order to structure the exercise of discretion by police officers and judges.[233] Finally, when the YCJA was adopted, the allocation of significant financial resources together with extensive training and education for criminal justice actors helped foster effective implementation of the changes.[234] In short, the YCJA shows how a concerted law reform effort can create far-reaching changes in how every actor in the justice system performs their roles.

Similarly, in our view it will take a concerted, large-scale legislative and policy effort to truly effect a culture change and reverse the course of bail practices in Canada. In the long term, transformative change of the bail system in Canada will involve reconceptualizing and fully replacing the law on bail – with the Supreme Court of Canada's recent jurisprudence providing the guiding principles. Experience tells us that any successful reform effort involves following elements:

- Conducting a thorough, principled review of the law, including consideration of empirical evidence;
- Bringing together justice system actors, academics, and community stakeholders; and
- Explicitly outlining the objectives and directions governing the exercise of discretion by decision-makers.

In the short-to-medium term, different levels of government have the ability to introduce targeted legislative and policy changes that would have smaller-scale positive impacts for bail practices and outcomes.

Introducing Targeted, Rights-Respecting Criminal Code Amendments

At the legislative level, the federal government should ensure that any amendments to the *Criminal Code* reflect the following:

Emphasize that granting reasonable bail is not lenient or benevolent – it is a constitutional right grounded in the presumption of innocence.

- Emphasize that granting reasonable bail is not lenient or benevolent – it is a constitutional right grounded in the presumption of innocence.
- Add guiding principles and objectives, to better structure the exercise of discretion by decision-makers. This should include the principle of proportionality.
- Remove all reverse onus provisions, which invert the foundational principle of the presumption of innocence. When a person's liberty is at stake, the state should bear the onus of proving that detention is justified.
- Develop specific, presumptive hurdles to custody, for both formal detention orders and adjournments.
- Decriminalize failure to appear and failure to comply with bail conditions. At a minimum, adapt the judicial referral hearing to allow judges and justices to initiate, and defence counsel to request, such hearings. This would expand the practical availability of JRHs as an alternative to criminal prosecution of bail breaches.

Improving the Efficiency and Quality of Decision-Making in Bail Court

At the policy and operational level, governments should explore the following solutions, aimed at fostering accountability for efficient, rights-respecting decision-making.

- Encourage and support police in using their powers of release, including the use of judicial referral hearings created by Bill C-75. This will result in fewer minor matters starting in bail court, giving courts more time and resources to focus on serious cases.

[232] Webster at 16.
[233] Webster at 17.
[234] Webster at 18.

- Develop systems to support the use of judicial referral hearings – including administrative processes, dedicated court time for judges or justices to conduct such hearings, and training to support police and Crown prosecutors in making greater use of this mechanism.
- Develop carefully tailored local strategies to eliminate unconstitutional delays and ensure timely bail hearings. The factors leading to systemic delay, over-holds, and unnecessary adjournments in bail court are complex and often specific to the practices and procedures in different courthouses. Depending on local context, provinces and territories should explore:
    - Creating dedicated bail courts, where they do not already exist;
    - Ensuring continuity in the Crowns and justices working in bail court each day, in order to enhance case knowledge and familiarity and provide better oversight for the progression of files;
    - Improving processes to ensure prompt, adequate disclosure to defence counsel – including a full, frank, and fair synopsis of the allegations against the accused; and
    - Creating streamlined paper procedures for matters that do not require a court appearance, such as consent releases and consent bail variations.
- Work with correctional authorities, defence counsel, and service providers to improve access to and communication with clients in custody. Provide funding to embed Legal Aid counsel in correctional institutions to ensure that individuals in detention have in-person access to counsel, helping individuals prepare for release by developing a release plan *before* they appear in bail court.
- Take immediate and concrete steps to end ongoing, unconstitutional adjournments in bail court. Mandate that courts *must* stay open to hear every bail matter that is ready to proceed, such that matters cannot be adjourned simply because of a lack of court time. Increase hours and staff in shifts to ensure courts can satisfy this requirement – including running night court and weekend court, where necessary.
- Reduce unnecessary adjournments by training and supporting decision-makers in scrutinizing adjournment requests, ensuring cases are moving forward, and actively inquiring about the reason for the adjournment including whether scheduling or a lack of resources are factoring into any adjournment request.
- Increase funding for Legal Aid services. Legal Aid counsel not only work to protect the constitutional rights of people upon arrest – on a practical level, they play an integral role in ensuring justice system efficiency by helping clients navigate the system and ensuring that court appearances are meaningful.
- Improve criminal case processing times to reduce time in pre-trial detention and time in the community subject to supervision and conditions of release.
- Consider assigning judges or judicial justices of the peace with specialized legal training to preside over bail matters. In particular, to shed light on the value of assigning judges (rather than justices of the peace) to handle bail matters, Ontario should release the results from its pilot study.
- Engage in active case management of “special” bail matters, including the determination of what constitutes a special bail hearing. Regardless of whether a matter is classified as “special,” all legislative and constitutional timelines must be respected.
- Jurisdictions that have not updated their Crown policy manuals to reflect recent legal changes should do so immediately. The updated manuals for British Columbia, Ontario, and the Public Prosecution Service of Canada provide helpful models. In particular, jurisdictions should adopt language similar to the portions of British Columbia’s manual that make clear that prosecutors will be supported if they make principled decisions that follow the law and key principles underpinning the bail system.
- Ensure timely access to bail reviews or bail condition variation requests by eliminating barriers including procedural hurdles and onerous requirements for Legal Aid funding.

Appropriate, Rights-Respecting Supports for Individuals Released on Bail

- Design and fund programs to provide and pay for transportation for accused people who are arrested, transported away from their home communities, and released in different locations.
- Improve bail supervision programs to focus on the purposes of bail – ensuring court attendance and preventing new substantive offences – rather than behaviour modification. Remove strict eligibility criteria, since such criteria may disproportionately exclude Indigenous people and members of other groups that are over-represented in the justice system. Restrict bail programs from imposing their own conditions of release, which are imposed without the court's oversight and often criminalize ordinary behaviour.
- Work with service design experts to create privacy-protective, user-friendly systems for reminding individuals about their court dates by phone, text, or email.
- In partnership with social service providers, create and adequately fund "bail beds" – housing options for individuals who could be released on bail, but who require housing and supportive services.
- Invest in mental health and substance use supports.
- Enhance data collection and availability to researchers, to track trends and changes over time.

> *If we're giving people mutual accountability supports and we're increasing their abilities to get what they need in the community, then they don't need sureties. Because they don't know how to access the justice system. That's really what they need. They need somebody to support them, to say: 'Here's how you get a lawyer. Here's how you deal with your charges.' They need mental health supports, they need addiction supports, they need housing. They don't need their family member putting up $10,000 to make sure they go to court – because really often what they need is somebody to tell them: 'This is your next court date.'*
>
> – Service provider in Ontario

Appendix A. Research Questions and Methodology

The primary objective of this report is to explore whether and how the legal and policy changes implemented across Canada since 2014 are affecting bail practices and outcomes on the ground. More specifically, this study sheds light on current day-to-day bail processes and decisions, focusing on:

- How the Supreme Court's guidance is being implemented;
- The effects of Bill C-75 amendments on bail practices;
- Highlighting policy changes that are having a positive effect on bail processes and outcomes;
- How technologies and processes introduced because of the COVID-19 pandemic are affecting bail, and how these changes might be retained or amended in the future; and
- The challenges and limitations of bail reform in achieving objectives.

To allow for some comparisons over time, this study follows, as closely as possible, the observational and interview methodology used in *Set up to Fail*. To achieve regional representation, we initially selected and for this study returned to five provinces and territories: British Columbia, Yukon, Manitoba, Ontario and Nova Scotia. Data collection for the current study took place between November 2021 and November 2022.

Data Sources

We used a mixed methodological approach for this report, bringing together bail court observations and interviews with criminal justice professionals.

Court Observations

Observational bail court data was collected in British Columbia, Manitoba, Ontario and Nova Scotia. Unfortunately, we were unable to observe the Yukon Territorial Court. With the return to in-person appearances, phoning in to listen to bail proceedings was unreliable. At times, observers were unable to access the courtroom, and when they did enter the courtroom, they were unable to hear what was happening as a result of low volume and background noise. The limited data we were able to collect from observations in Yukon have been removed from the analysis presented in Appendix E.

The Manitoba court was not observed in person in real time. Observers listened to a recording of proceedings in the intake and show cause courtrooms. We did not monitor the courtroom that handles domestic violence bail hearings. This was a time-intensive process, as the listening room could only be accessed for two hours at a time. This impacted the number of court days that could be observed.

Two complementary types of data were collected. Observers attended court in person or virtually for the full day of court operation on each observational day. Observers took notes on the way cases were processed in court – including how the case was discussed and how each case was resolved each day. Notes were taken about the type of counsel present, the onus, the Crown's bail position, current and outstanding charges and the presence of a criminal record as mentioned in open court well as the case outcome for the day. For cases that were adjourned, we noted who requested the adjournment and the reason provided to the court for the request. For accused who were released, either by consent or after a show cause hearing, observers noted the form of release, quantum of bail, the number and type of conditions imposed. Any statements made by the Crown, defence counsel, or the justice in support of the imposition of these conditions were documented.

Only the information read aloud in open court was collected; this may or may not contain the information provided above. The authors recognize the importance and relevance of the charges before the court, as well as the impact that a criminal record has on bail decisions and the types of conditions that are imposed. Where this information

was noted during a bail appearance, it was documented; however, in most appearances, including in consent releases, this information is not provided on the record.

While imperfect, the material offered in court by the Crown and defence counsel approximates the information available to the justice when accepting the proposed release (including the conditions of release) or making the decision to release an accused after a show cause hearing.

The bail courts were observed for a total of 79 days between June and November 2022. Each jurisdiction was observed for a minimum of 7 and maximum of 31 days. Some of the jurisdictions are overrepresented in the dataset. Over 79 days, 1,284 bail appearances were observed. Not all of these cases were unique, as some accused were seen on more than one day. As would be expected, the daily caseloads in the bail courts varied by courthouse. Overall, on average, each court heard 16.3 bail matters.

Analyses are presented for individual jurisdictions and are then aggregated across the jurisdictions. The findings of this study are limited to the courts observed in each jurisdiction. The authors caution against generalizing these findings to all courts in the province or territory or elsewhere in Canada, as this study only provides a snapshot of court operations. While it is insightful to compare the observational data from this study with the data from the 2014 report, statistical comparisons are not possible on account of different courts being observed.

Interviews with Criminal Justice Professionals

Criminal justice professionals with knowledge of and experience with the bail system in each jurisdiction were interviewed in semi-structured Zoom interviews, face-to-face and/or phone interviews. As other empirical studies have revealed, it is extremely challenging to access judges and Crown attorneys for research purposes. While we were able to speak to some judges and Crown Attorneys, representation from these professional groups is small.

The invitation to participate was emailed to a wide range of justice-involved actors, including relevant government ministers, Chief Justices, Crown prosecutor associations, legal aid organizations, community service organizations involved in the bail system, and defence counsel associations. Professional email databases, listservs and pre-existing professional contacts of the Canadian Civil Liberties Association were also used to contact legal experts.

Contacts were invited to share the call for participation with their professional network. We also contacted by email and phone the relevant courts, government departments, and other respective bodies, to solicit participation and official comments.

A total of 33 interviews were conducted between November 2021 and September 2022. The interviews lasted between 40 and 70 minutes on average. Each participant was asked to sign a consent form or provide oral consent prior to starting the interview, stating that they had read the information letter and consented to participate in the interview. Participants were also asked how they wished to be identified (i.e. by profession, region) and to consent to the interview being recorded. We used a semi-structured interview guide that touched on broad areas of inquiry while allowing for specific follow-up questions to be tailored to the particular experiences of the interviewees. This methodology generates rich details while maintaining some uniformity across participants. The questions consisted of a mix of open-ended and targeted inquiries.

Interviews were conducted with the following:

Jurisdiction	Interviewees
British Columbia	8
Yukon	7
Manitoba	5
Ontario	9
Nova Scotia	4
Total	**33**

Appendix B: The Practice of Bail

While the law of bail is set out in the *Criminal Code*, the administration of policing and the courts is left to the provinces and territories. Many policing and court processes are locally determined. As a result, the process an individual follows between arrest and determination of bail can vary significantly between, and even within, jurisdictions. These differences can have significant impacts on the operation of the bail system and respect for individuals' constitutional rights.

Since the outbreak of the COVID-19 pandemic in March 2020, the practice of bail has changed as courts respond to the evolving public health situation. This section provides information on the administration of bail at the time of our court observations in the summer and fall of 2022.

Bail Processes in British Columbia

Most bail hearings in British Columbia are presided over by Provincial Court judges. In recent years, the province has introduced different models for remote hearings in different regions of the province.

In Vancouver, bail hearings take place at the courthouse at 222 Main Street – which handles most criminal files from Vancouver and Burnaby – and at the adjacent Downtown Community Court.[235] According to local participants, judges and defence counsel attend bail hearings in person at the courthouse, but Crown counsel have been appearing remotely because of technical issues with their file management system. Most accused people appear via remote video link from the police station or detention centre.

In other regions of British Columbia, bail hearings are fully virtual. In April 2021, the Provincial Court launched a pilot project in northern British Columbia that introduced a centralized model of virtual courtrooms.[236] The project aims to facilitate quicker bail hearings, reducing the need to detain accused people overnight and transport them long distances out of their communities for bail. Accused people appear by video link from the Prince George Regional Correctional Centre or from RCMP detachments across northern British Columbia. The remote bail pilot project has since expanded to the Interior Region and Vancouver Island, with six virtual courtrooms conducting bail hearings over Microsoft Teams.[237]

On evenings and weekends, the Justice Centre in Burnaby, staffed by judicial justices, hears bail matters by telephone or video. Duty counsel are available to advise and speak on behalf of individuals arrested and brought before a judicial justice.[238]

Bail Processes in the Yukon

In Whitehorse, bail matters are conducted before justices of the peace on weekdays at 1:00 PM and on weekends at 10:00 AM. At different times throughout the COVID-19 pandemic, the Territorial Court conducted bail matters virtually. However, by the summer of 2022 – when our research took place – the Court had largely returned to hybrid proceedings. Justices of the peace, court staff and counsel typically attend in person at the Whitehorse courthouse for all bail appearances. The majority of accused people appear for their bail hearings by video link from the Whitehorse Correctional Centre. While the Yukon employed telephone and video bail appearances well before the onset of the COVID-19 pandemic, local participants indicate that accused people were brought into the courthouse more frequently before the pandemic.

[235] Opened in 2008, the Downtown Community Court (DCC) is an integrated problem-solving court that handles files from a concentrated geographic area in downtown Vancouver. The DCC does not deal with indictable offences or domestic violence cases.

[236] Zena Olijnyk, "Virtual bail pilot for northern communities launched by Provincial Court of British Columbia" (Canadian Lawyer, 29 April 2021), online at: https://www.canadianlawyermag.com/practice-areas/criminal/virtual-bail-pilot-for-northern-communities-launched-by-provincial-court-of-british-columbia/355480.

[237] Provincial Court of British Columbia, "Practice Direction: Northern, Interior, and Island Bail Pilot Project" (9 January 2023), online at: https://www.provincialcourt.bc.ca/downloads/Practice%20Directions/CRIM%2014%20Northern%20Bail%20Pilot%20Project.pdf.

[238] Provincial Court of British Columbia, "About the Court: Justice Centre" online at: https://www.provincialcourt.bc.ca/about-the-court/judicial-officers/justices-peace/justice-centre.

Individuals who are arrested outside Whitehorse typically appear by phone from an RCMP detachment for their initial bail hearing. None of the communities outside Whitehorse have appropriate facilities to house people who have been arrested overnight. As such, if people arrested outside Whitehorse cannot secure release on their first day following arrest, they are transported to the Whitehorse Correctional Centre. Most communities are connected to Whitehorse by road, although Old Crow is only accessible by plane.

The Territory has a bail supervision program managed through Yukon Community Corrections. The same officials who serve as probation officers handle bail supervision. The Court frequently requires accused people to report to a bail supervisor immediately upon release (or within several working days) and thereafter as directed. In addition, there is a facility operated by Connective (formerly the John Howard Society) and the Council of Yukon First Nations that offers housing for men released on bail. The facility is located in a converted wing of the Whitehorse Correctional Centre, but individuals living there are free to leave during the day.

Bail Processes in Manitoba

The mechanics of bail in Manitoba have evolved significantly in recent years, both because of the COVID-19 pandemic and in response to litigation.

When an individual is arrested, if the police do not exercise their discretion to release, the matter goes to a detention review Crown who evaluates all incoming files and may have conversations with duty counsel or the person's private counsel. There are now Crowns and duty counsel available 24/7, working in shifts to facilitate the bail process and negotiate consent releases. Originally, this procedure was initiated during the COVID-19 pandemic to limit movement in and out of custody.

If duty counsel and the Crown cannot negotiate a consent release, individuals are transported to a detention centre. In Winnipeg, for example, accused people are typically brought first to the Winnipeg Police Central Processing Unit, and from there, transported to the Winnipeg Remand Centre. In the north, accused people are typically flown out of their communities and transported to The Pas Correctional Centre.

Individuals who are arrested usually have an initial appearance by phone before a judicial justice of the peace (JJP) – an appearance that is intended to satisfy s. 503 of the *Criminal Code*. In the past, the initial appearance would happen without counsel and without any disclosure. Following the decision in *R v Budd*,[239] Legal Aid Manitoba began providing representation for s. 503 hearings.

Contested bail hearings are typically run before a Provincial Court judge, although judicial justices of the peace (JJPs) can also preside over contested hearings. In Winnipeg, the Provincial Court uses a triage procedure to facilitate timely bail hearings.[240] Bail triage court, presided over by a judicial justice of the peace (JJP) in Courtroom 301, sits from 9:30 AM until completion of the docket. This includes all consent remands, consent releases, consent in-custody no-contact orders, consent bail cancellations, and timeline extensions. Accused people appear from the Winnipeg Remand Centre and the Winnipeg Police Service Central Processing Unit by video.

Contested bail applications are transferred to other courtrooms to appear before a Provincial Court judge, if addressed in Courtroom 301 before the 11:30 AM cutoff. Any matters not spoken to in bail triage court by 11:30 AM remain in Courtroom 301 to be dealt with by the presiding JJP, including any remaining contested bail applications.

The majority of accused people attend their bail hearing by video link (if they are detained at a provincial correctional centre) or phone connection (if they are detained at a police station). In Portage la Prairie, individuals are still brought into the courthouse in person – one of the only locations in Manitoba where this still happens.

[239] *R v Budd*, 2021 MBPC 13. At para 44, Judge Harvie writes: "[I]t is critically important that an accused be given an opportunity to consult with counsel and, where they chose to do so, to make a bail application before a JJP. This is the case anywhere in the province, but in particular in rural and remote locations, where the denial of such a right will often result in the removal of an accused from their community and signficiant [sic] travel to appear in Court, with all of the delays and risks associated with such an appearance."

[240] Provincial Court of Manitoba, "Notice Re: Changes to Adult Bail Triage Procedure" (20 December 2021), online: https://www.manitobacourts.mb.ca/site/assets/files/1175/notice_-_changes_to_adult_bail_triage_procedure_courtroom_301_and_bail_court_courtrooms_304_and_306_-_december_20_2021_-_e.pdf.

Bail Processes in Ontario

Bail hearings in Ontario typically occur before justices of the peace, although the province has experimented with a pilot project assigning judges of the Ontario Court of Justice to adjudicate bail.[241]

Throughout the COVID-19 pandemic, the Ontario Court of Justice conducted bail hearings remotely, using Zoom videoconferencing capabilities. As of January 2023, a notice indicated that accused people will continue to appear for contested bail hearings by video "unless otherwise directed."[242] Based on information from criminal counsel, some court locations have reverted to in-person bail hearings, in part due to challenges in coordinating video appearances with the remand institutions where accused people are detained.[243] The mechanics of bail hearings in Ontario, however, continue to evolve and remain inconsistent across the province.

Bail Processes in Nova Scotia

Upon arrest, individuals in Nova Scotia typically have a first appearance over the phone with one of the presiding justices of the peace (PJPs) working at the Justice of the Peace Centre in Dartmouth.[244] However, these appearances are not adversarial bail hearings, with justice system actors referring to them as "remand hearings" rather than "bail hearings." These appearances occur without the participation of defence counsel. If the police are agreeable, the PJP may order the individual's release. Otherwise, the PJP will remand the individual from the police station to the detention centre. For people arrested in Halifax and Dartmouth, this means being transported to the Central Nova Scotia Correctional Facility in Burnside.

All contested bail hearings occur before judges of the Provincial Court. Both Halifax and Dartmouth have dedicated intake courts that handle a variety of matters, including bail. Nova Scotia began conducting virtual bail hearings during the COVID-19 pandemic. At the time of this study, accused people continued to attend their bail hearings via video link from jail, and judges and counsel participated in person at the courthouse.

[241] Jacques Gallant, "Judges to preside over bail hearings at two courthouses," *Toronto Star* (13 September 2017), online at: https://www.thestar.com/news/gta/2017/09/13/judges-to-preside-over-bail-hearings-at-two-courthouses.html.

[242] Ontario Court of Justice, "Notice to the Public and to the Profession – Interim Guidelines re Mode of Appearance for Ontario Court of Justice Criminal Proceedings" (18 March 2022, updated 14 January 2023), online at: <https://www.ontariocourts.ca/ocj/files/archives/criminal/Interim%20Guidelines%20re%20Mode%20of%20Appearance%20-%20Criminal%20Proceedings%20-%20updated%20Jan%2014%202023.pdf>. See also Ontario Court of Justice, "COVID-19: Ontario Court of Justice Protocol Re Bail Hearings" (11 May 2020, revised 22 April 2021 and 4 April 2022), online at: https://www.ontariocourts.ca/ocj/covid-19/covid-19-ontario-court-of-justice-protocol-re-bail-hearings.

[243] Correspondence on file with authors.

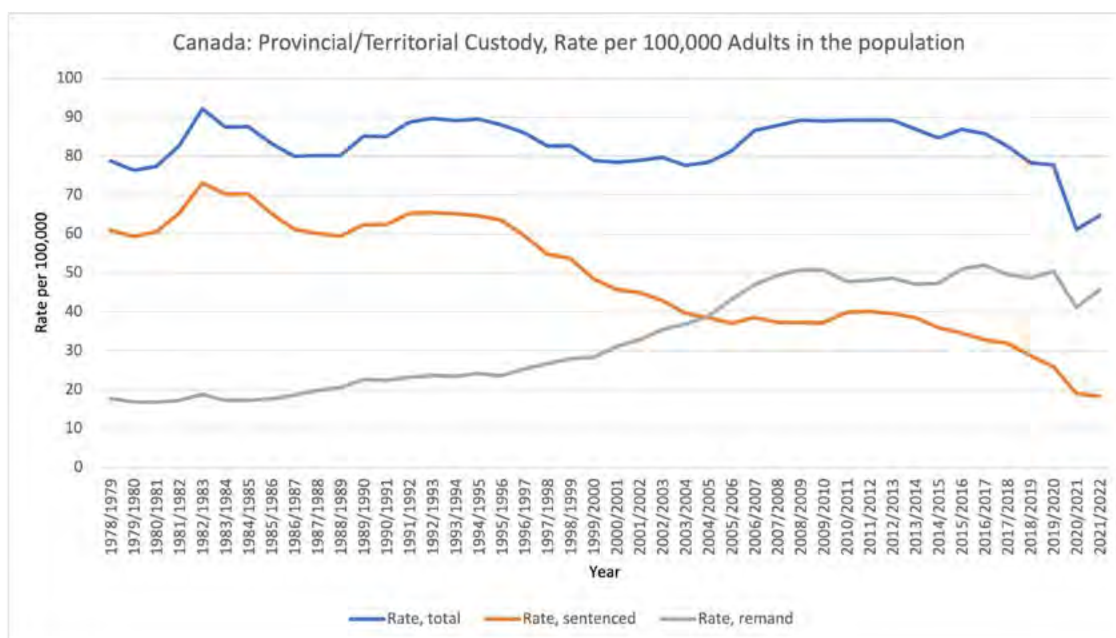
[244] "PJPs conduct approximately 1,400-1,600 tele-bail matters each year. These involve... either tele-bail consent releases of accused persons on undertakings and recognizances or adjournments for contested bail hearings. While PJPs have the jurisdiction to conduct contested bail hearings, these rarely take place in the tele-bail context." Brief to the Law Amendments Committee on Bill 1-3 – Amendments to the *Justices of the Peace Act* (March 25, 2019), online at: https://nslegislature.ca/sites/default/files/pdfs/committees/63_2_LACSubmissions/Bill103.pdf.

Appendix C: Research and Statistics – Update on Trends in Bail and Pre-Trial Detention

The charts below depict crime and custodial trends over time. The most recent data, across most measures, is inconsistent with earlier trends. As the pandemic had a significant impact on the criminal justice system and it is uncertain how long-lasting these changes may be, we focus on highlighting data from 2018/19, while also presenting the most recent data available.

Canada

Across Canada, the total provincial/territorial custody rate[245] per 100,000 adults in the population[246] has remained relatively consistent over time, fluctuating between 76.0 and 92.1 per 100,000. The rate in 2019/20 of 77.7 is virtually the same rate seen in 1980/81 (77.4). The custody rate dropped to 61.1 per 100,000 in 2020/21 before rising to 64.7 in 2021/22. Behind this consistency in rate is a shift in the constitution of the custodial population . The rate with which people are held in pre-trial detention has exceeded the provincial/territorial sentenced custody rate since 2004/05. The pre-trial detention rate has increased 185% from 17.7 per 100,000 in 1978/79 to 50.4 per 100,000 in 2019/20. While both the pre-trial and sentenced rate of custody declined in 2020/21, the decline was more notable in the sentenced population (17.7% for pre-trial custody and 26.5% for sentenced custody).



The total number of people[247] (count)[248] in provincial/territorial custody across Canada has increased over time, rising from 13,479 in 1978/79 to a high of 25,447 in 2016/17. In 2019/20, the year leading up to the onset of the pandemic, 23,894 people were in provincial/territorial custody. This number dropped 20.7% to 18,946 in 2020/21 and increased to 20,439 in 2021/22. The provincial/territorial custody numbers include two distinct populations – those who are in pre-trial detention awaiting the determination of their bail or the resolution of their case and those who have been convicted and sentenced to custody. The increase in counts is not seen across both populations in provincial custody. The number of people in sentenced custody has declined from a high of 14,317 in 1994/95 to a low of 7,957 in 2019/20 (further declining to 5,798 in 2021/22), while the number of people in pre-

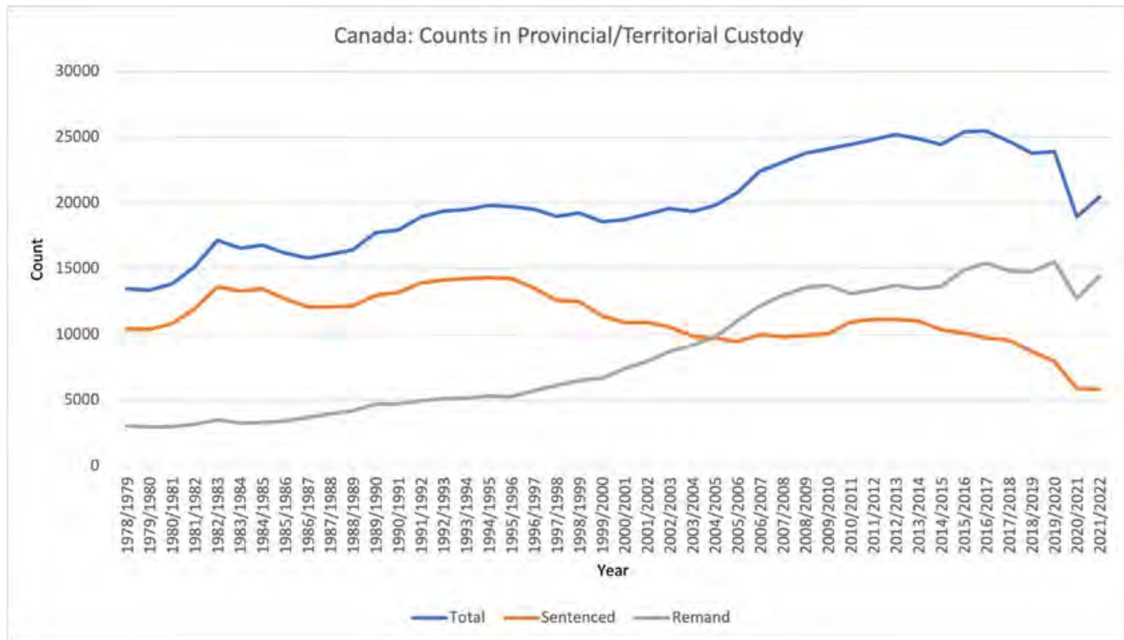
245 Statistics Canada, Table: 35-10-0154-01 – Average Counts of Adults in Provincial and Territorial Correctional Programs (2022), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510015401>.

246 The rate per 100,000 allows for more meaningful comparisons across time, as it takes into account changes in the population.

247 Statistics Canada, Table: 35-10-0154-01 – Average Counts of Adults in Provincial and Territorial Correctional Programs (2022), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510015401>.

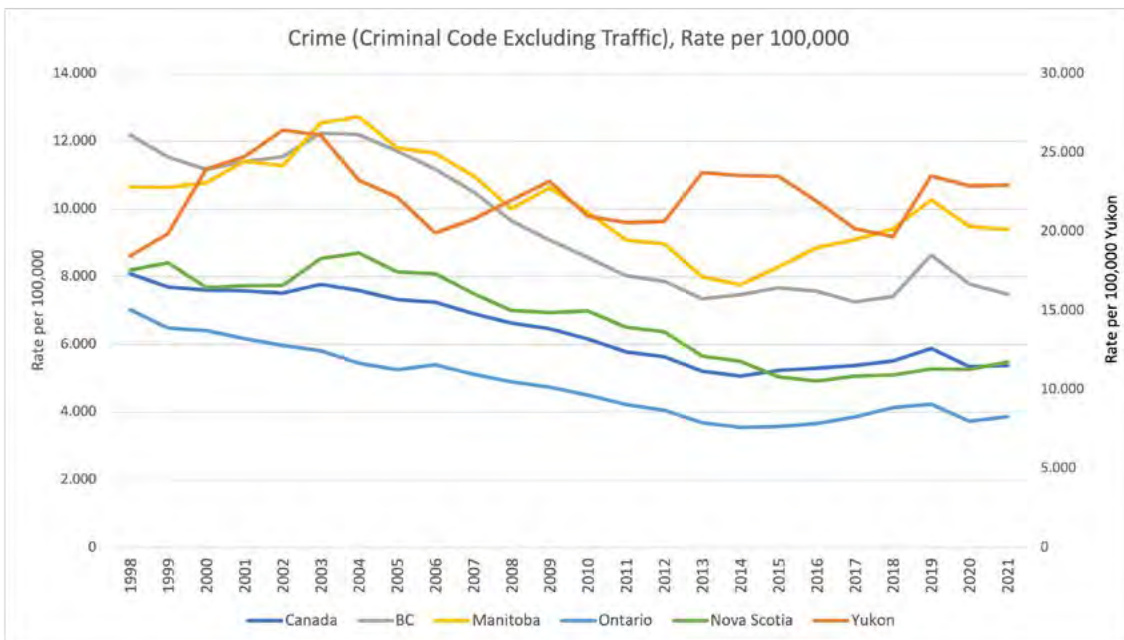
248 Counts refer to the number of people in custody on an average night in the year reported.

trial detention has increased from 5,327 in 1994/95 (2,948 in 1979/80) to a high of 15,505 in 2019/20 (14,415 in 2021/22). The number of people in pre-trial detention has exceeded the number of people in sentenced custody every year since 2004/05.



Jurisdictions of Study

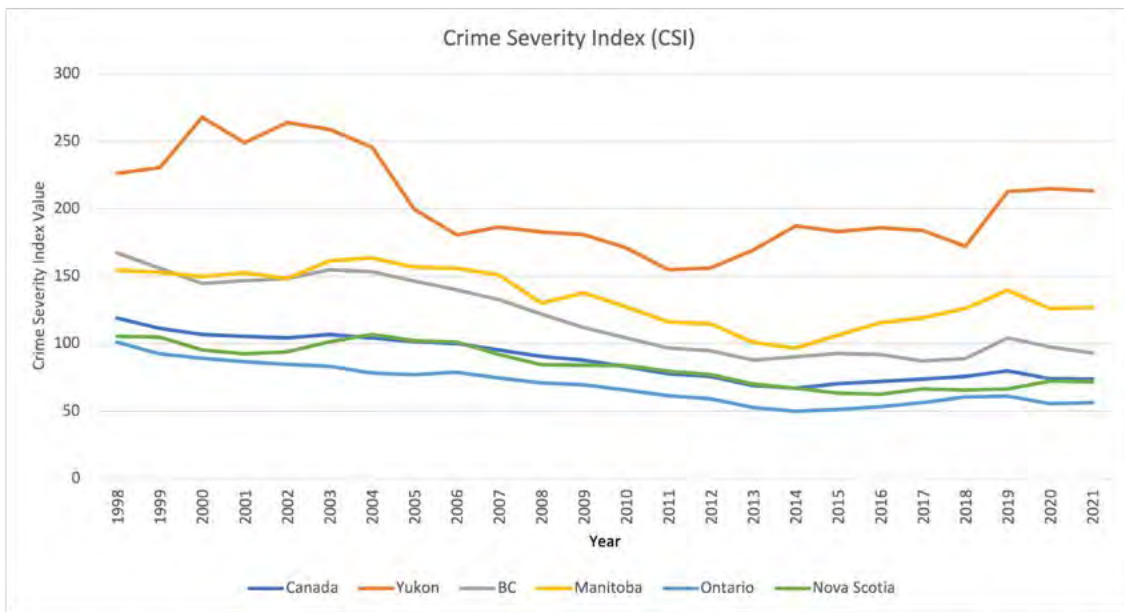
Across Canada generally and within the specific jurisdictions studied, the incident-based crime rate[249] has declined over time, from 8,092 per 100,000 in 1998 to a low of in 5,061 per 100,000 in 2014. Since 2014, the crime rate has increased marginally to a high of 5,877 incidents per 100,000 in 2019, falling to 5,395 per 100,000 in 2021. These trends are reflected across the jurisdictions studied in this report. One exception would be the Yukon, where the crime rate has seen more up and down fluctuations; in 1998, there were 18,448 incidents per 100,000, rising to a high of 26,428 in 2003 and declining to 22,938 per 100,000 in 2019.



[249] Statistics Canada, Table 35-10-0177-01 – Incident-Based Crime Statistics, By Detailed Violations, Canada, Provinces, Territories, Census Metropolitan Areas (2022), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510017701>.

The Crime Severity Index (CSI) provides a measure of the severity of police-reported crime. The CSI assigns a severity weight to each criminal offence to provide a relative measure of each crime's seriousness. The level of seriousness is determined on the basis of sentences handed down in the courts. Crimes that are more serious are assigned higher weights and less serious offences are assigned lower weights.

The CSI[250] trends follow a similar pattern to the incident-based crime rate. The CSI in Canada declined from 119 in 1998 (the first year the CSI was measured) to a low of 67 in 2014, before increasing to 80 in 2019 and falling to 74 in 2021.[251] A similar pattern is seen across the jurisdictions, with Manitoba showing a steeper increase since 2014. The trends in Yukon reveal a decline over time, from a high of 268 in 2000 to a low of 155 in 2011, before some fluctuating increases to 213 in 2019.

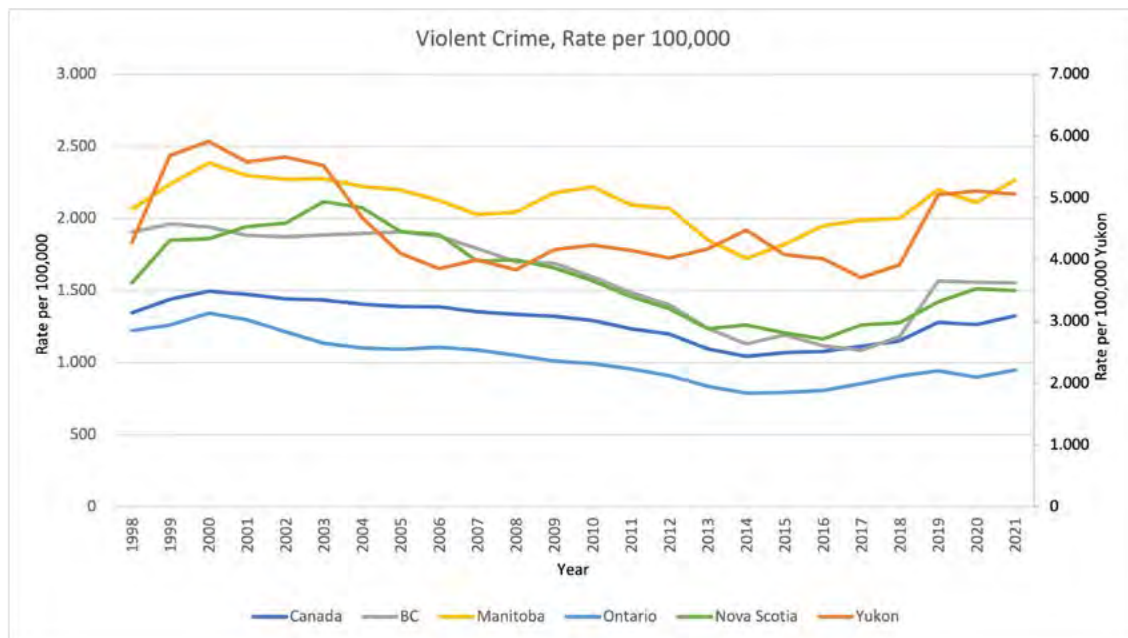


The violent crime rate[252] decreased from a high of 1,494 per 100,000 in 2000 to a low of 1,044 per 100,000 in 2014 before increasing to 1,380 per 100,000 in 2019 (though still lower than the violent crime rate in 1998) and falling to 1,323 in 2021. This pattern is largely seen across the jurisdictions, with Manitoba and Yukon seeing more fluctuations and a steadier increase over time. The property crime rate (not presented here) follows a similar pattern.

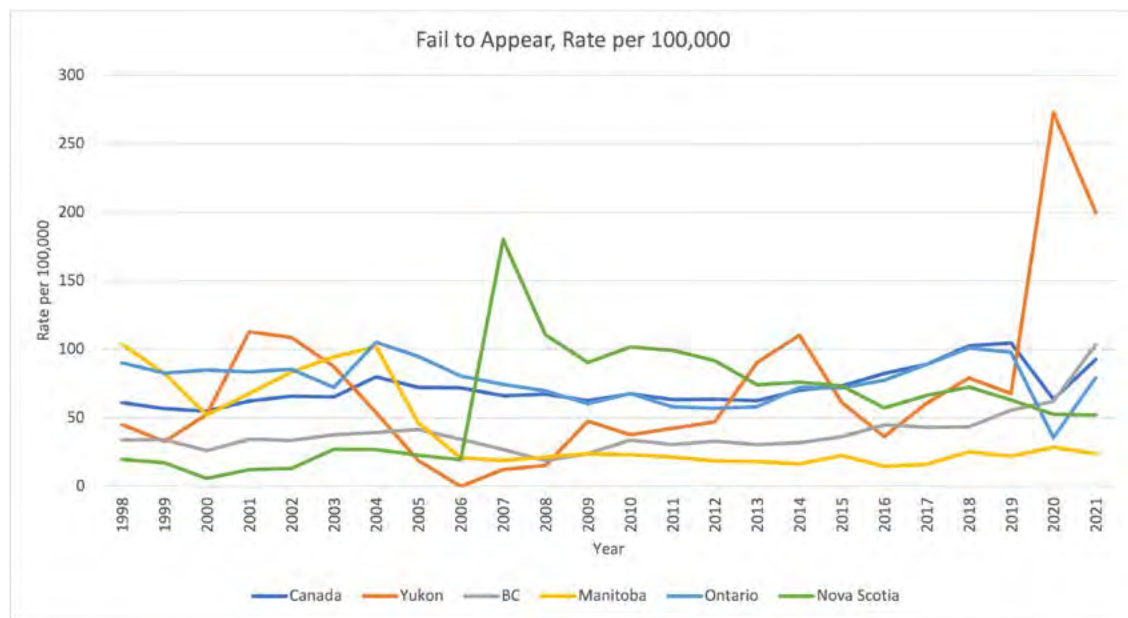
[250] Statistics Canada, Table 35-10-0026-01 – Crime Severity Index and Weighted Clearance Rates, Canada, Provinces, Territories and Census Metropolitan Areas (2022), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510002601>.

[251] *Ibid*.

[252] Statistics Canada, Table 35-10-0177-01 – Incident-Based Crime Statistics by Detailed Violations, Canada, Provinces, Territories, Census Metropolitan Areas (2022), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510017701>.

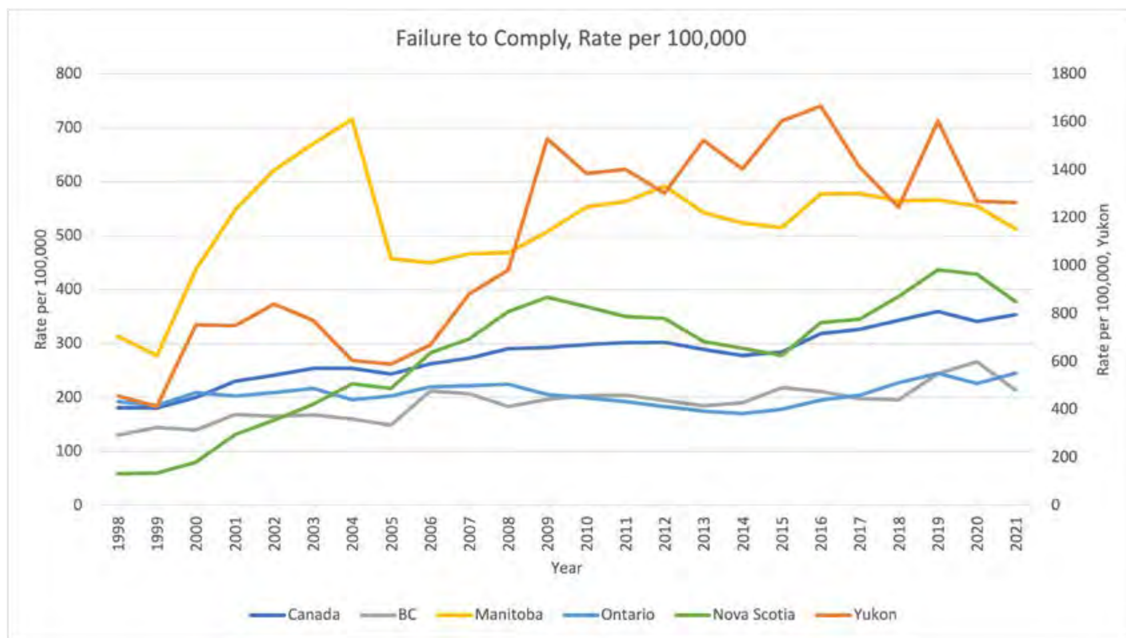


Concern about an accused not returning to court is not only the primary ground for detention but is the original purpose of bail. Historically, failing to appear was the only concern of the court; the addition of the secondary ground for detention as a bail consideration came later. The crime of failing to appear has remained relatively consistent over time. Across Canada, the rate per 100,000 has fluctuated from a low of 54.7 per 100,000 in the year 2000 to a high of 105 per 100,000 in 2019 before falling to 93 in 2021.[253]

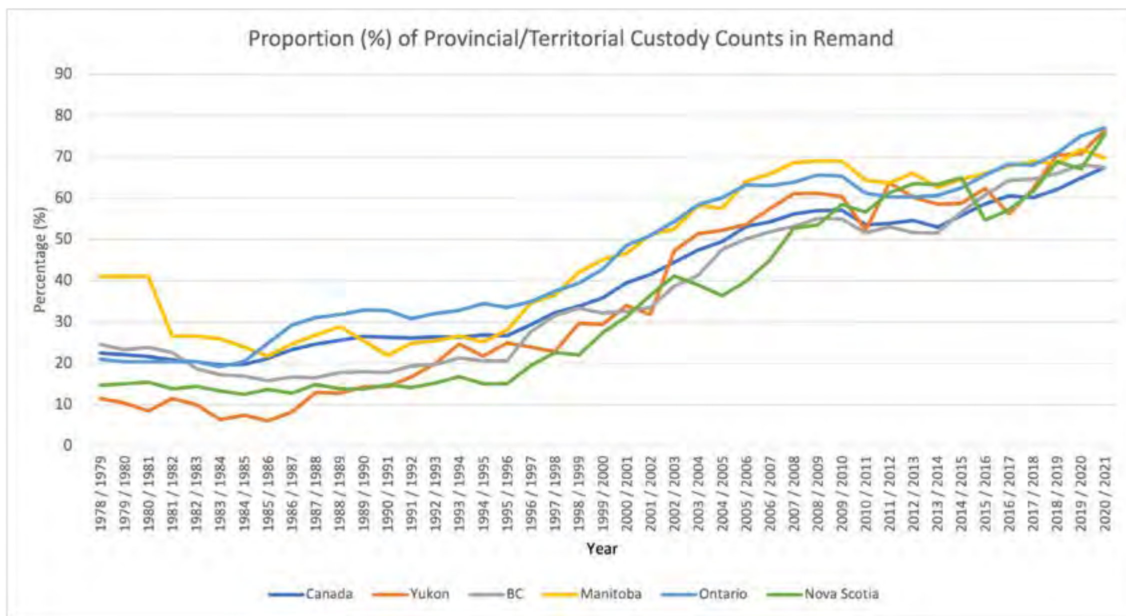


Failure to comply charges are far more common and have been increasing over time. Across Canada, the rate has grown from 181 per 100,000 in 1998 to 360 in 2019 and 354 in 2021.[254] The data from Manitoba and Yukon depict higher rates than the national average and more fluctuations in the rates over time. In 2019 in Manitoba the rate of failure to comply was 566 per 100,000 and in Yukon it was 1,263 per 100,000.

[253] *Ibid.*
[254] *Ibid.*



The constitution of the provincial custodial population has undergone a radical shift in the last 35 years. The proportion of the provincial/territorial custodial population that is in pre-trial detention has been increasing almost every year since the early 1980s.[255] In 1984/85, 20% of the provincial/territorial jail population was in pre-trial detention in Canada; in 2019/20 65% and in 2021/22 70.5% was in pre-trial detention. This pattern is replicated across the jurisdictions. Ontario has consistently had the highest proportions in remand; in 2019/20 75% and in 2021/22 77.0% of the provincial jail population was in remand.

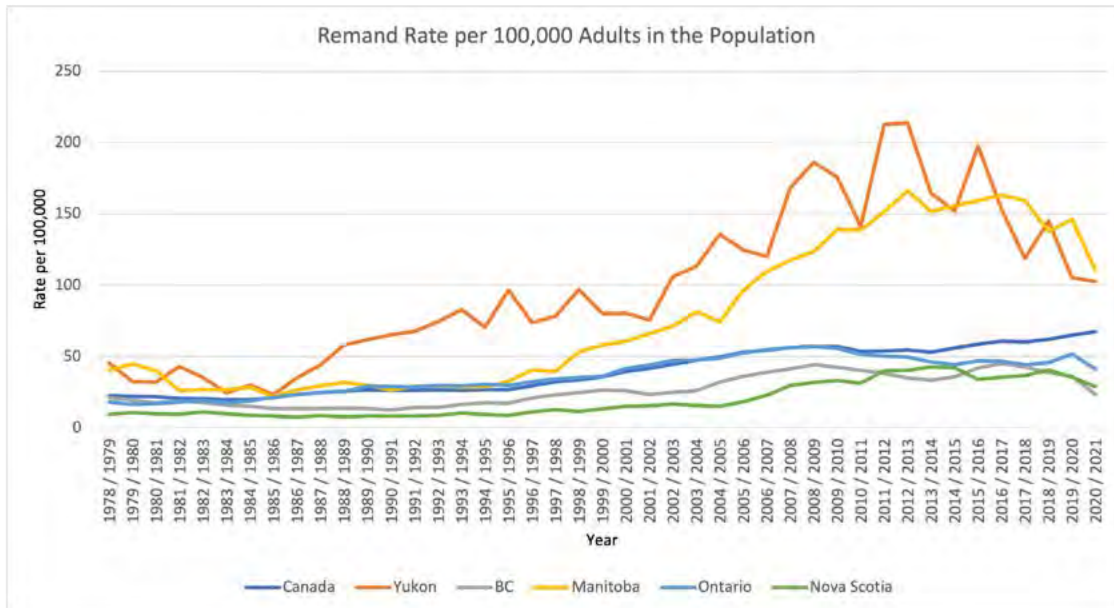


Each of the jurisdictions of study has seen an increase in the rate[256] with which accused are held in pre-trial detention, with decreases coinciding with the onset of the pandemic. Manitoba and Yukon have seen the greatest increases. The remand rate in Manitoba increased from a low of 22.1 per 100,000 in 1985/86 to a high of 163.0 per 100,000 in 2017/18, before starting to decline. In Yukon, the remand rate has seen considerable year-over-year

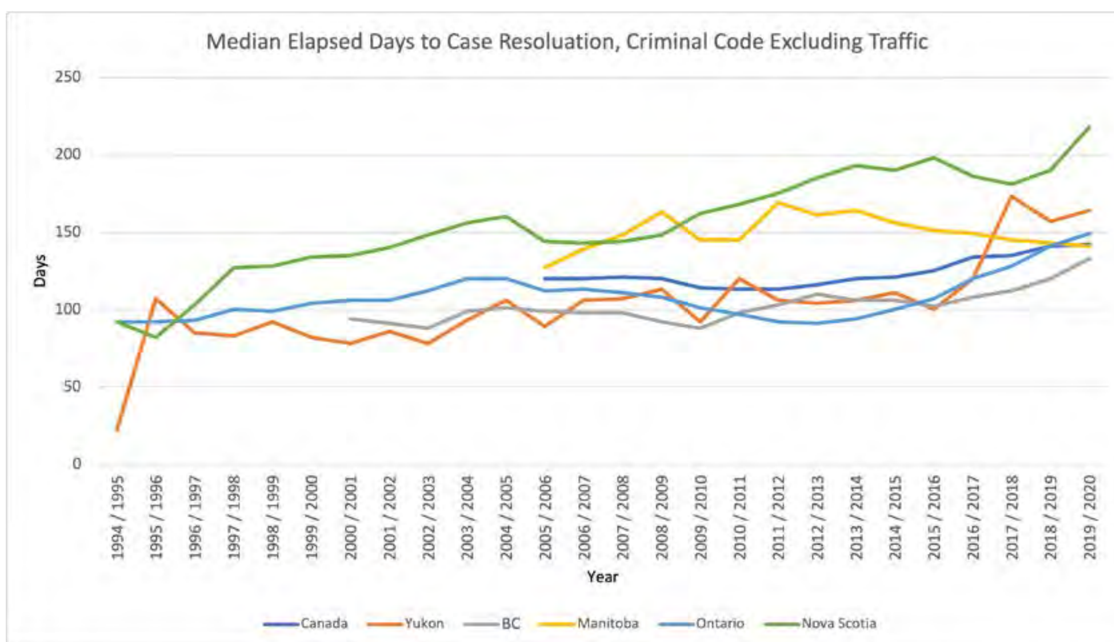
[255] Statistics Canada, Table 35-10-0154-01 – Average Counts of Adults in Provincial and Territorial Correctional Programs (2022), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510015401>.

[256] *Ibid*.

fluctuations, but was on a generally upwards trend until 2015/16. In 1985/86, the remand rate in Yukon was 23.4 per 100,000, while in 2015/16 the remand rate was 197.6 per 100,000.



Once charged with a criminal offence, accused face an increasing number of median days before their case is resolved. The median elapsed time[257] in Canada in 2005/06 (the earliest available year) was 120 days; in 2019/20 it had increased to 142 days. Over a longer period of time, other jurisdictions have seen a relatively steady increase in the median time between charging and resolution. In Nova Scotia in 2019/20, the median number of days to resolution was the highest at 218 days.



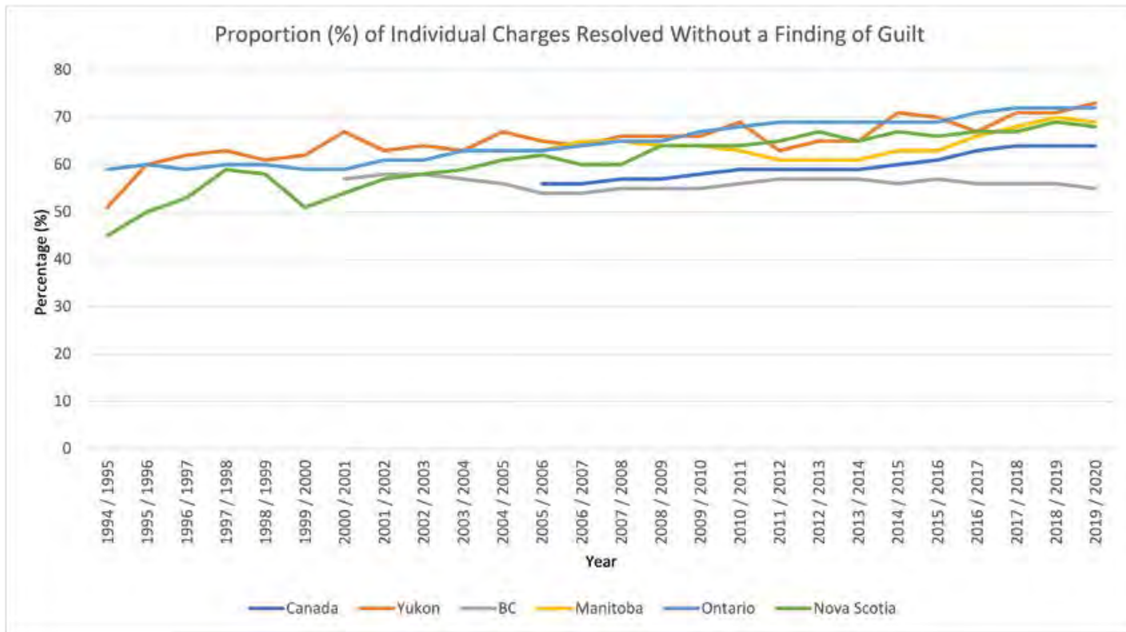
Many individual charges and cases[258] do not result in a finding of guilt.[259] This means for many accused the processing through the court system constitutes most or all of their sanctioning and experience with the criminal justice process.

[257] Statistics Canada, Table 35-10-0029-01 – Adult Criminal Courts, Cases by Median Elapsed Time in Days (2022), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510002901>.

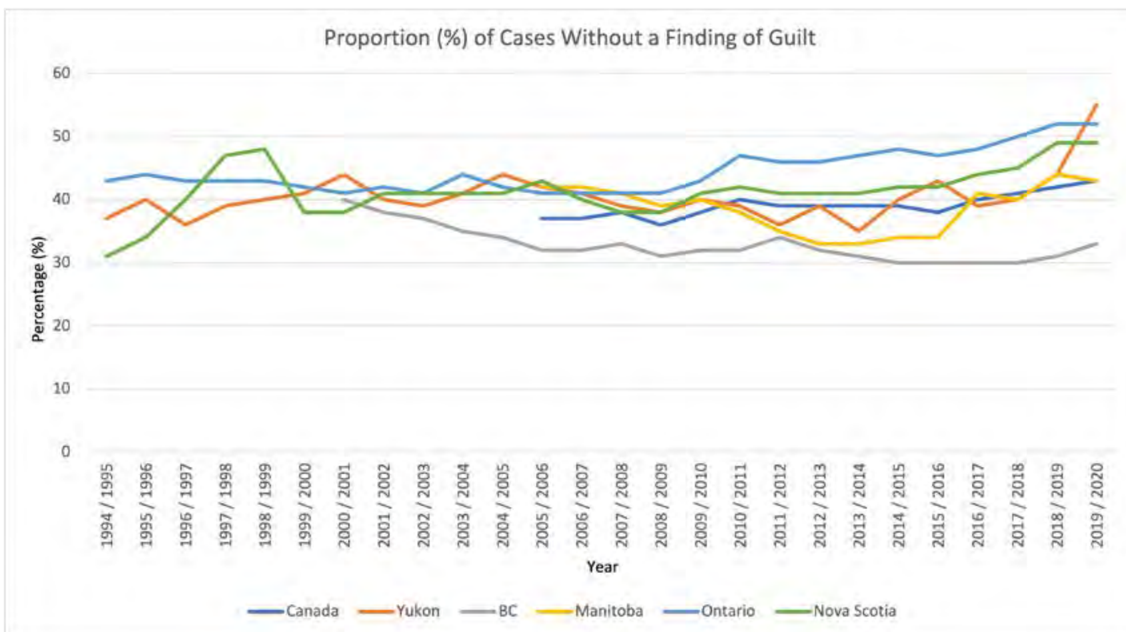
[258] Statistics Canada defines a case as "all charges against the same person having one or more key overlapping court dates (date of offence, date of initiation, date of first appearance, date of decision, date of sentencing), online: https://www150.statcan.gc.ca/n1/pub/85-002-x/2008010/definitions-eng.htm.

[259] Statistics Canada, Table 35-10-0027-01 – Adult Criminal Courts, Number of Cases and Charges by Type of Decision (2022), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510002701>.

Looking at individual charges,[260] in 2019/20 across Canada 64% of charges were resolved without a finding of guilt. With the exception of British Columbia (55%), the proportion of charges resolved without a guilty finding in the jurisdictions studied exceeded the national average: Yukon 73%, Manitoba 69%, Ontario 72%, Nova Scotia 68%.



In Canada in 2019/20, 43% of cases were resolved without a finding of guilt.[261] This proportion is consistent over time and across the jurisdictions studied. In both Yukon and Ontario, more than half of all cases are resolved without a finding of guilt.



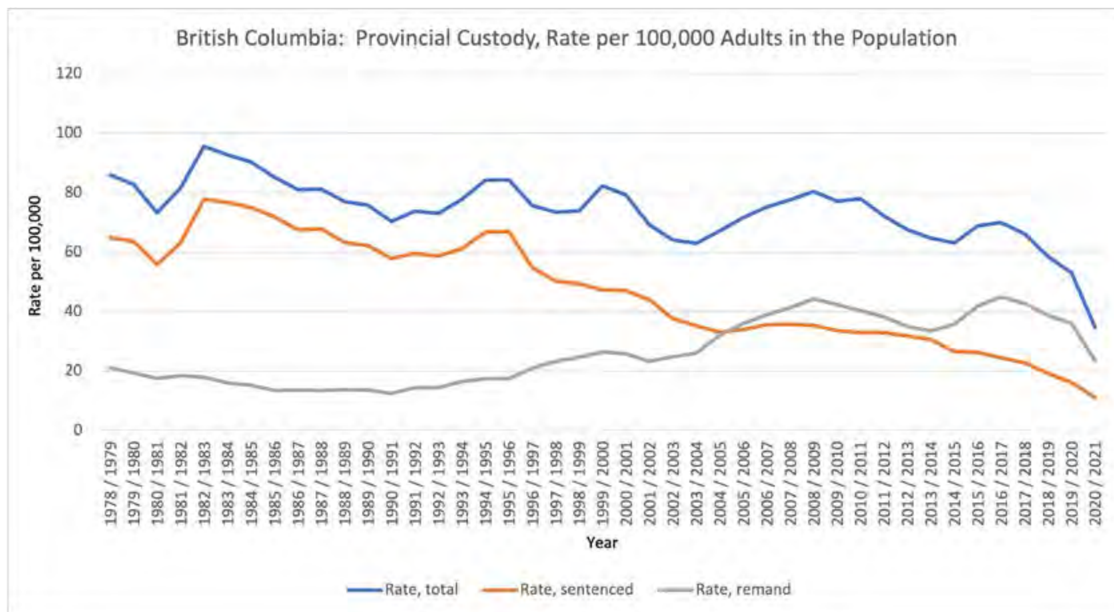
[260] *Ibid.*
[261] *Ibid.*

Appendix D: Statistical Data by Jurisdiction

Across the jurisdictions of study, patterns similar to those seen across the country emerge. Across all jurisdictions presented below, the number of people in remand provincial custody exceeds the number of people in sentenced provincial custody and the rate with which pre-trial detention is used exceeds the rate of provincial sentenced custody.

British Columbia

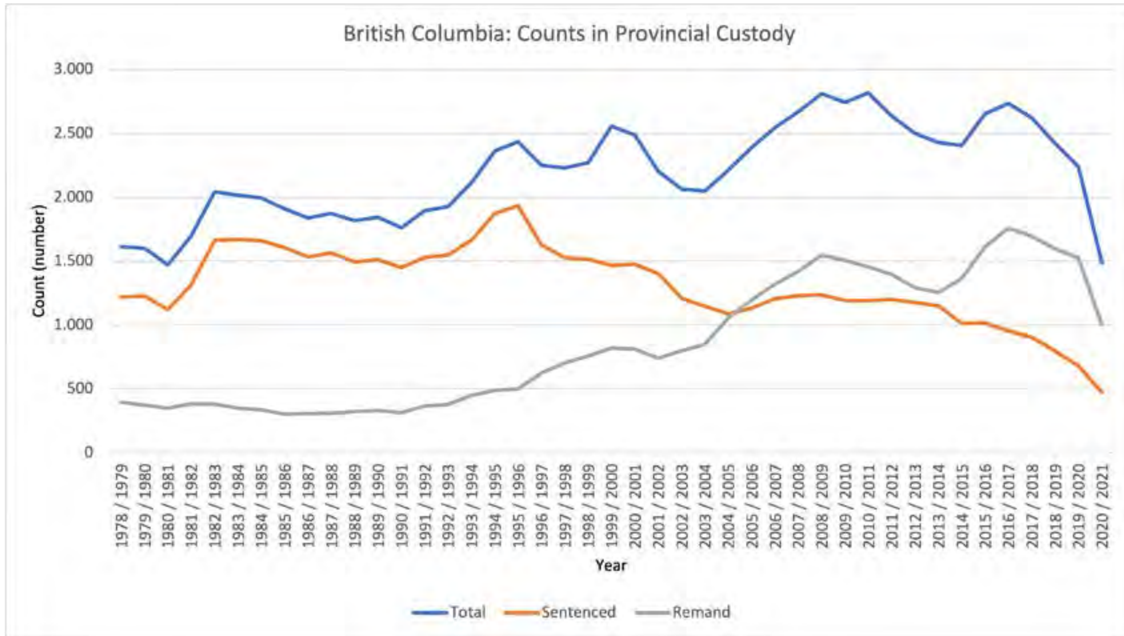
In British Columbia, the total provincial custodial rate[262] per 100,000 adults in the population demonstrates a clear decline over time, driven by a decline in the rate of sentenced provincial custody. The total provincial incarceration rate declined from 95.6 per 100,000 in 1982/83 to 58.5 per 100,000 in 2018/19 and then further declined to 34.7 per 100,000 in 2020/21. The provincial sentenced custody rate declined from 77.7 per 100,000 in 1982/83 to 19.2 per 100,000 in 2018/19 and then further declined to 11.0 per 100,000 in 2020/21. The pre-trial detention rate was consistently low in the 1980s before starting to increase in the early 1990s. At its lowest, the pre-trial detention rate was 12.5 per 100,000 in 1990/91. The rate then steadily increased, more than tripling to reach a high of 45.0 per 100,000 in 2016/17 before declining to 38.6 in 2018/19 and then further to 23.4 in 2020/21 – almost double the rate of 30 years earlier.



The number of people[263] in provincial custody has fluctuated over time, rising from a low of 1,469 people in 1980/81 to a high of 2,818 people in 2010/11 before starting to decline again in 2016/17, reaching a low of 1,488 people in 2020/21. The number of people in pre-trial detention has increased from a low of 350 in 1980/81 to a high of 1,757 in 2016/17 before starting to decline. While the number of people in pre-trial detention has increased over time, the number of people in sentenced custody has declined from a high of 1,933 in 1995/96 to a low of 472 in 2020/21. The number of people in pre-trial detention has exceeded the number of people in provincial sentenced custody since 2005/06 – in 2020/21, 67% of the provincial custodial population was in pre-trial detention.

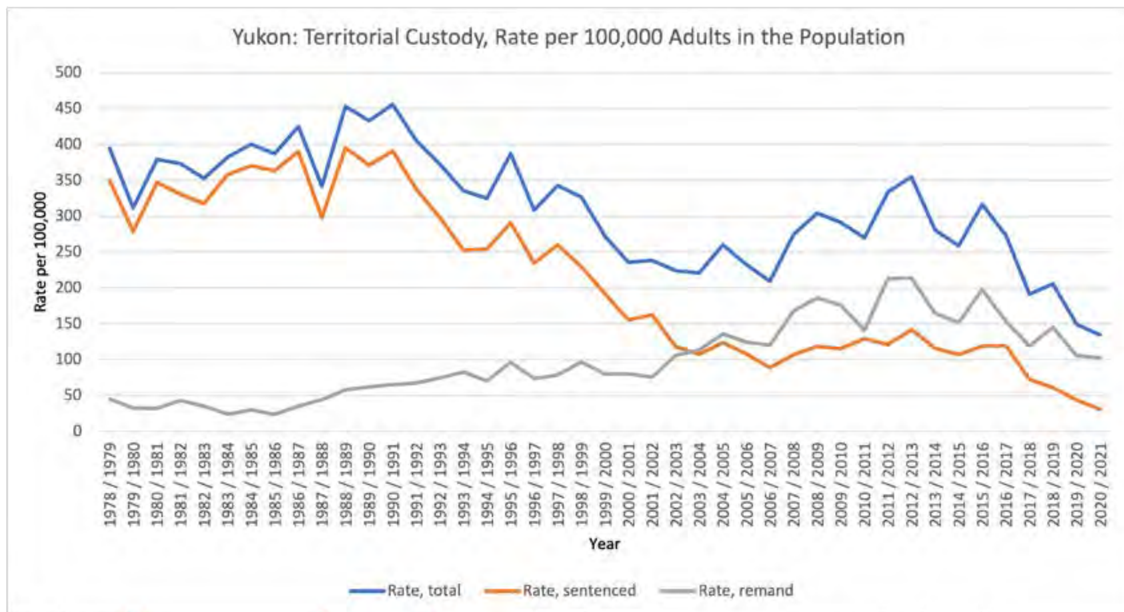
[262] Statistics Canada, Table 35-10-0154-01 – Average Counts of Adults in Provincial and Territorial Correctional Programs (2022), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510015401>.

[263] *Ibid*.



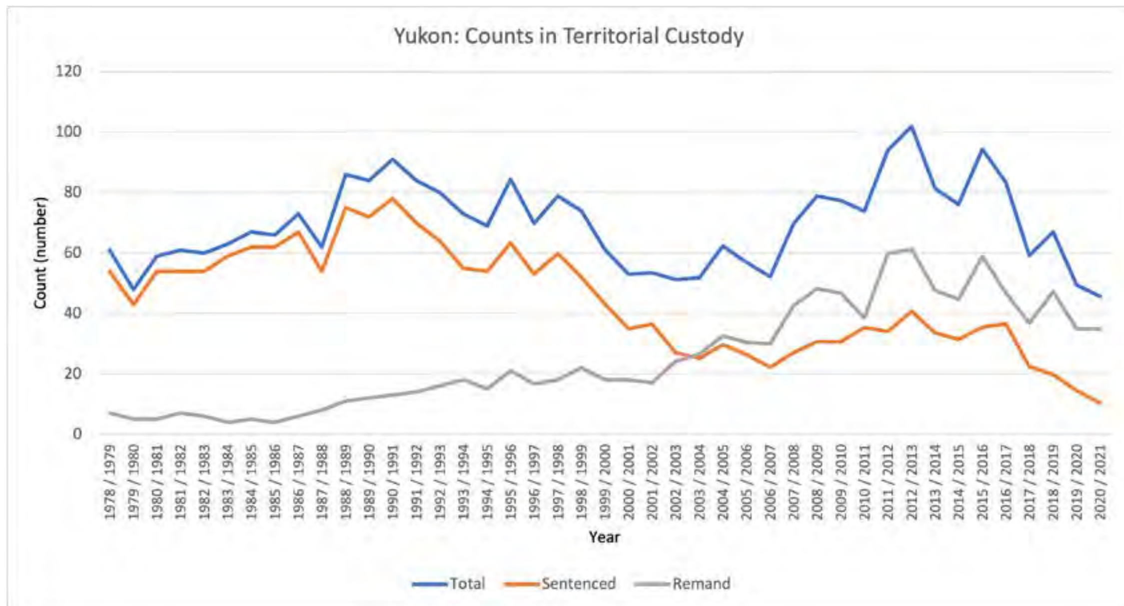
Yukon

In Yukon, the total territorial custodial rate[264] per 100,000 adults in the population demonstrates a fluctuating decline over time, driven by a decline in the rate of sentenced territorial custody. The total territorial incarceration rate declined from 456.1 per 100,000 in 1990/91 to 205.8 per 100,000 in 2018/19 and then further declined to 134.6 per 100,000 in 2020/21. The territorial sentenced custody rate declined from 390.9 per 100,000 in 1990/91 to 60.8 per 100,000 in 2018/19 and then further declined to 30.4 per 100,000 in 2020/21. The pre-trial detention rate was consistently low in the early 1980s before starting to increase in 1986/87. At its lowest, the pre-trial detention rate was 23.5 per 100,000 in 1985/86. The rate then steadily increased more than nine times to reach a high of 213.6 per 100,000 in 2012/13 before declining to 145.0 in 2018/19 and then further to 102.7 in 2020/21 – more than quadruple the rate of 35 years earlier.



[264] *Ibid*.

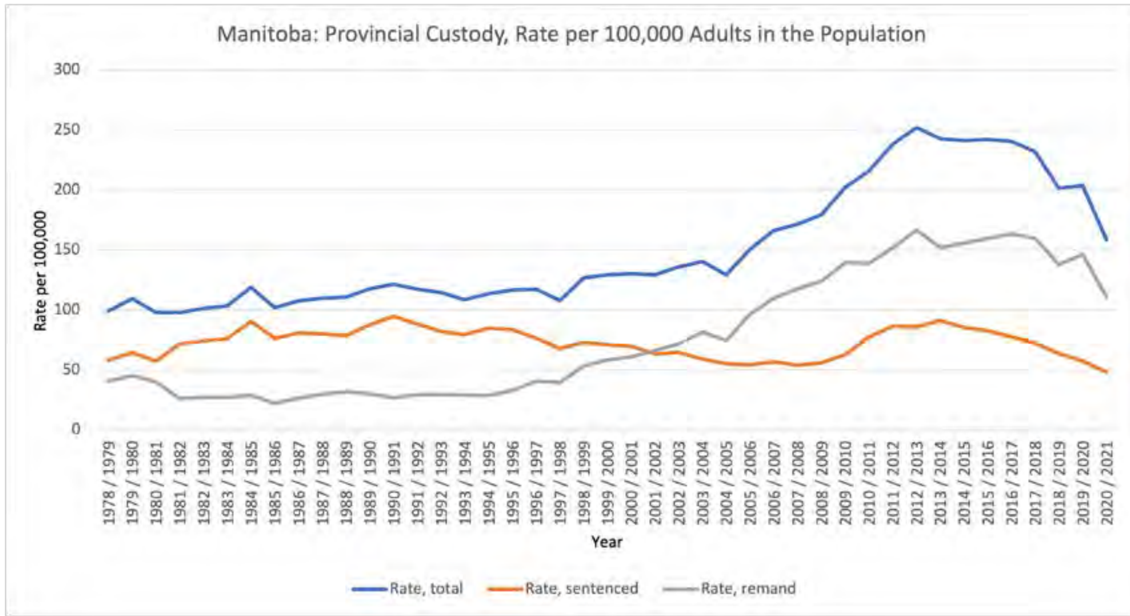
The number of people[265] in territorial custody has fluctuated over time, rising from a low of 48 people in 1979/80 to a high of 101.9 people in 2012/13 before starting to decline, reaching a low of 45.6 people in 2020/21. The number of people in pre-trial detention has increased from a low of four in 1985/86 to a high of 59.9 in 2011/12 before starting to decline. While the number of people in pre-trial detention has generally increased over time, the number of people in sentenced custody has declined from a high of 390.9 in 1990/91 to a low of 30.4 in 2020/21. The number of people in pre-trial detention has exceeded the number of people in provincial sentenced custody since 2002/03. In 2020/21, 76% of the territorial custodial population was in pre-trial detention.



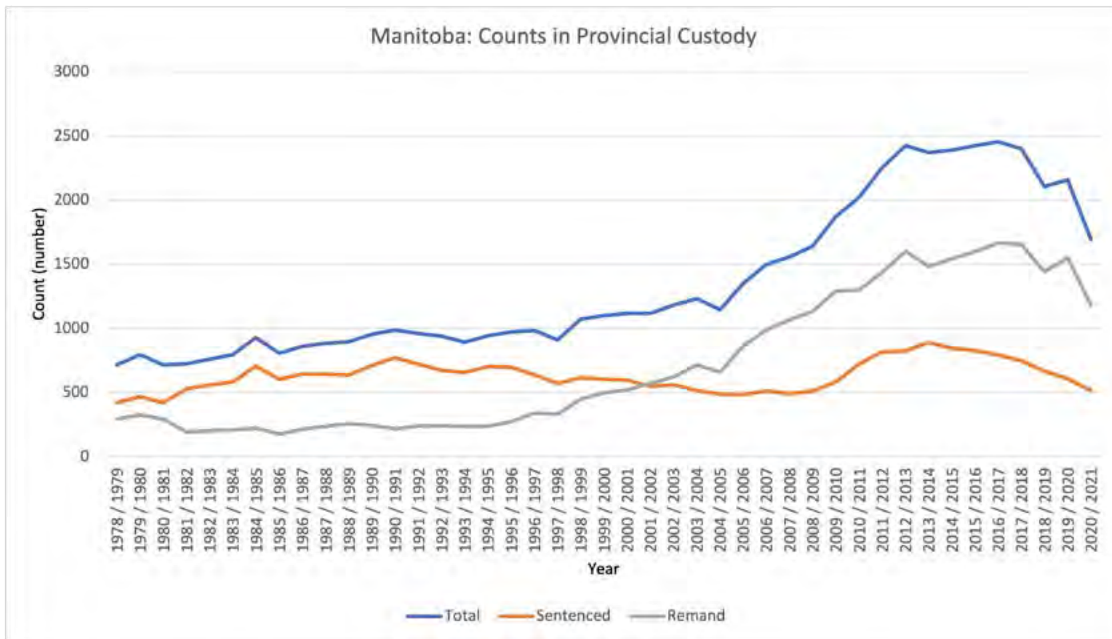
Manitoba

In Manitoba, the total provincial custodial rate[266] per 100,000 adults in the population indicates a clear increase over time, driven by increases in both the pre-trial and sentenced custody rate. The total provincial incarceration rate increased from 97.5 per 100,000 in 1980/81 to a high of 252 per 100,000 in 2012/13, before starting to decline. In 2018/19 the provincial custody rate was 201.2 per 100,000, which then fell further to 158.4 in 2020/21. The provincial sentenced custody rate increased from 57.2 per 100,000 in 1980/81 to 63.4 per 100,000 in 2018/19 and then declined to 47.9 per 100,000 in 2020/21. The pre-trial detention rate was consistently low in the 1980s before starting to increase in the mid1990s. At its lowest, the pre-trial detention rate was 22.1 per 100,000 in 1985/86. The rate then steadily increased, reaching a high of 166.2 per 100,000 in 2012/13 before declining to 137.7 in 2018/19 and then further to 110.4 in 2020/21 – more than quadruple the rate of 30 years earlier.

[265] *Ibid*.
[266] *Ibid*.



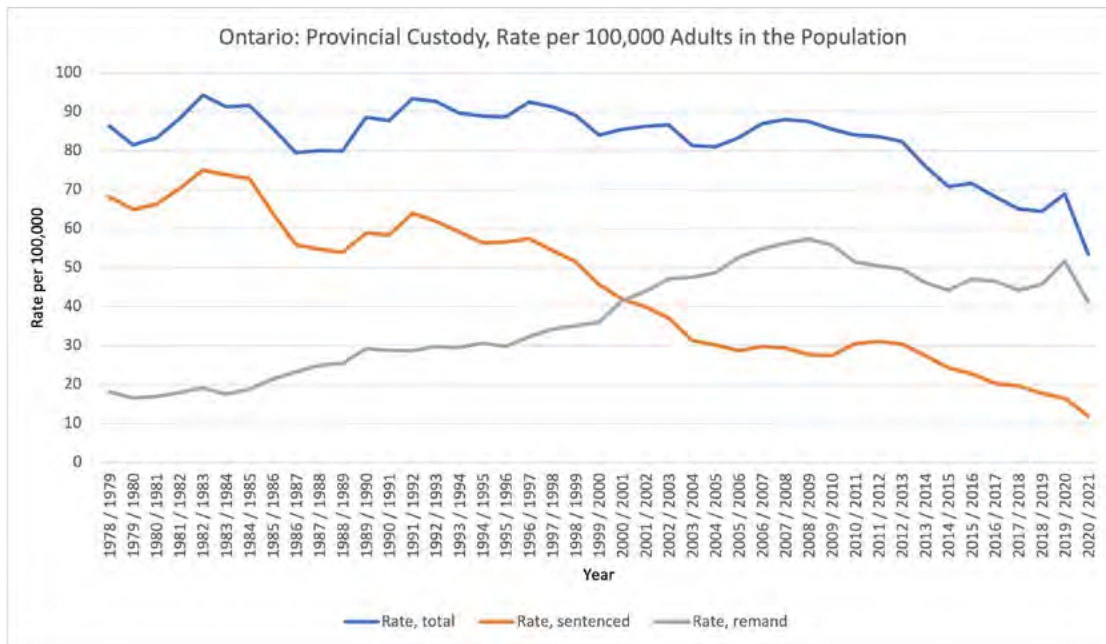
The number of people[267] in provincial custody has fluctuated over time, rising from a low of 714 people in 1980/81 to a high of 2,454 people in 2016/17 before starting to decline to 2,104 in 2018/19 and then further to 1,695 in 2020/21. The number of people in pre-trial detention has increased from a low of 175 in 1985/86 to a high of 1,664 in 2016/17 before declining to 1,441 in 2018/19 and then further to 1,182 in 2020/21. While the number of people in pre-trial detention has generally increased over time, the number of people in sentenced custody has declined from a high of 888 in 2013/14 to a low of 513 in 2020/21. The number of people in pre-trial detention has exceeded the number of people in provincial sentenced custody since 2001/02 – in 2020/21, 69.7% of the provincial custodial population was in pre-trial detention.



[267] *Ibid*.

Ontario

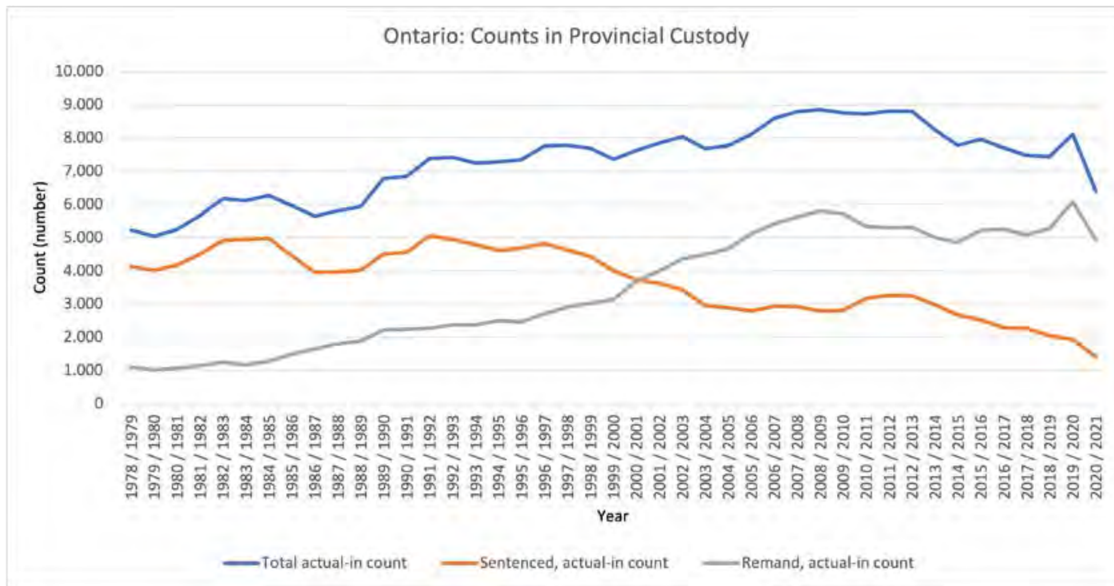
In Ontario, the total provincial custodial rate[268] per 100,000 adults in the population demonstrates a relatively consistent decline over time, driven by a decline in the rate of sentenced provincial custody. The total provincial incarceration rate declined from 94.2 per 100,000 in 1982/83 to 54.4 per 100,000 in 2018/19 and then further declined to 53.4 per 100,000 in 2020/21. The provincial sentenced custody rate declined from 75.0 per 100,000 in 1982/83 to 17.7 per 100,000 in 2018/19 and then further declined to 11.9 per 100,000 in 2020/21. The pre-trial detention rate was consistently low until the late 1980s. At its lowest, the pre-trial detention rate was 16.6 per 100,000 in 1979/80. The rate then steadily increased, more than tripling to reach a high of 57.4 per 100,000 in 2008/09 before declining to 45.7 per 100,000 in 2018/19 and then further to 41.2 in 2020/21.



The number of people[269] in provincial custody has fluctuated over time, rising from 5,039 people in 1979/80 to a high of 8,855 people in 2008/09 before starting to decline again in 2016/17, reaching a low of 6,405 people in 2020/21. The number of people in pre-trial detention has increased from a low of 1,034 in 1979/80 to a high of 6,083 in 2019/20 before declining to 4,993 in 2020/21. While the number of people in pre-trial detention has generally increased over time, the number of people in sentenced custody has declined from a high of 5,052 in 1991/92 to a low of 1,424 in 2020/21. The number of people in pre-trial detention has exceeded the number of people in provincial sentenced custody since 2001/02. In 2020/21, 77.0% of the provincial custodial population was in pre-trial detention.

[268] *Ibid.*

[269] *Ibid.*



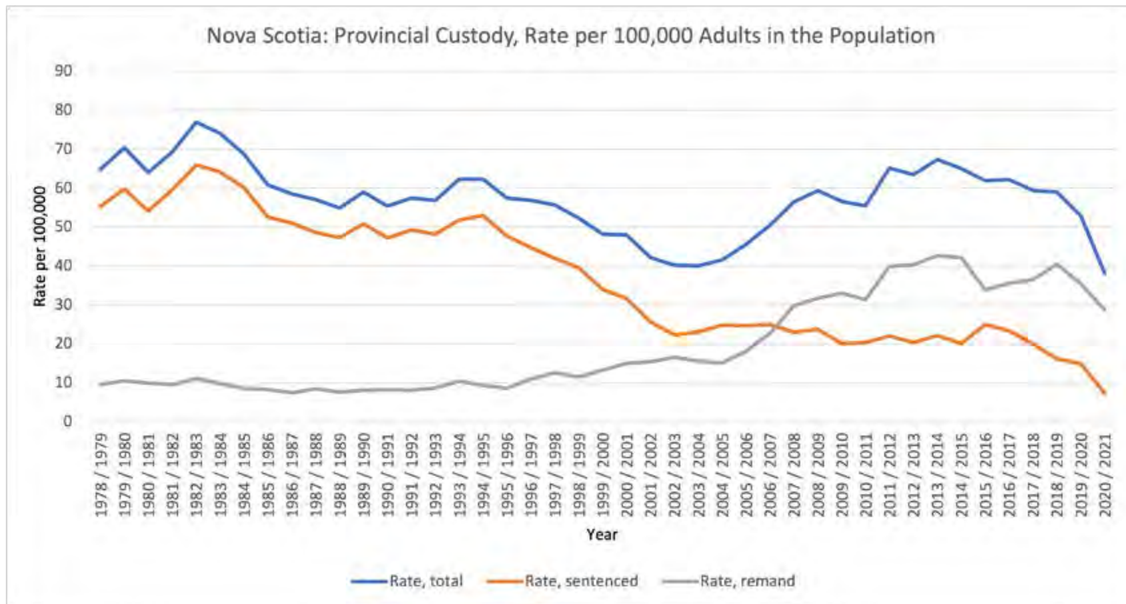
The Ontario Court of Justice[270] provides additional information on case processing times. In 2019, cases with a final case disposition that began case processing in bail court spent an average of 11.4 days in the bail process, making 2.1 appearances. Accused who were released on bail spent 3.8 days in the bail process and made two appearances, while accused who were denied bail spent 14.6 days in the bail process and made four appearances. Cases that started with a bail appearance took an average of 143 days and 10 court appearances to be resolved.

Nova Scotia

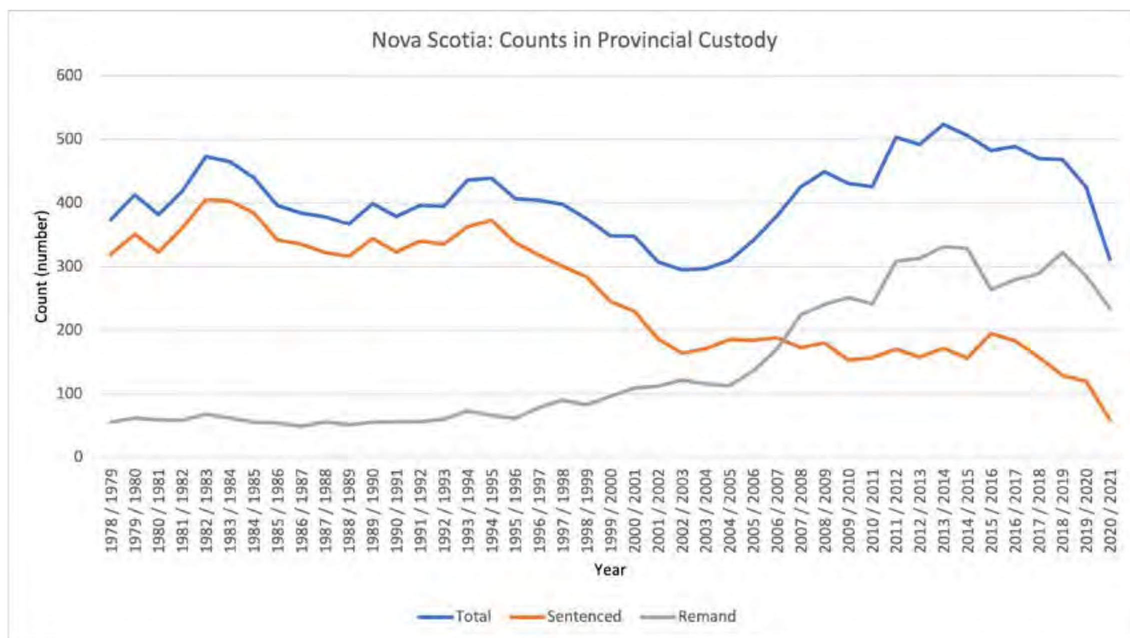
In Nova Scotia, the total provincial custodial rate[271] per 100,000 adults in the population has fluctuated over time. The total provincial incarceration rate has moved between a low of 40.1 per 100,000 in 2003/04 and a high of 67.4 in 2013/14 before declining to 59.0 per 100,000 in 2018/19 and further to 38.2 in 2020/21. The provincial sentenced custody rate declined from 65.9 per 100,000 in 1982/83 to 16.2 per 100,000 in 2018/19 and then further declined to 7.3 per 100,000 in 2020/21. The pre-trial detention rate was consistently low in the 1980s before starting to increase in the early 1990s. At its lowest, the pre-trial detention rate was 7.5 per 100,000 in 1986/87. The rate then steadily increased to a high of 42.7 per 100,000 in 2013/14 before declining. In 2018/19 the pre-trial detention rate was 40.6 per 100,000 which declined to 28.8 in 2020/21 – more than triple the rate 30 years earlier.

270 Ontario Court of Justice, Court Statistics (2022), online: https://www.ontariocourts.ca/ocj/statistics/.

271 Statistics Canada, Table 35-10-0154-01 – Average Counts of Adults in Provincial and Territorial Correctional Programs (2022), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510015401>.



The number of people[272] in provincial custody has fluctuated over time, rising from a low of 295 people in 2002/03 to a high of 524 people in 2013/14 before declining to 311 people in 2020/21. The number of people in pre-trial detention has increased from a low of 51 in 1988/89 to a high of 331 in 2013/14. In 2018/19 there were 322 people in pre-trial custody and in 2020/21 there were 235. While the number of people in pre-trial detention has been on a mostly upward trend over time, the number of people in sentenced custody has declined from a high of 385 in 1984/85 to a low of 60 in 2020/21. The number of people in pre-trial detention has exceeded the number of people in provincial sentenced custody since 2007/08 – in 2020/21, 75.4% of the provincial custodial population was in pre-trial detention.



[272] *Ibid*.

Appendix E: Court Observation Data Report

Descriptive Statistics[273]

Table 1: Days of Observation and Number of Cases Observed

Jurisdiction	Number of Days of Observation	Number of Bail Cases Observed	Average Number of Bail Cases Observed	% Women/Female Accused
British Columbia	21	282	13.4	11.0% (31) Missing in 16.3% (46)
Manitoba	7	146	21.0	15.1% (22) Missing in 11.6% (17)
Ontario	31	642	20.7	21.8% (140) Missing in 0.9% (6)
Nova Scotia	20	214	10.7	18.2% (39) Missing in 18.7% (40)
TOTAL	79	1,284	16.2	18.1% (232) Missing in 8.5% (109)

Legal Representation

Overall, 24.9% of observed accused used private counsel at the bail appearance observed[274] and 51.9% used the services of duty counsel. In 23.1% of appearances, the type of legal representation is unknown/missing.

Table 2: Type of Legal Representation

Jurisdiction	Privately Retained or Legal Aid Certificate Counsel	Duty Counsel	Counsel Type Unknown/Missing	TOTAL
British Columbia	48.6% (137)	42.6% (120)	8.9% (25)	100% (282)
Manitoba	12.3% (18)	59.6% (87)	28.1% (41)	100% (146)
Ontario	20.1% (129)	59.0% (379)	20.9% (134)	100% (642)
Nova Scotia	16.8% (36)	37.9% (81)	45.3% (97)	100% (214)
TOTAL	24.9% (320)	51.9% (667)	23.1% (297)	100% (1,284)

There is considerable jurisdictional variation in the type of legal representation used by accused at the bail stage. Data from Nova Scotia must be interpreted with caution, as the type of legal representation is unknown/missing in 45.3% of cases. Overall, most accused in bail court are represented by duty counsel (51.9%). This proportion is likely higher, given that in 23.1% of appearances the type of legal representation was unknown/unclear to observers.

Daily Case Outcome

On average, each day 65.6% of all cases were adjourned to another day. The frequency of adjournments varies considerably; in British Columbia 38.7% of bail matters were adjourned, and in Ontario 74.0% of cases were adjourned each day. The proportion of bail appearances in which the matter was adjourned has remained relatively

[273] When percentages do not add up perfectly to 100% (i.e. are off by 0.1%), this is due to rounding error.

[274] Privately retained and Legal Aid certificate counsel are combined due to the difficulty of determining if an accused used defence counsel privately retained or through a Legal Aid certificate.

consistent over time.[275] For example, in *Set up to Fail*,[276] across jurisdictions 54.2% of cases were adjourned on the day they were observed. The high proportion is concerning as it is important to remember that each adjournment is effectively a short detention order – the accused is required to remain in detention until the next appearance and there is no guarantee a bail decision will be made on that day.

In 27.9% of cases, a bail decision (release or detain) was made on the day observed. This proportion is similar to what was observed in CCLA's 2014 report, where in 36.1% of observed appearances a bail decision was made. There was considerable variability across jurisdictions, both now and then, with British Columbia making a bail decision in 54.3% (32.1% in 2014) of cases before the court each day and Ontario making a bail decision in only 18.7% (33.1% in 2014) of cases.

Overall, few accused (1.9%) were formally denied bail. (In 2014, 8.8% of appearances observed resulted in a detention order.) This varied from a high of 6.2% (22.7% in 2014) in Manitoba to a low of 0.9% in Ontario (3.3% in 2014) and Nova Scotia (3.9% in 2014).

On an average day, 26.0% of accused across all courts observed were released on bail (27.3% in 2014). The proportion of cases with a bail release order on an average day ranged from a high of 51.4% (20.1% in 2014) in British Columbia to a low of 13.7% (28.4% in 2014) in Manitoba.

Table 3: Case Outcome

Juris.	Detain	Release	Adjourn	Traverse*	Plea/ Sentence	Misc. (charges withdrawn, bail variation)	Missing/ unknown outcome	TOTAL
British Columbia	2.8% (8)	51.4% (145)	38.7% (109)	0.0% (0)	6.0% (17)	1.1% (3)	0.0% (0)	100% (282)
Manitoba	6.2% (9)	13.7% (20)	70.5% (103)	9.6% (14)	0.0% (0)	0.0% (0)	0.0% (0)	100% (146)
Ontario	0.9% (6)	17.8% (114)	74.0% (475)	4.5% (29)	0.0% (0)	0.6% (4)	2.2% (14)	100% (642)
Nova Scotia	0.9% (2)	25.7% (55)	72.4% (155)	0.5% (1)	0.0% (0)	0.0% (0)	0.5% (1)	100% (214)
TOTAL	1.9% (25)	26.0% (334)	65.6% (842)	3.4% (44)	1.3% (17)	0.6% (7)	1.3% (15)	100% (1,284)

Note: The reason a case is traversed to another court is generally due to an offer of assistance, with another court hearing the consent release or show cause hearing. Some cases are also traversed to plea court. The outcomes in these cases, however, are unknown as observers were unable to follow the accused to another courtroom.

[275] Nicole Marie Myers, "The More Things Change, the More They Stay the Same: The Obdurate Nature of Pandemic Bail Practices" (2021) 46:4 *Canadian Journal of Sociology* 11; Nicole Marie Myers, "Who Said Anything About Justice? Bail Court and the Culture of Adjournment" (2015) 30:1 *Canadian Journal of Law and Society* 127.

[276] Abby Deshman & Nicole Marie Myers, *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention* (Canadian Civil Liberties Association and Education Trust, 2014).

Adjournments

Consistent with previous research,[277] most (63.3%) requests for an adjournment came from defence counsel or the accused (70.4% in 2014). In 5.2% (9.5% in 2014) of adjournment requests, the Crown asked for the adjournment and 16.2% (6.7% in 2014) of adjournment requests came from the presiding justice. In 15.3% of adjournments (13.4% in 2014), it was unclear who requested the adjournment.

Table 4: Who Requests the Adjournment

	Crown	Defence/ Accused	Justice (Judge or JP)	Unknown	TOTAL
British Columbia	9.2% (10)	73.4% (80)	17.4% (19)	0.0% (0)	100% (109)
Manitoba	13.6% (14)	67.0% (69)	18.4% (19)	1.0% (1)	100% (103)
Ontario	2.3% (11)	58.9% (280)	15.8% (75)	22.9% (109)	100% (475)
Nova Scotia	5.8% (9)	67.1% (104)	14.8% (23)	12.3% (19)	100% (155)
TOTAL	5.2% (44)	63.3% (533)	16.2% (136)	15.3% (129)	100% (842)

Over half (65.5%) of all cases observed in bail court were adjourned on the day observed. The most common reason across the courts for an adjournment request was for no reason to be provided to the court (30.2%, similar to 28.3% in 2014). In Ontario, 13.7% (19.0% in 2014) of adjournment requests were for the purposes of finding an appropriate surety for release and a further 18.1% (4.4% in 2014) were to develop a release plan.

Across the courts, 6.1% (5.4% in 2014) of appearances were adjourned when counsel was ready to proceed with a bail hearing, but the court was out of time to hear the matter. This was most common in Ontario, where 9.1% (n=43) of observed bail appearances were adjourned because the court was out of time. In these cases, the accused and their counsel were ready to proceed with their bail hearing. However, the accused was of a lower priority than other accused who had been in custody longer, and the court did not have any more time available to hear contested show cause matters. This is an ongoing problem in Ontario. In our 2014 report, 12.7% (n=20) of appearances in Ontario were adjourned due to the court being out of time.

Table 5: Reason for Adjournment

	Counsel	Release Plan	Surety	Paperwork	Court Service
British Columbia	22.0% (16)	14.7% (16)	0.0% (0)	7.3% (8)	0.9% (1)
Manitoba	6.8% (7)	4.9% (5)	0.0% (0)	0.0% (0)	2.9% (3)
Ontario	14.3% (68)	18.1% (86)	13.7% (65)	2.7% (13)	4.4% (21)
Nova Scotia	12.9% (20)	20.0% (31)	8.4% (13)	7.7% (12)	3.2% (33)
TOTAL	14.1% (119)	16.4% (138)	9.3% (78)	3.9% (33)	3.6% (30)

	Court Out of Time	Show Cause	Plea	Other	No Reason Provided	TOTAL
British Columbia	2.8% (3)	11.0% (12)	3.7% (4)	8.3% (9)	29.4% (32)	100% (9)
Manitoba	0.0% (0)	2.9% (3)	0.0% (0)	2.9% (3)	79.6% (82)	100% (103)
Ontario	9.1% (43)	4.8% (23)	3.2% (15)	5.3% (25)	24.4% (116)	100% (475)
Nova Scotia	3.2% (5)	21.3% (33)	4.5% (7)	3.2% (5)	15.6% (24)	100% (155)
TOTAL	6.1% (51)	8.4% (71)	3.1% (26)	5.0% (42)	30.2% (254)	100% (842)

[277] Nicole Marie Myers, "The More Things Change, the More They Stay the Same: The Obdurate Nature of Pandemic Bail Practices" (2021) 46:4 *Canadian Journal of Sociology* 11; Nicole Marie Myers, "Who Said Anything About Justice? Bail Court and the Culture of Adjournment" (2015) 30:1 *Canadian Journal of Law and Society* 127.

Release on Bail

Across all bail appearances, 26% (n=334) (27.3% in 2014) of accused were released and 1.9% (n=25) (8.8% in 2014) were detained on the date observed. Most accused who applied for bail (n=333) were ultimately released, though in light of the high number of adjournments in all jurisdictions, it may take several appearances to arrive at this outcome. Most accused who were released were released with the consent of the Crown (86.8%, compared to 75.0% in 2014) across all jurisdictions.

Table 6: Accused Released on Bail on Date Observed

	Released with Consent of the Crown	Released After Show Cause Hearing	Missing Mode of Release	TOTAL RELEASES
British Columbia	87.6% (127)	12.4% (18)	0.0% (0)	100% (145)
Manitoba	60.0% (12)	40.0% (8)	0.0% (0)	100% (20)
Ontario	88.6% (101)	11.4% (13)	0.0% (0)	100% (114)
Nova Scotia	90.9% (50)	7.3% (4)	1.8% (1)	100% (55)
TOTAL	86.8% (290)	12.9% (43)	0.3% (1)	100% (334)

The bail courts continue to hold very few contested show cause bail hearings each day. Overall, 0.9 (1.5 in 2014, excluding Manitoba) show cause hearings were held each day across the jurisdictions. Manitoba had the highest average number of show cause hearings at 2.4 hearings.[278]

Table 7: Show Cause Hearings

	Number of Show Cause Hearings	Average Number of Show Cause Hearings Each Day
British Columbia	27	1.3
Manitoba	17	2.4
Ontario	20	0.6
Nova Scotia	11	0.6
TOTAL	75	0.9

Across the courts over half (57.4%; 46.7% in 2014) of the accused who had a full show cause hearing were released, 33.3% (47.6% in 2014) were detained and 9.3% (5.7% in 2014) were adjourned to another day to complete the hearing or for the justice to deliver their decision. The low number of show cause hearings observed in each jurisdiction makes it difficult to assess trends. However, the small number of average daily show cause hearings is consistent the 2014 report and with other earlier studies.[279]

Table 8: Result of Show Cause Hearing

	Detention Order	Release	Hearing Adjourned	TOTAL
British Columbia	29.6% (8)	66.7% (18)	3.7% (1)	100% (27)
Manitoba	52.9% (9)	47.1% (8)	0.0% (0)	100% (17)
Ontario	30.0%(6)	65.0% (13)	5.0% (1)	100% (20)
Nova Scotia	18.2% (2)	36.4% (4)	45.4% (5)	100% (11)
TOTAL	33.3% (25)	57.4% (43)	9.3% (7)	100% (75)

[278] The number of show cause hearings in Manitoba is substantially different from what was observed in 2014, where an average of 7.0 show cause hearings were observed each day. This difference can be attributed to the courtrooms that were observed in each study. For this study, we observed both the remand and show cause bail courts, whereas in 2014, we only observed the show cause bail court.

[279] Nicole Marie Myers, "The More Things Change, the More They Stay the Same: The Obdurate Nature of Pandemic Bail Practices" (2021) 46:4 *Canadian Journal of Sociology* 11; Nicole Marie Myers, "Who Said Anything About Justice? Bail Court and the Culture of Adjournment" (2015) 30:1 *Canadian Journal of Law and Society* 127.

Form of Release

Across all the courts, the most common form of release when the Crown consented to the accused's release was on the accused's own recognizance[280] (40.0%; 38.1% in 2014). A release with bail program supervision[281] was the next most common form of release at 36.9% (15.0% in 2014), followed by surety supervision[282] in 16.6% (30.6% in 2014) of releases. Overall, 53.5% (45.9% in 2014) of accused released with the consent of the Crown were required to be subject to some form of supervision in the community. British Columbia is somewhat anomalous in rarely requiring a surety (0.8%; 0.0% in 2014) for release. However, British Columbia imposes bail supervision the most at 45.7% (20.0% in 2014) of observed consent releases.

The forms of release depicted below suggest a shift in bail practices since our last report and other earlier studies, especially in Ontario[283] – with substantially more accused being released on their own recognizance and fewer accused requiring a surety.

Table 9: Form of Bail Order after Crown Consents to Release

	Cash	Own Recognizance	Bail Program	Surety	Same Bail	Missing	TOTAL
British Columbia	0.8% (1)	33.1% (42)	45.7% (58)	0.8% (1)	17.3% (22)	2.4% (3)	100% (127)
Manitoba	0.0% (0)	75.0% (9)	0.0% (0)	25.0% (3)	0.0% (0)	0.0% (0)	100% (12)*
Ontario	0.0% (0)	37.6% (38)	18.8% (19)	26.7% (27)	7.9% (8)	8.9% (9)	100% (101)
Nova Scotia	0.0% (0)	54.0% (27)	2.0% (1)	34.0% (17)	4.0% (2)	6.0% (3)	100% (50)
TOTAL	0.3% (1)	40.0% (116)	36.9% (78)	16.6% (48)	11.0% (32)	5.2% (15)	100% (290)

Note: The small number of releases in Manitoba must be interpreted with caution.

Release orders after a show cause hearing followed a similar pattern. The small numbers require caution; however, the data below suggest that after a show cause hearing accused are more likely to be required to be subject to the supervision of a bail program (41.9%; 26.5% in 2014) or a surety (30.2%; 28.6% in 2014).

Table 10: Form of Bail When Released After a Show Cause Hearing

	Cash	Own Recognizance	Bail Program	Surety	Same Bail	Missing	TOTAL
British Columbia	0.0% (0)	11.1% (2)	72.2% (13)	5.6% (1)	11.1% (2)	0.0% (0)	100% (18)
Manitoba	0.0% (0)	62.5% (5)	0.0% (0)	37.5% (3)	0.0% (0)	0.0% (0)	100% (8)
Ontario	0.0% (0)	23.1% (3)	30.8% (4)	46.1% (6)	0.0% (0)	0.0% (0)	100% (13)
Nova Scotia	0.0% (0)	0.0% (0)	25.0% (1)	75.0% (3)	0.0% (0)	0.0% (0)	100% (4)
TOTAL	0.0% (0)	23.3% (10)	41.9% (18)	30.2% (13)	4.6% (2)	0.0% (0)	100% (43)

Looking at all releases together, whether the Crown consented to the accused's release or the accused was released by the justice after a show cause hearing, most accused were released on their own recognizance (37.8%; 37.8% in 2014). British Columbia very rarely required a surety for release. When looking at surety and bail supervision together, close to half (47.1%; 48.0% in 2014) of accused released across all the courts were required to be under some form of supervision.

[280] Prior to 2019 amendments, s. 515 of the *Criminal Code* used the terms "undertaking" (a promise made by the accused with no monetary component) and "recognizance" (an acknowledged indebtedness to the Crown). While the current version of the *Criminal Code* no longer employs these terms, they are still commonly used in bail court. As such, we have chosen to continue using the term "own recognizance" to refer to a release where the accused promises to pay a specified amount of money if they fail to comply with the conditions of their release – corresponding to s. 515(2)(b) of the *Criminal Code*.

[281] This form of release refers to accused who were released on what was formerly referred to as their 'own recognizance' with the requirement of bail program supervision.

[282] This form of release refers to accused who were released on what was formerly referred to as their 'own recognizance' with the requirement of surety supervision.

[283] Myers, N.M. (2019). "Jailers in the Community": Responsibilizing Private Citizens as Third-Party Police. *Canadian Journal of Criminology*, 61(1), 66-85; Myers, N.M. (2017). Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail. *British Journal of Criminology,* 57(3), 664-683.

Table 11: Form of Bail Release for all Released Accused

	Cash	Own Recognizance	Bail Program	Surety	Same Bail	Missing	TOTAL
British Columbia	0.7% (1)	30.3% (44)	49.0% (71)	1.4% (2)	16.6% (24)	2.1% (3)	100% (145)
Manitoba	0.0% (0)	70.0% (14)	0.0% (0)	30.0% (6)	0.0% (0)	0.0% (0)	100% (20)
Ontario	0.0% (0)	36.0% (41)	20.2% (23)	28.9% (33)	7.0% (8)	7.9% (9)	100% (114)
Nova Scotia	0.0% (0)	50.0% (27)	3.7% (2)	37.0% (20)	3.7% (2)	5.6% (3)	100% (54)
TOTAL	0.3% (1)	37.8% (126)	28.8% (96)	18.3% (61)	10.2% (34)	4.5% (15)	100% (333)

Amount of Bail

The quantum of bail required was known in only 52.5% (175 of 334 releases). When known, the overall amount of bail was less than seen in earlier studies[284] with a mean of $1,066 ($2,669 in 2014) and a median of $500 ($1,000 in 2014).

Table 12: Amount of Bail

	Mean	Median	Range	Missing
British Columbia	$499	$500	$0 to $2,000	76.6% (111 of 145)
Manitoba	$1,200	$1,000	$500 to $5,000	0.0% (0 of 20)
Ontario	$1,053	$500	$0 to $10,000	32.5% (37 of 114)
Nova Scotia	$1,465	$1,000	$500 to $10,000	20.0% (11 of 55)
TOTAL	$1,066	$500	$0 to $10,000	47.6% (159 of 334)

Conditions of Release

Across the courts, when released, a mean of 5.9 (7.1 in 2014) and a median of 5.0 (6.5 in 2014) conditions of release were imposed on accused. However, there was substantial variation in the number of conditions, with a range of 1 to 24 (1-34 in 2014) conditions being attached to the bail order. Manitoba imposes the most conditions with a mean of 10.3 (7.4 in 2014) and median of 8.0 (7.0 in 2014), though the small number of releases means these results must be interpreted with caution. Notably, we did not observe *any* releases where the number of conditions was known and the accused was released unconditionally, a finding that is consistent with earlier studies.[285]

Table 13: Number of Conditions of Release

	Mean	Median	Range	Missing
British Columbia	4.9	4.0	1 to 16	17.9% (26 of 145)
Manitoba	10.3	8.0	4 to 24	10.0% (2 of 20)
Ontario	5.7	6.0	1 to 15	15.8% (18 of 114)
Nova Scotia	7.7	7.0	1 to 23	32.7% (18 of 55)
TOTAL	5.9	5.0	1 to 24	19.2% (64 of 334)

[284] Myers, N.M. (2019). "Jailers in the Community": Responsibilizing Private Citizens as Third-Party Police. *Canadian Journal of Criminology*, 61(1), 66-85; Myers, N.M. (2017). Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail. *British Journal of Criminology,* 57(3), 664-683.

[285] Myers, N.M. (2019). "Jailers in the Community": Responsibilizing Private Citizens as Third-Party Police. *Canadian Journal of Criminology*, 61(1), 66-85; Myers, N.M. (2017). Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail. *British Journal of Criminology,* 57(3), 664-683.

The percentages below were calculated as proportion of accused with this condition, when the number of conditions of release was known. Exercise caution interpreting percentages in Manitoba and Nova Scotia due to the small number of releases with known conditions.

A total of 334 releases were observed across the courts. In 64 of these cases, all the conditions imposed were unknown.[286] The percentages below are calculated based on the 270 cases in which the conditions were known. Overall, there appears have been a general reduction in the types of conditions imposed and the frequency with which certain conditions are imposed. Looking at individual jurisdictions, however, there are local perspectives on the appropriateness of certain conditions of release.

A wide variety of conditions were routinely imposed on release orders. Across the courts, conditions prohibiting the possession of weapons (42.2%; 45.9% in 2014), not to attend a particular address or addresses (usually the address of the alleged offence) (37.0%, 30.2% in 2014)), not to enter a boundary around an address or person (57.4%; 40.1% in 2014) and not to contact any victim or witness (70.4%; 51.2% in 2014) were most common.

Looking across all jurisdictions, it is clear the courts were concerned about where the accused would live when they were released on bail. In 10.7% (26.2% in 2014) of releases, the accused was required to reside with their surety, 3.0% (43.0% in 2014) at an approved address, and 26.3% (not captured in the 2014 report) at a specified address. Overall, 40.0% (69.2% in 2014) of accused had a residential requirement imposed on their release. In addition to specific residential requirements, 31.5% (44.2% in 2014) were required to report their address to the police.

In a departure from *Set up to Fail* (2014) and other previous studies,[287] where close to half of all release orders required accused to "keep the peace and be of good behaviour" and a quarter required accused to "be amenable to the rules and discipline of the home," these conditions were rarely imposed at 0% and 5.2% respectively.

In *Set up to Fail* (2014), close to a third of all accused released on bail were required to attend treatment or counseling (28.5%), abide by a curfew (23.8%), not purchase, possess, or consume drugs (25%) or alcohol (27.3%) and/or report to a program (27.2%). Treatment conditions at the bail stage, however, appeared to be largely an Ontario phenomenon, with 57.3% of all releases requiring accused to attend treatment or counseling. Treatment conditions were rarely imposed in British Columbia or Manitoba and were never imposed in Nova Scotia.

In this study, treatment conditions were rarely imposed in Ontario or elsewhere – a substantial departure from earlier studies.[288] By contrast, our research shows that courts continue to impose conditions not to purchase, possess or consume alcohol. Across jurisdictions, alcohol abstention conditions were imposed in 14.4% of releases, with Manitoba and Nova Scotia imposing this condition most often (note small number of releases).

Conditions other than those specified here were commonly imposed across jurisdictions, with 55.6% of releases containing one or more other conditions.

[286] The total number of conditions imposed was unknown when the conditions were not read out in court (a common practice when the accused is re-released on the same bail they were previously released on), or when the specific conditions were not fully captured by the observer when they were read in court (generally due to conditions being read out too quickly).

[287] Myers, N.M. (2017). Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail. *British Journal of Criminology,* 57(3), 664-683.

[288] Myers, N.M. (2019). "Jailers in the Community": Responsibilizing Private Citizens as Third-Party Police. *Canadian Journal of Criminology*, 61(1), 66-85; Myers, N.M. (2017). Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail. *British Journal of Criminology,* 57(3), 664-683.

Table 14: Conditions of Release[289]

	Reside with Surety	Reside at Approved Address	Reside at a Specified Address	Report or Notify Address	Be Amenable to Rules of Home	Report to Bail Program	Report to Police	TOTAL Releases with Known Conditions
British Columbia	4.2% (5)	1.7% (2)	16.8% (20)	40.3% (48)	1.7% (2)	61.3% (73)	0.8% (1)	119 of 145
Manitoba	5.6% (1)	0.0% (0)	100% (18)	0.0% (0)	5.6% (1)	0.0% (0)	5.6% (1)	18 of 20
Ontario	16.7% (16)	6.3% (6)	20.8% (20)	33.3% (32)	11.5% (11)	11.5% (11)	0.00% (0)	96 of 114
Nova Scotia	18.9% (7)	0.0% (0)	35.1% (13)	13.5% (5)	0.0% (0)	2.7% (1)	37.8% (14)	37 of 55
TOTAL	10.7% (29)	3.0% (8)	26.3% (71)	31.5% (85)	5.2% (14)	31.5% (85)	5.9% (16)	270 of 334

	Attend Court	Not Possess Weapons	Not Possess FAC	Not Contact Complainant or Witness	Not Contact Co-Accused	Not Enter Boundary Around Place or Person	Not at Specific Address	TOTAL Releases with Known Conditions
British Columbia	14.2% (17)	43.7% (52)	3.4% (4)	59.7% (71)	0.0% (0)	45.4% (54)	37.0% (44)	119 of 145
Manitoba	83.3% (15)	77.8% (14)	27.8% (5)	83.3% (15)	22.2% (4)	66.7% (12)	22.2% (4)	18 of 20
Ontario	1.0% (1)	57.3% (55)	40.6% (39)	69.8% (67)	8.3% (8)	62.5% (60)	38.5% (37)	96 of 114
Nova Scotia	81.1% (30)	54.1% (20)	24.3% (9)	100% (37)	10.8% (4)	78.4% (29)	40.5% (15)	37 of 55
TOTAL	23.3% (63)	52.2% (141)	21.1% (57)	70.4% (190)	5.9% (16)	57.4% (155)	37.0% (100)	270 of 334

	Not Enter Area	Not Enter Municipality	Remain in Province	Curfew	House Arrest	Present at Door to Police	Electronic Monitoring	TOTAL Releases with Known Conditions
British Columbia	8.4% (10)	2.5% (3)	0.0% (0)	7.6% (9)	2.5% (3)	3.4% (4)	2.5% (3)	119 of 145
Manitoba	5.6% (1)	5.6% (1)	0.0% (0)	33.3% (6)	11.1% (2)	33.3% (3)	0.0% (0)	18 of 20
Ontario	4.2% (4)	4.2% (4)	1.0% (1)	10.4% (10)	3.1% (3)	0.0% (0)	0.0% (0)	96 of 114
Nova Scotia	8.1% (3)	0.0% (0)	5.4% (2)	32.4% (12)	16.2% (6)	10.8% (4)	0.0% (0)	37 of 55
TOTAL	6.7% (18)	3.0% (8)	1.1% (3)	13.7% (37)	5.2% (14)	4.1% (11)	1.1% (3)	270 of 334

[289] Note that the percentages represent the cases in which people were released and the specific condition was imposed. Totals will add to more than 100%.

	No Drugs	No Alcohol	Not Enter Any Bars	Attend Treatment	Take Medication	Sign Medical Releases	Work with Dr., Worker, etc.	TOTAL Releases with Known Conditions
British Columbia	10.1% (12)	12.6% (15)	0.0% (0)	0.8% (1)	0.8% (1)	0.8% (1)	0.0% (0)	119 of 145
Manitoba	50.0% (9)	50.0% (9)	0.0% (0)	0.0% (0)	0.0% (0)	0.0% (0)	0.0% (0)	18 of 20
Ontario	6.3% (6)	5.2% (5)	1.0% (1)	0.0% (0)	0.0% (0)	0.0% (0)	1.0% (1)	96 of 114
Nova Scotia	18.9% (7)	27.0% (10)	0.0% (0)	0.0% (0)	0.0% (0)	0.0% (0)	0.0% (0)	37 of 55
TOTAL	12.6% (34)	14.4% (39)	0.4% (1)	0.4% (1)	0.4% (1)	0.4% (1)	0.4% (1)	270 of 334

	Not Possess Cell Phone	Not Use the Internet	Not Possess Financial Documents Not in Name	Not Possess Tools	Not Possess Incendiary Devices	Not with Underage	Other Conditions	TOTAL Releases with Known Conditions
British Columbia	0.0% (0)	0.0% (0)	7.6% (9)	2.5% (3)	0.8% (1)	0.0% (0)	45.4% (54)	119 of 145
Manitoba	0.0% (0)	0.0% (0)	0.0% (0)	5.6% (1)	0.0% (0)	5.6% (1)	5.6% (11)	18 of 20
Ontario	0.0% (0)	1.0% (1)	1.0% (1)	8.3% (8)	0.0% (0)	1.0% (1)	58.3% (56)	96 of 114
Nova Scotia	2.7% (1)	2.7% (1)	2.7% (1)	0.0% (0)	0.0% (0)	2.7% (1)	78.4% (29)	37 of 55
TOTAL	0.4% (1)	0.7% (2)	4.1% (11)	4.4% (12)	0.4% (1)	1.1% (3)	55.6% (150)	270 of 334

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