

Bail Reform: Proposals to Amend the Criminal Code of Canada

(September 30, 2025)

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Introduction

A fundamental principle of criminal law is that a person accused of a criminal offence is presumed to be innocent and cannot be punished until found guilty of an offence. However, the criminal law permits, in certain circumstances, the detention of an accused person prior to a finding of guilt. At the judicial interim release stage (bail hearing stage) of the criminal justice process, the legal grounds that can justify detention prior to a finding of guilt are that detention is necessary (a) to ensure that the person appears in court when required to do so (primary ground); (b) for the protection or safety of the public (secondary ground); or (c) to maintain confidence in the administration of justice (tertiary ground). Also, prior to the judicial interim release stage there are important decisions made by police and prosecutors that determine whether the bail hearing is necessary.

This paper proposes reform of the *Criminal Code* that is more comprehensive than recent provincial government recommendations, which focus on relatively narrow issues (e.g., adding more reverse onus offences). This paper proposes a major overhaul of the law regarding judicial interim release hearings, including new principles for decision-making and new grounds for detention. It clearly states a policy that pretrial detention is to be reserved for people who are charged with serious offences and that the criminal justice system should reduce its over-reliance on incarceration, particularly for persons accused of less serious offences. The paper also takes a more systemic approach to reform by recognizing the importance of the decisions by police and prosecutors prior to the bail hearing stage of the criminal justice process. More specifically, it proposes reform of the *Code* provisions on alternative measures (extrajudicial measures) and provisions on detention by police. Reform of the law governing decisions made by the police and prosecutors at the pre-bail stage can have a significant impact on the flow of cases into the bail court, including reducing the backlog of bail cases and enabling the bail courts to focus on serious cases. The paper is divided into the following parts:

A. Concerns about Pretrial Detention and Release

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- B. *The Youth Criminal Justice Act: a Model for Bail Reform*
- C. Proposed Amendments: Judicial Interim Release
- D. Proposed Amendments: Extrajudicial Measures
- E. Proposed Amendments: Detention by Police

The parts of the paper discussing proposed amendments (Parts C, D and E) explain the current law, set out specific legislative wording, and provide commentary on the proposed amendments.

Part A: Concerns about Pretrial Detention and Release

Numerous concerns have been raised about bail and pretrial detention. Some concerns have focused on tragic cases in which innocent people have been harmed or killed by persons who have been released on bail. These concerns have led some to believe that the bail system is too lenient. Other concerns have focused on the negative impacts on the huge and increasing number of presumed-innocent accused people - many of whom are charged with minor offences - being detained in overcrowded and dangerous correctional facilities. These concerns have led some to the view that the main problem with the bail system is not that it is too lenient but rather that it is too harsh, unfair and counter-productive - too many innocent people are being locked up; their lives and the lives of their families are being disrupted; and pretrial detention actually increases the risk of future crime.

1. *Serious crimes by persons released on bail*

Although the vast majority of persons in detention have not been charged with serious violent offences, there have been media reports about rare cases of serious violent crimes committed by persons who had been released on bail. For example, in December 2022, Randall McKenzie was charged with first-degree murder in the fatal shooting of an Ontario Provincial Police officer. At the time of the shooting, McKenzie was on bail and had a lifetime ban prohibiting him from owning a firearm. This type of unusual incident has resulted in calls from police and provincial governments for tighter legal provisions relating to bail and pretrial detention, with a particular focus on repeat violent offenders and repeat offenders who commit firearm offences. There is a lack of data on what percentage of people on bail commit a serious violent crime.

2. *The number of accused people in detention has increased significantly.*

Over a twenty year period, there was a major increase in adults being held in detention facilities. The average *number* of adults in detention increased from 8,703.7 in 2002/03 to 14,414.5 in 2021/22 - *an increase of 67%*. The adult detention *rate* (the number of adults in detention per 10,000 adults in the population) increased between 2002/03 and 2021/22 by 30%.²

As will be discussed in Part B of this paper, the *Youth Criminal Justice Act* took a different approach to bail and pretrial detention and the number of youths in detention and the youth detention rate are strikingly lower than the adult system under the *Criminal Code*. This significant reduction in the use of pretrial detention was achieved without any increase in youth crime.

One of the results of the increasing number of accused people in pretrial detention is the growing crisis in overcrowded jails. The overcrowding has caused many problems, including frequent lockdowns, three inmates in cells built for two, inmates sleeping in broom closets, mould, and inmates receiving the wrong medications. The overcrowding is also leading to judges dropping or reducing charges against inmates because of poor treatment and living conditions.³

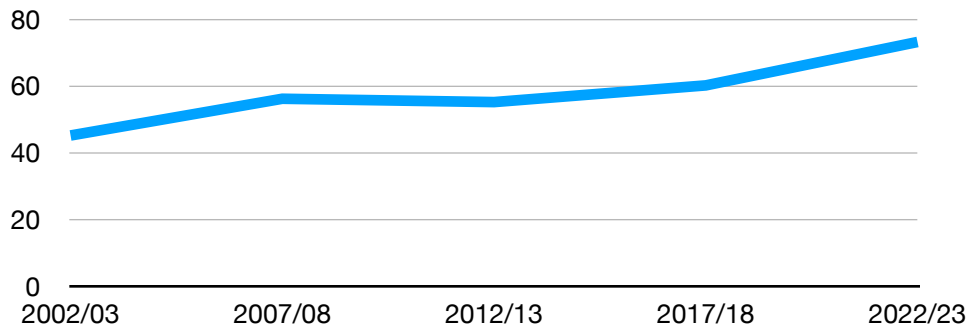
3. The percentage of adults in remand in correctional facilities has increased significantly.

It is important to recognize that people in pretrial detention/remand are legally innocent. They have not been convicted of the offence for which they have been charged. The percentage of adults in custody who are in remand, as opposed to sentenced custody, increased over the last twenty years. Since 2004/05, most adults held in custody are in remand, not sentenced custody.⁴ In 2002/03, 8,704 adults were in remand, which was 45% of the total number of adults in custody. In 2012/13, the number of adults in remand rose to 13,739, which was 55% of the total number of adults in custody. The most recent statistics indicate that the number of adults in remand rose to 16,194, which is 73% of the total number of adults in custody. Also, the actual number of people in remand more than doubled (54%) over this time frame.

² Statistics Canada, *Average counts of adults in provincial and territorial correctional programs*.

³ *Toronto Star*, article on the Ontario Ombudsman's Annual Report 2024-2025, June 26, 2025.

⁴ Statistics Canada, *Average counts of adults in provincial and territorial correctional programs*.



Source: Statistics Canada, Average counts of adults in provincial and territorial correctional programs

4. Pretrial detention results in the punishment of large numbers of innocent people.

In 2022 and 2023, half of all criminal charges against pretrial detention inmates did not result in a conviction. That means thousands of innocent people are, in effect, being punished, often for weeks or months.⁵

Recent research found that pretrial detention is experienced by the detained person as being just as punitive as post-conviction incarceration in a prison:

“In general, ‘individuals in pretrial detention reported similar perceptions and experiences as individuals serving a sentence in jail.... Individuals in jail who are not convicted of an offence... are generally not simply being held; they are experiencing pains and conditions that look much like punishment’. ... (N)o matter how one looks at the data, it is clear that pretrial detention exposes people to some of the most consequential pains of imprisonment’ that are not reliably different from the experiences of those serving sentences in jails or prisons.”⁶

Another study found that “many people who enter remand imprisonment return to their communities without a conviction.... Participants in this study described the harms of arrest and making court appearances as the most visceral and painful aspects of remand imprisonment.... Each [part of the system – police, courts, and

⁵ King, T. and Doob, A., John Howard Society of Canada blog, April 17, 2025.

⁶ Centre for Criminology and Sociolegal Studies, University of Toronto, *Criminological Highlights Vol. 22, No. 1*, a summary of Anderson, Claudia N., Joshua C. Cochran & Andrea N. Montes (2024). “How Punitive is Pretrial? Measuring the Relative Pains of Pretrial Detention.” *Punishment & Society*, 26(5), 790-812.

corrections] plays a separate but related role in forming the experience of punishment for remand prisoners”⁷

5. Most bail cases appear to involve non-violent offences, including administration of justice offences.

It appears that the most serious charge against a large number of accused persons at bail hearings is a non-violent offence, including a high percentage whose most serious charge is an administration of justice offence (e.g., breach of a bail condition or a probation condition).⁸ Administration of justice offences often involve behaviour that would not be a crime outside the context of a court order. As Webster notes, “The largest offence category of bail cases is not violence but administration of justice charges... This offence type represents almost three in five cases. Despite a 25% drop in the total Ontario criminal court caseload between 1993 and 2013, administration of justice charges steadily increased, significantly outpacing the slight rise in cases with any violence. In fact, the number of bail cases with violence charges declined substantially with 9,185 fewer cases in 2013. 45% of all Ontario criminal court cases “started their lives” (i.e., began) in bail court.... Clearly Ontario criminal courts are in the business of administration of justice offences.”⁹

The predominance of non-violent cases, including administration of justice cases, can also be seen in the national statistics regarding the types of offences in the adult criminal courts. In 2022/23, among the cases involving the three major categories of offences (violent, property, and administration of justice), most of the cases were non-violent cases: 55%.¹⁰ 28% were administration of justice offences.

A survey by the Department of Justice Canada found that a “majority of the Canadian public are in favour of increasing bail releases if there is a low risk to public safety (75%) and Canadians are in favour of not charging individuals with a

⁷ Pelvin, Holly (2019). “Remand as a Cross-Institutional System: Examining the Process of Punishment before Conviction”. *Canadian Journal of Criminology and Criminal Justice*, summarized by Centre for Criminology and Sociolegal Studies, *Criminological Highlights*, Vol. 17, No. 6.

⁸ Webster, C., “‘Broken Bail’ in Canada: How We Might Go About Fixing It”, Research and Statistics Division, Department of Justice Canada, June, 2015.

⁹ Webster, C., *Policy Options*, February 8, 2023, p. 4.

¹⁰ Statistics Canada, *Adult criminal courts, number of cases and charges by type of decision*.

criminal offence for administrative offences that do not include criminal activity (68%).”¹¹

6. Negative impacts on the accused person

In addition to experiencing what is effectively punishment and inhumane conditions due to overcrowding, an accused but innocent person in pretrial detention is likely to suffer other serious negative consequences, including

- job loss,
- long-term negative labour market outcomes¹²,
- educational setbacks,
- worsening mental illness or addiction,
- physical harm, including death,¹³
- a straining of family and community relationships,
- difficulty in preparing their defence and meeting their lawyers,
- pressure to plead guilty or to agree to onerous conditions to secure release,
- a greater likelihood of being convicted¹⁴, and
- a greater likelihood of receiving a custodial sentence.

In *R. v. Myers*, the Supreme Court of Canada recognized that pretrial detention has a negative impact on accused persons, stating that their 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.”¹⁵ The Court also recognized that the conditions in detention are often dire and that “overcrowding and lockdowns are frequent features of this environment, as is limited access to recreation, health care and basic programming.”¹⁶

¹¹ Coady, K., “Assessments and Analyses of Canada’s Bail System”, Department of Justice Canada, 2015.

¹² Dobbie, Will, Jacob Goldin, and Crystal S. Yang (2018). The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges. *American Economic Review*, 108(2), 201-240, summarized in Centre for Criminology and Sociolegal Studies, University of Toronto, *Criminological Highlights*, Vol. 17, No. 2.

¹³ e.g., “162 inmates died in Ontario jails in the last four years - the deadliest period in the province’s history for people behind bars”, *Toronto Star*, March 30, 2025.

¹⁴ Lee, Jacqueline G. (2019). To Detain or Not to Detain? Using Propensity Scores to Examine the Relationship Between Pretrial Detention and Conviction. *Criminal Justice Policy Review*, 30(1), 128-152, summarized in Centre for Criminology and Sociolegal Studies, University of Toronto, *Criminological Highlights*, Vol. 18, No. 4.

¹⁵ *R v Myers*, 2019 SCC 18 at para 27.

¹⁶ *Ibid.*

In *R.v. Antic*, the Supreme Court of Canada noted that, despite the presumption of innocence, an accused who is detained may find it necessary to plead guilty solely to secure his or her release.¹⁷

An accused person who is not detained but is released on conditions is also likely to suffer negative consequences, including restrictions on liberty and the risk of a new charge for violation of a release condition due to behaviour that would not be an offence for someone who is not subject to a release order.¹⁸

7. Negative impacts of pretrial detention on public safety

Despite public safety often being used as the rationale for detaining a person, research shows that detention can have a *negative* impact on public safety because it increases the detained person's likelihood of committing a crime after release.

As Doob and Sprott note, “(It) has been shown that detention for a week or longer while awaiting trial *increases* the likelihood of long-term offending (as compared to releasing the person while awaiting trial). 105 days in pretrial detention (the average number of days to complete a case starting in bail court in Ontario) doesn't sound like a very good crime prevention approach.”¹⁹

As stated in a report commissioned by the federal Department of Justice: ‘It is no secret that any time in prison increases the likelihood of future criminal behaviour’.²⁰

7. Delays in making the bail decision

Although the bail decision is a preliminary matter, the bail process often takes a long time with many delays. It typically involves numerous court appearances and adjournments before the bail decision is made.

¹⁷ *R. v. Antic*, 2017 SCC 27

¹⁸ For a discussion of the experience of being released on conditions, see Dorson, D., “Being on Bail”, <https://www.Law360.ca/ca/criminal/articles/2324899/being-on-bail>.

¹⁹ Doob and Sprott, “Using Money Wisely to Reduce Crime”, John Howard Society of Canada blog, June, 16, 2025)

²⁰ Department of Justice Canada, *JustFacts: Recidivism in the Criminal Justice System* (August 2020).

Research in Ontario found that over one-third of cases required three or more court appearances, 10% took five to seven appearances, and 6% took 8 or more appearances before the bail decision was made.²¹ In *R. v. Myers*, the Supreme Court of Canada, citing Statistics Canada, noted that in 2016-17, “approximately 7 percent of those in remand were still in custody after 3 months, and some spent upwards of 12 or even 24 months awaiting trial in detention.”²²

Webster found that “research has repeatedly highlighted a systemic culture of frequently unproductive adjournments, unnecessary reliance on sureties as a requirement of release and the often-questionable need for complex release plans.”²³ During the period of delay due to multiple court appearances, the accused, presumed-innocent person remains in custody. As discussed above, continued detention caused by these delays can have serious negative impacts for the people who are detained.

8. Excessive and inappropriate conditions of release

In cases in which an accused person is released on conditions, there is concern that

- too many conditions are imposed;
- some conditions are unrelated to the risk that the person is alleged to pose (e.g., failure to appear in court); and
- some conditions are difficult to comply with, thereby setting up the person for failure.

In its study of bail cases in five provinces and territories, the Canadian Civil Liberties Association (CCLA) found that 35 different conditions were imposed by the courts. The average number of conditions per accused was 5.9 and the median was 5. The number of conditions per accused varied considerably, with a range of 1 to 24.²⁴

In *R. v. Zora*, the Supreme Court of Canada expressed concern about “the prevalence of bail conditions that fail to reflect the requirements for bail under

²¹ Webster, C., “Calls for harsher bail laws are misguided”, *Policy Options*, February 8, 2023.

²² *R. v. Myers*, 2019 SCC 18 at para 26.

²³ Webster, C., *op cit*.

²⁴ Canadian Civil Liberties Association, *Still Failing: The Deepening Crisis of Bail and Pre-trial Detention in Canada*, Appendix E, Table 13, p. 80, 2024. (See the CCLA report generally for a detailed, research-based analysis of bail and pretrial detention in Canada.)

the *Charter*, the *Code* and this Court's principles in *Antic*. In practice, the number of unnecessary and unreasonable bail conditions, and the rising number of breach charges, undercut the claim that there is sufficient individualization of bail conditions.... (S)tudies across the country have shown that the majority of bail orders include numerous conditions of release, which often do not clearly address an individual accused's risks in relation to failing to attend their court date, public safety, or confidence in the administration of justice.”²⁵

The Court cited research that “the likelihood of an accused person being charged with breaching their bail conditions increases when they are subject to a greater number of conditions and a longer court order.”²⁶

The Court also noted that a factor that contributes to courts ordering excessive bail conditions is risk aversion. This aversion to risk applies not only to prosecutors and judges, discussed below,²⁷ but also to defence counsel who, in discussion with prosecutors, often agree to onerous release conditions because of their concern that, if they do not, the prosecutors will be seeking pretrial detention of the accused. As noted in the research study by CCLA: “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.”²⁸

The Court recognized that onerous conditions disproportionately affect vulnerable and marginalized populations and quoted an earlier CCLA report:

“Canadian bail courts regularly impose abstinence requirements on those addicted to alcohol or drugs, residency conditions on the homeless, strict check-in requirements in difficult to access locations, no-contact conditions between family members, and rigid curfews that interfere with employment and daily life. Numerous and restrictive conditions, imposed for considerable periods of time, are setting people up to fail — and failing to comply with a bail condition is a criminal offence, even if the underlying behaviour is not otherwise a crime.”²⁹

²⁵ *R. v. Zora*, 2020 SCC 14

²⁶ *Ibid.*

²⁷ See Concern #12, below, *Risk Aversion*.

²⁸ Canadian Civil Liberties Association, *Still Failing: The Deepening Crisis of Bail and Pre-trial Detention in Canada*, p. 42, 2024

²⁹ *R. v. Zora*, *op. cit.*, quoting Canadian Civil Liberties Association, *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention*, 2014.

Non-compliance with a release condition not only adds to the criminal record of the person but also increases the person's chances of being sentenced to a term of imprisonment. These types of cases make up a considerable portion of the high number of administration of justice offences in the criminal court caseload.

A common breach of a release condition is failure to appear in court. There is research that shows that failures to appear in court can be reduced substantially (37%) by a simple telephone reminder³⁰ or a text message³¹ to the accused regarding their required upcoming court appearance. The bail court could be required by law to ensure that an accused receives such a reminder and thereby help to reduce administration of justice charges.

9. Tertiary ground for detention

The tertiary ground for detention is in s. 515(10)(c). It allows detention

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

The tertiary ground essentially authorizes detention of an accused person on the basis of the court's perception of public opinion. Although this provision has been found to be constitutional by the Supreme Court of Canada in *R. v. Hall*³² and *R. v. St. Cloud*,³³ some commentators and dissenting judges of the Supreme Court have argued that the tertiary ground for detention is unconstitutional and should be repealed.

Writing before the *Hall* decision, Gary Trotter (now a justice of the Ontario Court of Appeal) stated his opinion that the tertiary ground was unconstitutional.³⁴ He noted that the tertiary grounds is similar to the "public interest" wording that was

³⁰ Ferri, Russell (2022). The Benefits of Live Court Date Reminder Phone Calls During Pretrial Case Processing. *Journal of Experimental Criminology*, 18, 149-169, summarized in Centre for Criminology and Sociolegal Studies, University of Toronto, *Criminological Highlights*, Vol. 20, No.3.

³¹ Fishbane, Alissa, Aurelie Ouss, and Anuj K. Shah (2020). "Behavioural nudges reduce failure to appear in Court", *Science* 10.1126/ science.abb6591 (2020), summarized in Centre for Criminology and Sociolegal Studies, University of Toronto, *Criminological Highlights*, Vol. 20, No.1.

³² *R. v. Hall*, (2002) 3 S.C.R. 309

³³ *R. v. St. Cloud*, [2015] S.C.J. No. 27

³⁴ Trotter, G., *The Law of Bail in Canada*, Carswell, 2nd ed., 1999.

struck down by the Supreme Court in *R. v. Morales*: “it permits the detention of an accused person based upon the anticipated reaction of the public to the decision, free of any concern about the accused person absconding or reoffending.”³⁵

Four of the nine judges in the *Hall* case wrote a strong dissent arguing that the tertiary ground should be deleted entirely. They stated that “confidence in the administration of justice” did not provide a sufficiently precise standard and was “little more than a facade of precision”. They argued that it did not set out a ground for detention that was not already covered by the primary and secondary grounds. They also found that the tertiary ground is “ripe for misuse, allowing for irrational public fears to be elevated above the Charter rights of the accused.”³⁶

They concluded that the provision does not have a rational connection to the proper functioning of the bail system. In giving sweeping, open-ended discretion to the bail judge, the provision authorizes pre-trial detention in a much broader array of circumstances than necessary. The judges also found that the tertiary ground fails to meet the proportionality requirement set out in the *Oakes*³⁷ case.

In its review of the bail provisions of the *Criminal Code*, the Law Reform Commission of Canada did not include “maintain confidence in the administration of justice” in its proposed reform of the grounds for pretrial detention.³⁸

Regarding other jurisdictions, the U.S. federal bail reform statute³⁹ does not include a ground related to maintaining confidence in the administration of justice. It also appears that European bail laws do not have such a ground.⁴⁰ Maintaining confidence in the administration of justice is also not included in the law of the

³⁵ *R. v. Morales*, [1992] 3 S.C.R. 71

³⁶ See footnote 24.

³⁷ *R. v. Oakes*, (1986) 1 S.C.R. 103

³⁸ Law Reform Commission of Canada. *Compelling Appearance, Interim release and Pretrial Detention* (Working Paper 57) (1988)

³⁹ *The Bail Reform Act of 1984* 18 U.S.C. §§ 3141–3150, 3156

⁴⁰ Martufi, A. and Peresteridou, C., “Pre-trial Detention and EU Law: Collecting Fragments of Harmonisation Within the Existing Legal Framework”, *European Papers*, Vol. 5, 2020, No. 3, *European Forum, Insight* of 28 December 2020, pp. 1477-1492.

United Kingdom⁴¹ and in the recommended pretrial detention standards of the European Commission of the European Union.⁴²

10. Reverse onus provisions

Over the last several years, the number of reverse onus offences has been increasing. A reverse onus offence provision requires accused persons (who have not been convicted and is presumed innocent) to show why they should not be detained. In all other cases, the prosecutor has the onus of showing why the accused should be detained. There is currently considerable political pressure to add more offences that trigger a reverse onus, particularly for serious repeat offenders. There is also no statistical evidence that reverse onus provisions increase public safety.

The Supreme Court of Canada has set out two criteria for the use of these provisions: (a) reverse onus should be used only in a narrow range of circumstances and (b) reverse onus must not be used for a purpose not included within the bail provisions.⁴³ Despite the restriction that reverse onus should be used only in a “narrow range of circumstances”, the *Code* currently has more than forty offences that trigger a reverse onus.

The Law Reform Commission of Canada recommended that reverse onus provisions be repealed, stating:

“This Commission generally rejects the use of reverse onus clauses in criminal matters. They are invariably deviations from such general principles as presumption of innocence and proof beyond a reasonable doubt. It is therefore no surprise that ‘reverse onus’ clauses usually raise the spectre of unconstitutionality. Moreover, their utility is to be doubted. For example, the prosecution does not need a reverse onus to convince a justice that a person who commits a crime while on release should be detained. In such a situation, the prosecutor's evidence to that

⁴¹ Cape, Ed and Smith, T. (2016) The practice of pre-trial detention in England and Wales: Research report. Project Report. University of the West of England, Bristol. Available from: <http://eprints.uwe.ac.uk/28291>

⁴² European Union Commission, *Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions*, @<https://eur-lex.europa.eu/eli/reco/2023/681/oj/eng>

⁴³ *R. v. Pearson*, 1992 CanLII 52 at para 47 (SCC)

effect at the show-cause hearing will often easily persuade the judge to conclude that detention is justified.

.....

"Reverse onus" clauses have been attacked successfully in other contexts as contravening the Charter, most noticeably in *R. v. Oakes*, ([1986] 1 S.C.R. 103)) a case dealing with procedure for the trial of drug trafficking offences under the *Narcotic Control Act*. Here, the issue is simply whether the fact that the accused has (allegedly) committed a specific type of crime is, in itself, sufficient reason to place the onus on the accused to show cause why detention is not justified. The Commission, in the pursuit of fairness and consistency with Charter values, believes that the reversal of the ordinary burdens of proof is unjustified whether at the trial or pre-trial stages of the process. Moreover, requiring the prosecutor to show cause why detention is justified does not place an onerous burden on the Crown nor does it pose a threat to public safety."⁴⁴

The legal scholar, Martin Friedland, whose research on the bail system in Canada played an important role in bringing about the *Bail Reform Act* of 1972, also questioned the appropriateness of, and expansion of, reverse onus provisions, stating:

"I suspect that the reverse onus provisions have significantly contributed to the dramatic increase in the number of persons held in custody..." and "... we should stop the expansion of reverse onus cases. Where does one stop?"⁴⁵

The European Commission of the European Union, in setting minimal standards for pretrial detention, was opposed to reverse onus provisions: "Member States should require the competent national authorities to bear the burden of proof for demonstrating the necessity of imposing pre-trial detention."⁴⁶

As will be discussed below, the *Youth Criminal Justice Act* eliminated the reverse onus at bail hearings and clearly states that the onus remains on the prosecution in all cases. After 13 years of experience with the elimination of the reverse onus, there is no evidence that it is a problem or that it has caused an increase in crime.

⁴⁴ Law Reform Commission of Canada. *Compelling Appearance, Interim release and Pretrial Detention* (Working Paper 57) (1988) at pp. 66 and 36.

⁴⁵ The *Bail Reform Act* Revisited, [16 C.C.L.R.], pp. 319-320.

⁴⁶ European Union Commission, see footnote 37, above.

11. The use of justices of the peace

There is concern about the use of justices of the peace rather than judges to conduct bail hearings. In particular, justices of the peace (at least those who are not lawyers), lack the legal training of judges. The decision to detain or release the accused person can have, as noted above, profound and negative consequences for the accused. It is one of the most important decisions in a criminal case. Given the serious potential for the accused person and for the public, the legal training of a judge seems necessary for a decision-maker who is dealing with release and detention, particularly as the law becomes more complex. It can be reasonably argued that the decision on pretrial detention is so important that it should be reserved for judges. As noted below, some argue that justices of the peace may be more risk-averse than judges, which may be part of the explanation for the high percentage of remand prisoners in provincial detention facilities.

12. Risk aversion

There is concern that police, prosecutors, justices of the peace and judges are often risk-averse in their decision-making, which has resulted in increasing the number of people appearing at bail hearings and being detained or placed on conditions of release. These decision-makers may appear to be inclined toward recommending detention rather than release because of “a culture of risk aversion” in which it is the safer or less risky choice and less likely to be criticized.⁴⁷

In commenting on the high percentage of bail hearings being conducted by justices of the peace in Ontario, Friedland notes that justices of the peace may be more inclined than judges to be risk-averse in their pretrial detention decisions:

“(Justices of the peace) may not in practice enjoy the same degree of independence, confidence, and authority as provincial court judges. Justices of the peace may therefore be more inclined than provincial court judges to play it safe and not take the risk of releasing an accused without sureties and stringent conditions.”⁴⁸

Friedland goes on to raise the question of whether the high use of justices of the peace in bail hearings in Ontario could be the reason for Ontario’s high percentage of remand persons incarcerated in provincial jails.

⁴⁷ *R. v. Zora*, 2020 SCC 14, at para. 77.

⁴⁸ *The Bail Reform Act Revisited*, [16 C.C.L.R.]

As noted earlier,⁴⁹ another type of risk aversion concerns defence lawyers who in discussion with prosecutors often agree to onerous release conditions because of their concern that, if they do not, the prosecutors will be seeking pretrial detention of the accused.

13. Inconsistent application of the law

The *Code* provisions on pretrial detention and release are relatively vague, open to a range of interpretations and contribute to inconsistency in the application of the law. The problem of inconsistency in the application of the bail provisions across the country has been recognized by the Supreme Court of Canada in *R. v. Antic*.⁵⁰

As will be discussed below, the vagueness and generality of the *Code* provisions is particularly striking when compared to the provisions of the *Youth Criminal Justice Act*, which has helped to bring about the substantial reduction in the use of pretrial detention of youths. There appears to be a need for legislation more like the *YCJA*, which more effectively structures the decisions of police, prosecutors, justices of the peace and judges through provisions that are more specific, explicit and directive than the *Criminal Code* provisions. The *YCJA* approach increases clarity in the decision-making process and provides support for the decision-maker so the decision-maker can have more confidence that the decision can be justified under the law.

14. The prediction problem

Inherent in the *Code*'s grounds for detention is the requirement that the court make predictions about whether the accused, if released, will fail to appear in court or endanger public safety. The difficulty in accurately predicting dangerousness has been recognized by the Supreme Court of Canada as well as the research literature.

As Trotter notes in *The Law of Bail in Canada*, the Supreme Court of Canada in *R. v. Morales* recognized the difficulty in accurately predicting dangerousness for the purpose of determining whether detention is necessary for public safety. However,

⁴⁹ See footnote 28.

⁵⁰ *R v Antic*, 2017 SCC 27

the court accepted that “dangerousness is a fact of social life that the courts must try their best to cope with.”⁵¹

It appears that the factors relied on in the case law generally do not accurately predict court attendance or re-offending while on bail. It may be that many of the “common sense” assumptions about the risk of non-appearance and future offending are not valid. However, it does appear that, among the weak predictors of future violent behaviour, the best (or “least weak”) predictor is a history of previous violent behaviour.

In a review of the research on prediction of dangerousness, which was done for the Correctional Service Canada, Ogloff makes the following observations:⁵²

“Many myths surround the prediction of dangerousness. Most are based on what we call “illusory correlations,” that is, relationships that we believe may exist between dangerousness and some potential risk factor, when no actual relationship has been supported by research. For example, it is not uncommon for people to believe that mentally ill people are more likely to be violent and dangerous than non-mentally ill people. However, there is little evidence that such a strong relationship reliably exists.”

Other key conclusions reached by Ogloff regarding the research on prediction include:

- “there is no empirically proven, effective way for anyone to determine with any degree of accuracy who will and who will not recidivate in a violent way.”
- “Empirical research generally shows that mental health professionals and others tend to over-predict violence.”
- “failure on prior conditional release — especially violent failure — is a reliable predictor of failure on future conditional release.....(t)he best predictor of future violent behaviour is a history of previous violent behaviour...”

⁵¹ Trotter, G., *The Law of Bail in Canada*, Carswell, 1999.

⁵² James R.P. Ogloff, “Risk Assessment of Dangerousness”, in *Forensic Psychology: Part 4: Chapter 15*, Correctional Service Canada, Government of Canada) <https://www.canada.ca/en/correctional-service/corporate/library/forensic-psychology/forensic-psychology-part-4-chapter-15-assessing-offender-populations.html>.

- “both clinical and actuarial approaches to the prediction of dangerousness have proven to be less than perfect, often resulting in unacceptable levels of false positives and false negatives.”
- “In a well-known review of this literature, Professor John Monahan concluded that psychiatrists and psychologists are accurate in no more than one of three predictions of violent behaviour over a several-year period....”
- “It is advisable to be extremely cautious in accepting any individual's clinical appraisal of another person's potential dangerousness.”
- “No single psychometric instrument has been developed that reliably and accurately predicts violent recidivism or parole failure...”

As noted in the CCLA report, the inability to predict the future actions of an accused person is acknowledged in the British Columbia Crown Policy Manual.⁵³

A conclusion from the research is that predictions on future behaviour (particularly dangerous behaviour) of an accused are likely to be wrong if they are based on factors other than the prior record of the accused. This should encourage considerable restraint and caution about depriving an innocent person of liberty in a bail decision, which is largely based on prediction. It also supports a policy that detention should be reserved for serious cases and, to the extent that prediction is required, that prior record of the accused should be a significant factor in making decisions.

15. Over-representation of Indigenous and Black people

There is considerable evidence of the over-representation of Indigenous people in correctional facilities. For example, Indigenous people make up 2.9% of Ontario's population but make up 19.4% of those admitted to Ontario's prisons without a finding of guilt.⁵⁴

The CCLA report states:

⁵³ CCLA report, see footnote 22, p.14.

⁵⁴ King, T., Sprott, J. and Doob, A., “Tougher bail laws won't make us safer, and could have the opposite effect”, *Toronto Star*, July 25, 2024.

“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. ... (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. In a similar vein, the Supreme Court of Canada has continued to note the overrepresentation of Black persons in the criminal justice system.”⁵⁵

An analysis by Statistics Canada found that:⁵⁶

- In 2020/2021, Indigenous people in Canada were incarcerated at a much higher rate than non-Indigenous people. On an average day that year there were 42.6 Indigenous people in provincial custody per 10,000 in the population compared to 4.0 non-Indigenous people.
- The over-representation of Indigenous women in provincial correctional facilities (15.4 times higher than non-Indigenous women) was greater than for Indigenous men (8.4 times higher), in 2020/2021.
- (B)ail was used more frequently than remand for non-Indigenous persons. The ratio between average counts for bail and remand was 4.9 (that is for everyone one person in remand, almost 5 people were on bail), compared to 2.6 for the Indigenous population. (...In other words, compared to the overall average, Indigenous people were about twice as likely to be on remand rather than bail.) So, for Indigenous people on either bail or remand/detention, about 2 in 3 (66%) were in remand, while for the overall average for people on either bail or remand/detention about 1 in 5 (20%) were in remand/detention.

16. The financial cost of keeping people in pretrial detention is high.

⁵⁵ Canadian Civil Liberties Association, *Still Failing: The Deepening Crisis in Bail and Pre-trial Detention in Canada*, (2024).

⁵⁶ Statistics Canada, *Over-representation of Indigenous persons in adult provincial custody, 2019/2020 and 2020/2021* (accessed in June 2025).

The cost of keeping a person in detention is much higher than placing the person in some form of community supervision and the cost of detention has been increasing. According to Statistics Canada, the average *daily* inmate cost in provincial and territorial adult correctional services in 2022/23 was \$326. On an *annual* basis, the cost was \$118,990 per inmate. Over a ten-year period, the inmate cost increased by 84%.⁵⁷

In contrast, according to the Parliamentary Budget Officer, the average cost per person per year for community supervision in 2018 was \$18,000.⁵⁸ Based on these figures, the cost of incarcerating an accused person in pretrial detention is more than 6 times the cost of placing the accused in community supervision. Given the large number of accused persons charged with less serious offences, it appears that decreasing the use of detention in many of these cases would not only be fairer for the accused, it would also save a considerable amount of money and reduce the problem of overcrowding in detention facilities.

Again, it is important to keep in mind that these costs of pretrial detention are being used to incarcerate people who have not been convicted of an offence. A significant percentage of them have their charges dropped. An Ontario study found that "... of those who were detained prior to trial, 17,893 (or 29%) had *all* their charges stayed, withdrawn or dismissed. 4,534 of them were detained up until the day that the case was completed."⁵⁹

As noted by the John Howard Society of Canada:

"In total, Canada's provinces and territories spend \$2.84 billion each year on adult corrections – 70% of which is devoted to people who are not (at least yet) guilty of anything. Two billion dollars per year to lock up innocent people.

"... more than 40% of all criminal charges in Canada do not end in a guilty finding, so a large portion of this \$2 billion is locking up people who will walk away with no conviction. Surely this is a scandalous waste of public money – and a huge injustice. Surely any political party interested in wise spending of public

⁵⁷ Statistics Canada, *Operating expenditures for adult correctional services*.

⁵⁸ John Howard Society of Canada blog, "Financial Costs of Canadian Prisons", August 23, 2018.

⁵⁹ Doob, A., and Sprott, J., "Using Money Wisely to Reduce Crime", John Howard Society of Canada blog, June 16, 2025.

money, or any person with an interest in reasonable public policy would be advocating for many fewer people being held on remand”⁶⁰

17. Detention by police

Police are gatekeepers to pretrial detention in the criminal justice system. If the police do not detain the accused, a bail hearing is not required. The initial police decision to detain the accused sets in motion further justice system processing and the involvement of other decision-makers in the criminal justice system. For example, if the police detain the accused, the prosecutor must then determine whether to consent to release of the accused or to seek continued detention at a bail hearing.

It is clear that police decision-making can increase or decrease the flow of cases into court for bail hearings. Measures that address any problems that may exist at this early stage of the criminal justice process may have a significant impact in addressing some of the concerns that have been raised about pretrial detention.

Under the *Criminal Code*, there are various points at which the police may decide to detain or release an arrested person. The rules that apply to the decision depend on factors such as whether the arrest is with a warrant or without a warrant. The *Code* provides some guidance but it does not provide sufficient structure, clarity and support for the discretion exercised by police in making these decisions.

The criteria for police detention decisions are vague and open to a wide range of interpretations. For example, s. 498(1.1)(a) states that the police officer shall detain the accused if the officer believes, on reasonable grounds, that detention is “necessary in the public interest”. Although the section includes some factors to consider in making the decision (e.g., the need to establish the identity of the person; prevent the commission of any offence), the ultimate criterion is whether detention is “necessary in the public interest”.

As noted earlier, in the *Morales* decision, the Supreme Court of Canada struck down the “public interest” ground of the *Criminal Code*’s judicial interim release provisions because it was determined to be a vague and imprecise basis for detaining a person. It seems reasonable that if public interest has been removed as

⁶⁰ John Howard Society of Canada, “There is a problem with bail, but it’s not what we are being told”, March 12, 2024

a basis for judicial interim release decisions, then it should also be removed as a basis for the police decision to detain a person.

Regarding the risk of failure to appear, the criterion in s. 498(1.1)(b) is whether the officer believes, on reasonable grounds, that the person will fail to attend court. No further criteria or considerations are included to guide the officer in reaching the conclusion that the person will fail to appear.

A result of the current police detention provisions is that police are likely to be more risk averse in their decision-making. Given that the provisions are open to wide range of interpretations, they create an incentive for police to detain because it will often appear to them that they are less likely to be criticized if they detain the accused and leave the decision on release to the prosecutor or the court.

As suggested in Part C of this paper, Proposed Legislative Reforms - Detention by Police, police can be given better guidance by amending the *Code* with clearer and more specific criteria for making the detention decision and by enabling them to use extrajudicial measures instead of charges for some accused. As will be discussed in Part B of this paper, these approaches have been very successful under the *Youth Criminal Justice Act* over the last twenty years.

18. Lack of information

Although the discussion of some of the concerns discussed in this Part include statistical information, there is a serious lack of statistical information about how the bail system operates. It is difficult to get an overall picture of bail in Canada from available sources. There are numerous basic questions that are relevant to evidence-based bail reform but are not currently answerable through available data. For example:

- What, if any, evidence is there that reverse onus provisions increase public safety?
- What percentage of persons in remand are charged with administration of justice offences?
- What percentage of remand orders are based on each of the three grounds of detention?
- What percentage of people breach their bail conditions?
- What percentage of people on bail are charged with serious violent offences while on bail?
- What are the number and types of alleged offences that lead to detention by police?

Federal and provincial/territorial governments should work together to obtain answers to these and other questions. Such federal/provincial/territorial action would help to provide a solid base of evidence for rational bail reform, which has been lacking in recent changes to bail law.

Part B: The Youth Criminal Justice Act - A Model for Bail Reform⁶¹

Prior to the enactment of the *Youth Criminal Justice Act*, there had been a large increase in the use of pretrial detention under the *Young Offenders Act*. In passing the *YCJA*, one of Parliament's objectives was to reduce the incarceration of youths, which included reducing the use of pretrial detention.

Initially, the *YCJA* continued the approach of the *YOA* of using the *Criminal Code* provisions related to bail and pretrial detention with the exception of two relatively minor changes. Concerns eventually began to be raised about pretrial detention. The concerns (many of which are similar to current concerns about adult pretrial detention discussed in Part A of this paper) were summarized in a consultation paper released by the Department of Justice (DOJ) in 2007⁶²: (a) the increasingly large numbers of youths in detention; (b) the high percentage of youths charged with nonviolent offences, including administration of justice offences; (c) provincial/territorial variation in detention rates; (d) the use of detention for reasons unrelated to the charges or the grounds for detention; and (e) excessive and inappropriate conditions of release, which often set up a youth for failure and further charges.

Unlike the areas of extrajudicial measures and sentencing, pretrial detention was clearly not achieving Parliament's criminal justice objectives. The limited impact of the pretrial detention provisions suggested that reducing the use of pretrial detention required legislative provisions that were different from the general and relatively vague *Code* provisions. The pretrial detention provisions needed to be clearer and more explicit - i.e., more like the *YCJA* provisions on extrajudicial measures and sentencing.

The 2012 *YCJA* amendments removed the application of the *Criminal Code*

⁶¹ This part of the paper is derived from Barnhorst, R., "Achieving Restraint in the Use of the Criminal Justice System: Canada's Youth Criminal Justice Act, (2024), 72 *Criminal Law Quarterly*.

⁶² Department of Justice Canada, *Pretrial Detention under the Youth Criminal Justice Act: A Consultation Paper*, 2007.

grounds for detention and replaced them with new, stand-alone grounds, which are more restrictive and explicit than the *Code* grounds. Under the amendments, pretrial detention has been dramatically reduced in the youth criminal justice system. The change in the wording of the legislation appears to have been a significant factor in bringing about the change. The success of the *YCJA* in this area has led to recommendations that the *YCJA* provisions should be used as a model for bail reform in the adult system.⁶³

How YCJA Detention Provisions are Different from the Criminal Code

The *Criminal Code* and the *YCJA* have parallel grounds for detention. Each statute has a “primary” ground regarding ensuring that the accused will appear in court; a “secondary” ground regarding protection of the public; and a “tertiary” ground regarding maintaining confidence in the administration of justice. However, there are some significant differences between the *YCJA* grounds and the *Criminal Code* grounds. In particular, the *YCJA* has more restrictive and explicit criteria for detention; its underlying objective is to reduce the use of detention for less serious alleged offenders; it greatly limits the use of the tertiary round; and it places the onus on the prosecution in all cases.

1) The *YCJA* has a threshold provision that limits the types of alleged offenders who may be eligible for detention. The court has no authority to detain unless the youth is charged with a *serious offence* (an indictable offence for which the maximum adult sentence is imprisonment of 5 years or more), or has a history that indicates a pattern of previous findings of guilt or outstanding charges. The objective is to reserve detention for serious cases. The provision essentially prevents most alleged minor offenders (e.g., youths charged with administration of justice offences) from being detained. In contrast, the *Code* allows detention of an adult accused who is charged with *any offence*. If this *YCJA* threshold requirement were inserted in the *Code*, it could have a major impact in reducing the over-use of pretrial detention of less serious alleged offenders in the adult system.

2) Under the *YCJA*, the primary ground requires a substantial likelihood of not appearing in court. The *Code* states that detention is “necessary to ensure attendance in court”.

3) Unlike the *Code* provisions, the secondary ground in the *YCJA* requires a

⁶³ e.g., Canadian Civil Liberties Association, *Still Failing: the Deepening Crisis of Bail and Pre-trial Detention in Canada* (2024); and Canadian Criminal Justice Association, *Considering Bail Reform and the Repercussions of Bill C-48*, a brief to Parliament, April 2024. Also see Barnhorst R., (footnote 35 above), which is part of a volume of the *Criminal Law Quarterly* subtitled: “Twenty Years of the YCJA: Lessons for the Adult System”.

substantial likelihood of a serious offence if the youth is released. In contrast, the Code refers to a substantial likelihood of *any criminal offence* or interference with the administration of justice if the accused is released, which is a much lower standard.

4) Unlike the *Code* provisions, the tertiary ground in the *YCJA* can be used only if three criteria are met: the youth is charged with a “serious offence”; the first two grounds do not apply; and there are “exceptional circumstances” justifying detention on this ground.

The importance of the differences in the wording of the *YCJA* and *Code* provisions regarding the tertiary ground can be seen in the decision of the Supreme Court of Canada in *R. v. St. Cloud*.⁶⁴ The Court stated that the *Code* (s. 515(10)(c)) does not require a finding that the first two grounds do not apply before the tertiary ground can be used and it does not require that the circumstances be “exceptional” to justify detention on this ground. The absence of the word “exceptional” in the *Code* was significant in the Court’s interpretation that s. 515(10)(c) allows the prosecutor and the court to rely on any type of crime to justify detention.

5) The court is prohibited from ordering detention unless it is satisfied that conditions of release would not adequately address a risk listed as a justification for detention in s. 29(2)(b) (e.g., protection of the public). In contrast, the *Code* allows release on conditions unless the prosecutor “shows cause” why detention is justified.

6) Under the *YCJA*, the onus is on the Crown in all cases (s. 29(3)). *The reverse onus provisions of the Code do not apply under the YCJA*. So, unlike the *Code* (s. 515(6)), in cases such as failure to appear in court or failure to comply with a release condition, the onus does not shift to the accused to show why he or she should not be detained.

Release Conditions

Violations of release conditions lead to administration of justice charges. One way to reduce the number of administration of justice offences in the courts is to ensure that only necessary conditions are imposed and that they have a direct, rational connection to the risk that the accused is alleged to pose

In 2019, amendments to the *YCJA*’s provisions on pretrial release conditions came into force. The amendments were intended to restrict the number and nature of

⁶⁴ [2015] S.C.J. No. 27.

conditions being imposed on youths.⁶⁵ DOJ noted that, prior to the amendments, conditions were often unrelated to the charge, were too restrictive or impossible to comply with or improperly focused on social welfare objectives. The amendments state that a release condition may be imposed only if:

- it is necessary to ensure attendance in court or to protect public safety;
- it is reasonable in the circumstances of the offending behaviour; and
- the youth will reasonably be able to comply with the condition.

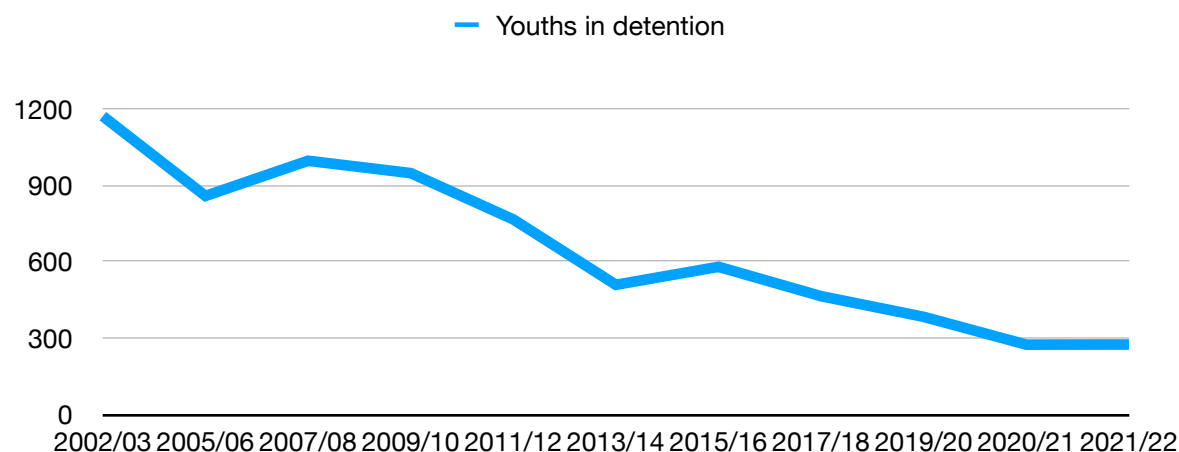
This amendments do not allow conditions being used to “maintain confidence in the administration of justice”. Therefore, this exclusion narrows the types of breaches of conditions that may lead to administration of justice charges. In contrast, the *Code* does allow a court to impose conditions if the court’s concern is maintaining confidence in the administration of justice.

Experience under the YCJA

This section addresses the changes in pretrial detention in the youth system under the *YCJA* and contrasts them with what happened under the *Code* in the same time period.

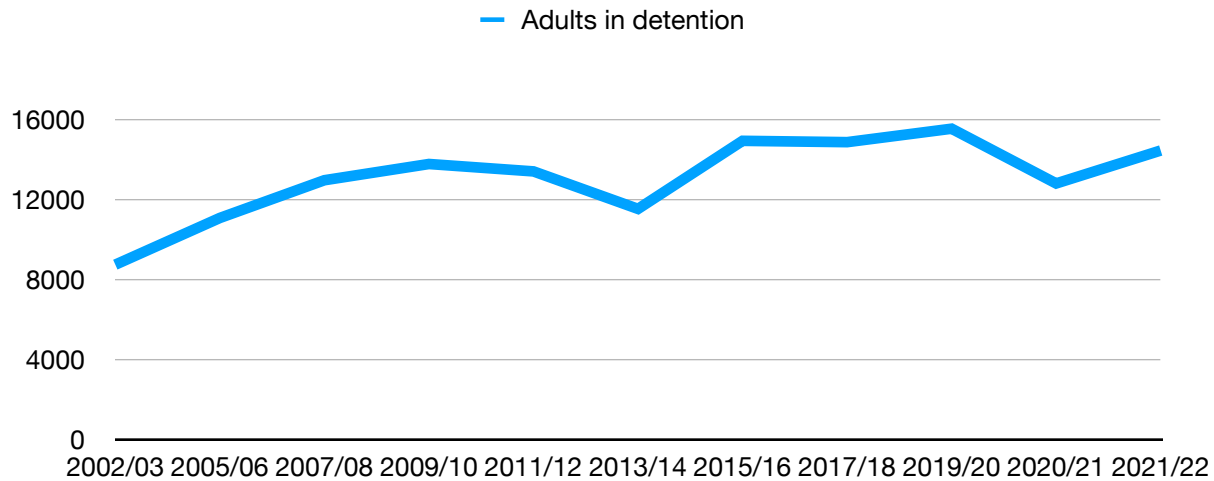
Number of Persons in Detention

Under the *YCJA*, from 2003/04 to 2021/22, the number of youths in detention *decreased by 77%*. In contrast, over the same time period, the average number of adults in detention *increased by 67%*.



Source: Statistics Canada, Average counts of young persons in provincial/territorial correctional programs

⁶⁵ Department of Justice Canada website, Youth Justice, *Recent Amendments to the YCJA*.



Source: Statistics Canada, Average counts of adults in provincial/territorial correctional programs

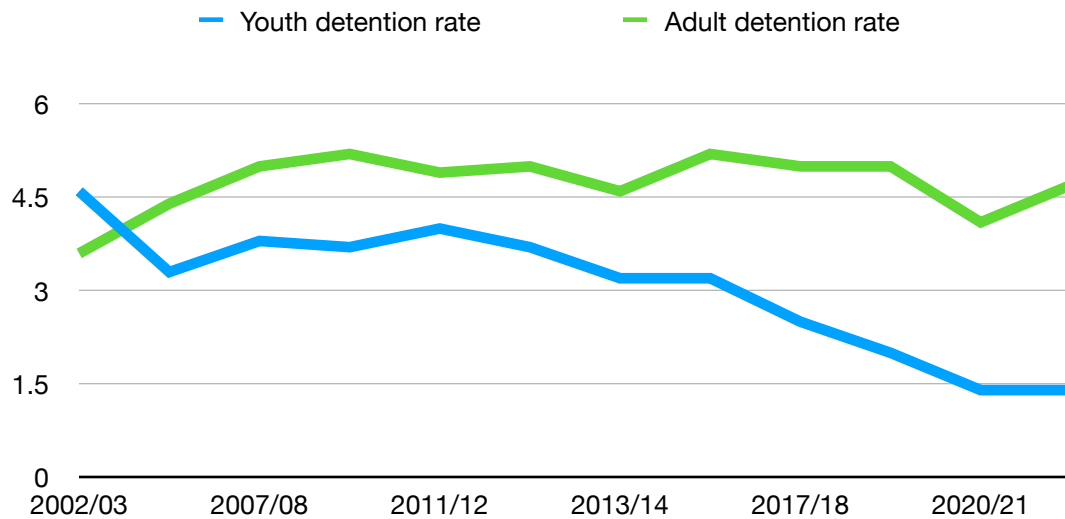
As mentioned earlier, pretrial detention initially did not have consistent and significant changes that were in keeping with the *YCJA*'s objective of decreasing the use of detention for less serious offenders. A major reduction in the number of detainees generally coincided with the 2012 amendments, which were discussed above.

Since 2011/12, the number of youths in detention has declined by 64%. After the amendments, the number continued to generally decline, resulting in the *fewest youths in detention in all of the years ever reported by Statistics Canada: 274*.

Detention Rates

The youth detention rate (the number of youths in detention per 10,000 youths in the population) has also declined. In the last year of the *YOA*, the youth detention rate was 4.6 and higher than the adult rate. In 2021/22 under the *YCJA*, it was 1.4 - a *decrease of 70%*. In contrast, the adult detention rate *increased by 30%*.

In 2012/13, the year that the *YCJA*'s pretrial detention amendments came into force, the youth detention rate dropped and continued to decline to a rate of 1.4 in 2021/22.



Source: Statistics Canada, Average counts of youths and adults in provincial/territorial correctional programs

In summary, under the *YCJA*, the youth system has experienced a dramatic reduction in the use of pretrial detention. The number of accused youths in detention has *dropped by 77%* while under the *Criminal Code* the number of accused adults *increased by 67%*. Similarly, the youth detention rate *dropped by 70%* while the adult rate *increased by 30%*. These different results showing that the two detention systems have been moving in opposite directions may not be entirely explained by the differences in the legislative provisions. However, the *YCJA* provisions appear to have been a significant factor in the *YCJA*'s success in achieving Parliament's objective of reducing the use of pretrial detention. The decreases in pretrial detention generally coincided with the amendments, which replaced the *Code* provisions with clearer, more restrictive and more directive provisions. These results were achieved without causing an increase in youth crime. In fact, youth crime and youth crime severity decreased.

If an objective of adult bail reform is to reduce the increasing use of pretrial detention, particularly for the large number of accused persons charged with relatively less serious offences, then amending the Code along the lines of the YCJA would seem to be a good way of helping to achieve that objective.

Part C: Proposed Amendments - Judicial Interim Release

The legislative provisions proposed in this section take account of the numerous concerns raised in Part A of this paper. They also take account of the success of the *Youth Criminal Justice Act*. More specifically, the proposed provisions take account of the *YCJA*'s pretrial detention provisions, the differences between the *YCJA* provisions and the comparable *Criminal Code* provisions, and research findings based on more than a decade of experience under the *YCJA*.

Key features of the proposed amendments regarding judicial interim release include:

- The Declaration of Principles incorporates important decision-making principles, including many identified by the Supreme Court of Canada in various judgments.
- Detention is reserved for people who are charged with serious offences - i.e., indictable offences for which the maximum punishment is imprisonment for five years or more. The underlying goal is to reduce the large number of people charged with relatively minor offences who are in pretrial detention.
- Reverse onus offences are deleted.
- Instead of reverse onus provisions triggered by certain very serious repeat offence charges, the proposed amendments identify these offences as factors that increase the likelihood that the presumption of release should be rebutted and that the accused should be detained. Unlike the current reverse onus provisions in the *Code*, the amendments are not in conflict with the presumption of innocence.
- The tertiary ground of detention (maintain confidence in the administration of justice) is deleted.
- The criteria and factors for decision-making are more specific, explicit and directive than the *Criminal Code* provisions.
- In the determination of whether an accused person should be detained, an emphasis is placed on whether the person has a record of relevant past offences, which research has shown has better predictive value than other commonly used factors.
- Specific principles are set out for making decisions regarding release conditions, including the requirement that a condition may not be imposed unless it has a direct and rational connection to the risk that the accused is alleged to pose.

Many of the current provisions in s. 515 of the *Code* would continue to apply if these proposed amendments become law. They are not reproduced with the proposed amendments in this part of the paper. Where there is an inconsistency

between these proposed amendments and the current s. 515 of the *Code*, these amendments would apply.

Judicial Interim Release

Declaration of Principles

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Commentary

Most of these principles have been recognized and confirmed by the Supreme Court of Canada. The principles are intended to apply to decisions made to detain or release and to impose conditions of release.

This statement of principles would replace the current sections 493.1 and 493.2 - Principles and Considerations.

Grounds for Detention

2. A justice shall not order detention of an accused unless the accused has been charged with a serious offence and the justice is satisfied that

- (a) there is a substantial likelihood that the accused, if released, will fail to appear in court at the accused's next court hearing, or**
- (b) there is a substantial likelihood that the accused, if released, will commit a serious offence prior to the accused's next court hearing, and**
- (c) the justice is satisfied that no condition or combination of conditions would, depending on the justification on which the court relies under (a) or (b), reduce below substantial the likelihood that the accused**
 - (i) would not appear in court at the person's next court hearing, or**
 - (ii) would commit a serious offence prior to the person's next court hearing.**

3. A "serious offence" means an offence for which the maximum sentence is five years or more.

4. A “substantial likelihood” is greater than a balance of probabilities but less than beyond a reasonable doubt.

5. The onus of satisfying the court as to the matters in s. 2 is on the Attorney General.

Commentary

These proposed grounds for detention would replace the grounds in the current s. 515(10).

As discussed earlier, the detention of legally innocent persons who are charged with relatively minor offences is a major problem. This provision addresses this issue, in part, by creating a threshold regarding who is potentially eligible for detention. It provides that any person who is charged with an offence that is not a serious offence shall not be detained. In other words, pretrial detention is to be reserved for persons charged with serious offences. The Criminal Code defines a “serious offence” as an offence for which the maximum sentence is imprisonment for five years or more. There are legal options other than detention for compelling the appearance of a person to be dealt with according to law (e.g., a summons; an appearance notice; an undertaking).

The youth criminal justice system has experience with this threshold requirement. The removal of the Criminal Code provisions and the limiting of detention primarily to persons charged with serious offences has been the law under the YCJA for the last thirteen years. It has helped to decrease the numbers in pre-trial detention during a period in which the adult detention numbers continued to increase significantly. This decline in the use of detention for youths has not endangered public safety. Quite the contrary - the youth crime rate and youth crime severity have declined dramatically.

This provision also sets out a specific time period for considering the risk that the accused may pose: the time between the bail hearing and the accused’s next court appearance. The risk of failing to appear or committing a serious offence is not to be considered simply within some unspecified time in the future but rather the much shorter time frame of when the accused will be required to appear in court. For the purpose of determining whether pretrial detention is needed, the focus is on the short-term, not the long-term, risk of offending.

Another significant change under this proposed provision is that the “tertiary ground” for detention under the Code (maintain confidence in the administration

of justice) is deleted. As discussed in Part A, this change has been recommended by the Law Reform Commission of Canada and other legal scholars. It is too vague to be used as the basis of depriving an innocent people of their liberty. Also, in a strong dissenting opinion in R. v. Hall, four justices of the Supreme Court of Canada argued that it is unconstitutional and should be repealed.

Although not recommended in this paper, an alternative to deletion of the “tertiary ground” would be to use the approach in the YCJA, which includes “maintain confidence in the administration of justice” as a ground for detention, but, unlike the Code, contains specified limits on the applicability of the ground (e.g. only to be used exceptional circumstances), as discussed in Part B.

The grounds for detention in these proposed amendments - failure to appear and commission of a serious offence - are based on the wording of the judicial interim release provisions of the YCJA. The discussion in Part B of this paper contrasts the YCJA provisions with the Code provisions. The YCJA grounds are more specific and directive than the Code grounds. Again, the long experience under the YCJA with the grounds has demonstrated that they have been helpful in reducing unnecessary pretrial detention.

These proposed amendments also eliminate the reverse onus offence provisions of the current s. 515(6),(7). The onus is on the Crown in all cases. This approach has been successful under the YCJA. The arguments for repealing reverse onus provisions were discussed in Part A. Section 8 of these amendments provides a different way of recognizing in law that the current reverse onus offences are very serious and increase the likelihood of detention without conflicting with the Charter-protected presumption of innocence.

Substantial Likelihood of Failing to Appear

6. In determining under s. 2(a) whether there is a substantial likelihood that the accused, if released, will not appear in court as required, the justice shall make the decision in accordance with the principles and considerations in s. 1 and after considering the following:

- (a) the length of time before the accused’s next court hearing;**
- (b) the expected length of time that the accused, if detained, will remain in detention while awaiting the resolution of the case;**
- (c) whether the likely negative consequences of detaining the person are disproportionate to the negative consequences of the person not appearing**

- in court;
- (d) whether the accused has a record of failing to appear in court when required by law to do so;
- (e) whether the accused has a record of complying with certain release conditions that are relevant to reducing the likelihood that the accused will not appear in court;
- (f) whether the accused has a record of failing to comply with any other court order;
- (g) the likelihood of the accused, if convicted of the alleged offence, being sentenced to a lengthy term of custody;
- (h) the accused's ties to the community,
- (i) the level of potential supervision if the accused is released,
- (ii) the strength of the prosecution's case; and
- (j) any other factor that has a direct, rational connection to the likelihood of the accused not appearing at the accused's next court hearing.

Substantial Likelihood of Committing a Serious Offence

7. In determining under s. 2(b) whether there is a substantial likelihood that the accused will commit a serious offence while on release, the justice shall make the determination in accordance with the principles and considerations in s.1 and after considering the following:

- (a) whether the accused had a pending serious offence charge at the time of the alleged current offence;
- (b) whether the accused has a record of being convicted of a serious offence within the last five years;
- (c) whether the accused has a record of being charged with a serious offence while on release within the last five years;
- (d) whether the accused has a record of being convicted of non-compliance with previous court orders within the last five years;
- (e) whether the accused has a record of complying with certain release conditions that are relevant to reducing the likelihood that the accused will commit a serious offence if released;
- (f) the strength of the prosecution's case;
- (g) whether the accused, if convicted, is likely to receive a lengthy custodial sentence; and
- (h) any other factor that has a direct, rational connection to the likelihood of the accused committing or not committing a serious offence prior to the

accused's next court hearing.

Commentary

The general approach of the proposed s. 6 and s. 7 is to be much more specific than the Code in setting out factors that must be considered in determining whether there is a substantial risk that the accused will commit a serious offence or fail to appear in court. The factors are, in part, based on the research that has found that most predictions are likely to be inaccurate but that a relevant prior record is the best (or least weak) of predictive factors. That is why there is an emphasis in the factors on the record of the accused regarding matters that are relevant to the grounds for detention (e.g., a record of having committed a serious offence).

The specificity is also intended to give greater clarity and direction to the justice than the general principles set out by the Code and the Supreme Court of Canada regarding bail. Those principles, which have been incorporated into s. 1 of these proposed amendments, have not been sufficient on their own to bring about a more restrained use of pretrial detention. Experience under the YCJA suggests that more specific direction to decision-makers can have a significant effect in helping to achieve the policy objective of reducing incarceration, including pretrial detention, in the criminal justice system.

Factors Making Detention More Likely: Serious Repeat Offences

8.(1) In determining whether one of the grounds for detention under s. 2 is met, the justice shall find that the following factors make it more likely that the presumption of release should be rebutted and that the accused should be detained:

- (a) the accused is charged with a serious offence, other than an offence listed under s.469,**
 - (i) while at large after being released in respect of another serious offence;**
 - or**
 - (ii) is not ordinarily resident in Canada; or**
- (b) the accused is charged with an indictable offence, other than an offence listed in s. 469,**
 - (i) that is in one of the following offence categories: (a) violent offence against an intimate partner, (b) violent offence with a weapon, (c)**

terrorism offence, (d) drug offence, (e) firearm offence, (f) criminal organization offence (g) offence under the *Foreign Interference and Security of Information Act*; (h) human trafficking offence; (i) home invasion offence; and (j) violent motor vehicle theft;

- (ii) the accused also has a prior conviction for an offence that is in the same offence category as the charged offence in subparagraph (i) and
- (iii) the prior conviction was within five years of the current charge.

(c) For the purposes of this section

- (i) “violent offence against an intimate partner” means an offence in the commission of which violence was allegedly used, threatened or attempted against an intimate partner of the accused;
- (ii) “violent offence with a weapon” means an offence in the commission of which violence was allegedly used, threatened or attempted against a person with the use of a weapon;
- (iii) “terrorism offence” means an offence under any of sections 83.02 to 83.04 and 83.18 to 83.23;
- (iv) “drug offence” means an offence punishable by imprisonment for life under any of sections 5 to 7 of the *Controlled Drugs and Substances Act* or the offence of conspiring to commit such an offence;
- (v) “firearm offence” means an offence that is an offence under section 95, 98, 98.1, 100, 102, 103, or that is an offence under s. 244, 244.2, 239, 272, 273, 279(1), 279.1, 344 or 346 that is alleged to have been committed with a firearm;
- (vi) “offence under the *Foreign Interference and Security of Information Act*” (FISIA) means (i) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1), 20.1(1), 20.3(1), 20.4(1) or 22(1) of the FISIA or (ii) an offence under subsection 21(1) or 23 of the FISIA committed in relation to an offence referred to in subparagraph (i);
- (vii) “criminal organization offence” means an offence under section 467.11, 467.111, 467.12 or 467.13 or a serious offence alleged to have been committed for the benefit of, at the direction of, or in association with, a criminal organization;
- (viii) “human trafficking offence” means an offence under s. 279.01 or 279.011;
- (vix) “home invasion offence” means an offence that is included in s. 348.1; and (x) “violent motor vehicle theft” means an offence under s. 331.1 which allegedly involved the use of violence.

Commentary

The Supreme Court of Canada has set out two criteria for the use of reverse onus provisions: (a) reverse onus should be used only in a narrow range of circumstances and (b) reverse onus must promote the proper functioning of the bail system (e.g., public safety). The number of reverse onus offences has been steadily increasing and the pressure to increase them further continues. Currently, more than 40 offences are included in the existing and proposed reverse onus offences. This large number of reverse onus offences raises the issue of what constitutes a “narrow range of circumstances”. As noted earlier, the increasing number of reverse onus offences caused the legal scholar Martin Friedland, in calling for the end of reverse onus provisions, to ask: “Where does one stop?”

This proposed section replaces the reverse onus provisions in the Criminal Code. The discussion of reverse onus offences in Part A of this paper sets out the rationale for repealing the existing reverse onus provisions. As discussed earlier, the reverse onus provisions create a presumption of detention for certain repeated serious offences and shift the onus to the accused to persuade the court that he or she should not be detained. This shifting of onus to the accused is in conflict with the presumption of innocence and the presumption of release.

The proposed amendment recognizes the exceptional seriousness of these repeat offences. It provides that if the accused (a) is charged with one of the listed serious offences and (b) has a prior record of being convicted of the same type of offence, the court is required to find that it is more likely that the presumption of release should be rebutted and that the accused should be detained. The listed offences are the same offences that are currently reverse onus offences in the Code as well as offences that have been identified by the federal government as offences for which bail law should be toughened. The amendment, unlike the Code, when referring to prior record does not include a discharge related to intimate partner violence because a discharge should not be treated as equivalent to a conviction.

Although the amendment removes the reverse onus, the factors listed in this proposed amendment do make it easier (compared to other bail cases) for the prosecution to persuade the court that a ground for detention is met (e.g., a substantial likelihood that the accused will commit a serious offence if released.) They make clear in law that a bail case that includes these factors is more serious and is not to be treated the same as less serious cases. The onus remains on the prosecution but these factors distinguish the accused serious repeat offender from other accused persons by making it less likely that the accused

should be released because of the seriousness of the alleged offence and the seriousness of the accused's record. In other words, the prosecution's burden of persuading the court that the accused should be detained is less onerous than in cases in which these factors are not present.

Unlike the reverse onus provisions in the Code, this provision makes it more likely that serious repeat offenders will be detained without conflicting with the presumption of release and the fundamental principle of criminal law that everyone is presumed innocent until proven guilty. It can be seen as a middle ground between the reverse onus approach and the approach of treating these accused persons like all other accused persons at the bail stage.

An alternative to this proposed amendment is to simply repeal the current reverse onus provisions. A strong argument can be made that there is no need for a special provision related to these serious repeat offences because the prosecution should have no difficulty in persuading the bail court that an accused person who has been charged with one of the offences (and has been convicted of the same type of offence previously) listed in this section should be detained. However, the obvious and understandable public concern regarding the release of persons accused of these serious repeat offences suggests that the law should recognize in some way that they are exceptionally serious.

Another alternative to this proposed amendment is to provide that if these listed factors are present, neither a presumption of release nor a presumption of detention would apply. The onus would remain on the prosecution and the court would be required to find that, if the listed factors apply to the accused, it is more likely that the accused should be detained.

Alternatives to Detention

9. In determining under s. 2(c) whether there is an alternative to pretrial detention, the justice shall consider, in addition to the considerations in s. 6 or s. 7 as the case may be, submissions relating to

- (a) the alternatives to detention that are available, including unconditional release and any means of supervision of the accused while on release;**
- (b) the likelihood that the accused will comply with release conditions, taking into account the accused's compliance or non-compliance with previous court-ordered conditions; and**

- (c) the alternatives to detention that have been used in respect of accused persons charged with similar offences allegedly committed in similar circumstances.**

Reasons

- 10. If the justice decides that the accused should be detained, the justice shall:**
- (a) state the reasons why the justice has determined that a conditional release is not adequate to achieve the purpose in s. 2(a) or (b), as the case may be; and**
 - (b) the reasons shall include an explanation of how the considerations in s. 6, s. 7, s. 8 or s. 9 affected the decision to detain the accused.**

:

Order of Release and Release Conditions

- 11. If the justice decides not to order detention of the accused, the justice shall order that the accused be released on an undertaking without conditions unless the prosecutor satisfies the justice that conditional release is required in order to meet the objectives in s. 2(a) or (b), as the case may be. *(Similar to Code s.515(1))***

- 12. If the justice does not make an order under s. 11, the justice shall order that the accused be released**
- (a) on an undertaking with such conditions as the justice directs;**
 - (b) on a recognizance without sureties, in such an amount and with such conditions, if any, as the justice directs but without deposit of money or other valuable security;**
 - (c) on a recognizance with sureties in such amount and with such conditions, if any, as the justice directs, but without a deposit of money or other valuable security;**
 - (d) on a recognizance without sureties in such amount and with such conditions, if any, as the justice directs and on depositing such sum of money or other valuable security as the justice directs; or**
 - (e) If the accused is not ordinarily resident (i) in the province in which he is in custody or (ii) within 200 kilometres the place of custody, on a recognizance with or without sureties and upon his depositing such sum of money or the valuable**

security as the justice directs. (*Shortened, paraphrased version of Code s. 515(2)*)

13. If the justice decides to order a condition of release, the justice shall make the decision in accordance with the principles and considerations in s. 1 and the following principles:

- (1) Conditions must be tailored, reasonable, not excessive and demonstrably connected to the grounds for detention in s. 2(a) or (b).**
- (2) Conditions must be minimal, necessary, the least onerous in the circumstances, and not disproportionate to the risks that the accused is alleged to pose.**
- (3) Rehabilitating or treating an accused's addiction or other illness is not an appropriate purpose for a bail condition.**
- (4) Conditions must take into account that an accused person who is released on conditions is likely to suffer negative consequences, including restrictions on liberty and the risk of a new charge for violation of a condition due to behaviour that would not be an offence for someone who is not subject to a release order.**
- (5) A condition of release shall not be ordered unless the justice has determined that the accused person will reasonably be able to comply with the condition.**

Commentary:

These principles, along with the relevant principles and considerations in s. 1, are intended to guide the imposition of a condition of release. The principles in subsections (1) - (4) are drawn from decisions of the Supreme Court of Canada in R. v. Penunsi and R. v. Zora. Principles from s. 1 that are specifically relevant to the ordering of a condition of release, and which, to some extent, overlap with principles in this section, include

- (a) Conditional release prior to a conviction is a significant deprivation of liberty that conflicts with the presumption of innocence and must be the exception, not the rule, even when the accused person is charged with a serious criminal offence.*
- (b) It must be presumed that an accused person should be released without conditions.*
- (c) Detention and release decisions must be based on the principle of restraint and the requirement that the least restrictive alternative must be used.*
- d) All alternatives to detention that are reasonable in the circumstances must be considered for all accused persons, with particular attention to the*

- circumstances of aboriginal persons and other vulnerable populations.*
- (e) An accused person shall not be subjected to a condition of release as a substitute for appropriate mental health services or other social measures.*
 - (f) Under the Charter of Rights and Freedoms, everyone has the right not to be denied reasonable bail without just cause.*
 - (g) Conditional release of an accused person must not be disproportionate to the risks that the accused person is alleged to pose.*

Part D: Proposed Legislative Amendments: Extrajudicial Measures⁶⁶

The proposed amendments in this Part are basically the same as the extrajudicial measures provisions in the *Youth Criminal Justice Act* and would replace the alternative measures provisions in s. 717 of the *Criminal Code*. They would be inserted in the *Code* at the beginning of Part XVI: Compelling Appearance of Accused before a Justice and Interim Release.

There is a precedent for the *Criminal Code* adopting diversion provisions that are in youth criminal justice legislation. In 1997, the *Code* (s. 717) incorporated the alternative measures provisions of the *Young Offenders Act* and they continue to be in the *Code*. The *YCJA* extrajudicial measures provisions have been much more successful than the alternative measures provisions in diverting less serious cases from the court and thereby reducing the court's caseload. There is reason to believe that similar results would be seen in the adult system if the *YCJA* provisions were inserted in the *Code*.

The extrajudicial measures provisions of the *YCJA* have been in Canadian law since 2003. They have been an important factor in changing police charging practices. The provisions give legislative guidance, support and encouragement to the police regarding the use of alternatives to the court process, particularly for less serious offences. Prior to the *YCJA* police were charging 55% of apprehended youths and not charging 45%. Under the *YCJA*, these numbers have reversed, with only 45% charged and 55% not charged. These changes did not result in an increase in the youth crime rate.

⁶⁶ See Barnhorst, R., "Achieving Restraint in the Use of the Criminal Justice System: Canada's Youth Criminal Justice Act", 72 *Criminal Law Quarterly* for a detailed discussion of extrajudicial measures under the *YCJA*, the contrast with the *Code* provisions on alternative measures, and the contrast in the outcomes under the *YCJA* and the *Criminal Code*.

An effect of the extrajudicial measures provisions has been a reduction in minor cases going to court and more time for courts to deal with more serious cases. By reducing the flow of cases into the criminal court process, these provisions appear to have helped to reduce the need for bail hearings and the use of pretrial detention.

Between 2005/06 and 2020/21, under the *YCJA*, court cases dropped by 74%. During the same period, adult court cases also declined but only by 39%. The youth system, compared to the adult system, also had a much more significant reduction in the proportion of non-violent court cases (property offences and administration of justice offences).

Unlike the youth system, the adult system has continued to have an increasing number of bail hearings, long delays and increasingly heavy court caseloads. Based on the long experience under the *YCJA*, it seems reasonable to replace the current *Code* provisions with the extrajudicial measures provisions of the *YCJA* because of their potential to reduce the overload of bail cases and the delays in completion of bail hearings.

As noted in *Criminological Highlights* of the University of Toronto, there is research that shows that diversion can be effective in the adult system: “Although diversion of offenders is more often a policy for youths than for adults, these 5 studies ... demonstrate the benefits of diversion of adults as well: reduced use of scarce resources on cases that do not need full prosecutions and no evidence of a subsequent increase in crime.”⁶⁷

Key features of the extrajudicial measures provisions that are different from the current *Code* provisions on police charging and alternative measures include:

- They set out a range of extrajudicial measure options for police and prosecutors: taking no further action; informal warnings; police cautions; Crown cautions; referrals to a community program; and extrajudicial sanctions.
- Police are required in all cases, before starting judicial proceedings, to consider whether an extrajudicial measure would be sufficient.

⁶⁷ Centre for Criminology and Sociolegal Studies, University of Toronto, *Criminological Highlights*, Vol. 20, No 2, summarizing Davis, Robert C., Warren A. Reich, Michael Rempel, and Melissa Labriola (2021). “A Multisite Evaluation of Prosecutor-Led Pretrial Diversion: Effects on Conviction, Incarceration, and Recidivism”. *Criminal Justice Policy Review*, 32(8), 890-909. Also see

- Police are directed that extrajudicial measures, rather than a charge, should be used if an extrajudicial measure would be adequate to hold the person accountable.
- Extrajudicial measures are presumed to be adequate to hold a person accountable if the person has committed a nonviolent offence and has not previously been found guilty of an offence.
- Extrajudicial measures are presumed to be adequate for administration of justice offences unless the person has a history of repetitive breaches or the breach caused harm or risk of harm to public safety.
- An extrajudicial measure must be proportionate to the seriousness of the alleged offence.
- The use of “conferences” is authorized and encouraged; they enable members of the community to assist decision-makers in the criminal justice system (e.g., a restorative justice conference).

EXTRAJUDICIAL MEASURES

Definitions

493. In this Part,

“conference” means a group of persons who are convened to give advice in accordance with section 493.10.

“extrajudicial measures” means measures other than judicial proceedings to deal with a person alleged to have committed an offence and includes extrajudicial sanctions.

“extrajudicial sanction” means a sanction that is a part of a program referred to in section 493.8.

Commentary:

These definitions would be added to the list of definitions in s. 493 of the Code.

Declaration of principles

493.1. The following principles apply in this Part:

- (a) extrajudicial measures are often the most appropriate and effective way to address crime;**
- (b) extrajudicial measures allow for effective and timely interventions focused on correcting offending behaviour;**

- (c) extrajudicial measures are presumed to be adequate to hold a person accountable for his or her offending behaviour if the person has committed a non-violent offence and has not previously been found guilty of an offence; and**
- (d) extrajudicial measures should be used if they are adequate to hold a person accountable for his or her offending behaviour and, if the use of extrajudicial measures is consistent with the principles set out in this section, nothing in this Act precludes their use in respect of a person who**
 - (i) has previously been dealt with by the use of extrajudicial measures, or**
 - (ii) has previously been found guilty of an offence.**

493.2 (1) Extrajudicial measures are presumed to be adequate to hold a person accountable for a failure referred to in s. 496 (judicial referral hearing) or s. 145 (failure to comply with an order - e.g., release order) of the Criminal Code unless

- (a) the person has a history of repetitive failures or refusals; or**
- (b) the person's failure or refusal caused harm, or a risk of harm, to the safety of the public.**

(2) In the cases referred to in paragraphs (1)(a) and (b),

- (a) extrajudicial measures should be used if they are adequate to hold the person accountable for the failure or refusal; and**
- (b) if the use of extrajudicial measures would not be adequate under paragraph (a), but issuing an appearance notice under section 496 (judicial referral hearing) of the Criminal Code as an alternative to proceeding by charge would be adequate, then the appearance notice should be used.**

Objectives

493.3 Extrajudicial measures should be designed to

- (a) provide an effective and timely response to offending behaviour outside the bounds of judicial measures;**
- (b) encourage persons to acknowledge and repair the harm caused to the victim and the community;**
- (c) encourage families of persons — including extended families where appropriate — and the community to become involved in the design and implementation of those measures;**
- (d) provide an opportunity for victims to participate in decisions related to the measures selected and to receive reparation; and**

- (e) respect the rights and freedoms of persons and be proportionate to the seriousness of the offence.

Warnings, cautions and referrals

493.4 (1) A police officer shall, before starting judicial proceedings or taking any other measures under this Act against a person alleged to have committed an offence, consider whether it would be sufficient, having regard to the principles set out in sections 4 and 4.1, to take no further action, warn the person, administer a caution, if a program has been established under section 7, or, with the consent of the person, refer the person to a program or agency in the community that may assist the person not to commit offences.

- (2) The failure of a police officer to consider the options set out in subsection (1) does not invalidate any subsequent charges against the person for the offence.**

Police cautions

493.5 The Attorney General, or any other minister designated by the lieutenant governor of a province, may establish a program authorizing the police to administer cautions to persons instead of starting judicial proceedings under this Act.

Crown cautions

493.6 The Attorney General may establish a program authorizing prosecutors to administer cautions to persons instead of starting or continuing judicial proceedings under this Act.

Evidence of measures is inadmissible

493.7 Evidence that a person has received a warning, caution or referral mentioned in section 6, 7 or 8 or that a police officer has taken no further action in respect of an offence, and evidence of the offence, is inadmissible for the purpose of proving prior offending behaviour in any proceedings before a court in respect of the person.

Extrajudicial sanctions

(Note: These provisions are essentially the same as the current Code provisions in s. 717. The term “extrajudicial sanctions” replaces “alternative measures”.)

493.8 (1) An extrajudicial sanction may be used to deal with a person alleged to have committed an offence only if the person cannot be adequately dealt with by a warning, caution or referral mentioned in section 6, 7 or 8 because of the seriousness of the offence, the nature and number of previous offences committed by the person or any other aggravating circumstances.

(2) An extrajudicial sanction may be used only if

- (a) it is part of a program of sanctions that may be authorized by the Attorney General or authorized by a person, or a member of a class of persons, designated by the lieutenant governor in council of the province;**
- (b) the person who is considering whether to use the extrajudicial sanction is satisfied that it would be appropriate, having regard to the needs of the person and the interests of society;**
- (c) the person, having been informed of the extrajudicial sanction, fully and freely consents to be subject to it;**
- (d) the person has, before consenting to be subject to the extrajudicial sanction, been advised of his or her right to be represented by counsel and been given a reasonable opportunity to consult with counsel;**
- (e) the young person accepts responsibility for the act or omission that forms the basis of the offence that he or she is alleged to have committed;**
- (f) there is, in the opinion of the Attorney General, sufficient evidence to proceed with the prosecution of the offence; and**
- (g) the prosecution of the offence is not in any way barred at law.**

(3) An extrajudicial sanction may not be used in respect of a person who

- (a) denies participation or involvement in the commission of the offence; or**
- (b) expresses the wish to have the charge dealt with by a court.**

(4) Any admission, confession or statement accepting responsibility for a given act or omission that is made by a person as a condition of being dealt with by extrajudicial measures is inadmissible in evidence against any person in civil or criminal proceedings.

(5) The use of an extrajudicial sanction in respect of a person alleged to have

committed an offence is not a bar to judicial proceedings under this Act, but if a charge is laid against the person in respect of the offence,

- (a) the court shall dismiss the charge if it is satisfied on a balance of probabilities that the person has totally complied with the terms and conditions of the extrajudicial sanction; and
- (b) the court may dismiss the charge if it is satisfied on a balance of probabilities that the person has partially complied with the terms and conditions of the extrajudicial sanction and if, in the opinion of the court, prosecution of the charge would be unfair having regard to the circumstances and the person's performance with respect to the extrajudicial sanction.

(6) Subject to subsection (5) and section 24 (private prosecutions only with consent of Attorney General), nothing in this section shall be construed as preventing any person from laying an information or indictment, obtaining the issue or confirmation of any process or proceeding with the prosecution of any offence in accordance with law.

Victim's Right to Information

493.9. If a person is dealt with by an extrajudicial sanction, a police officer, the Attorney General, or any organization established by a province to provide assistance to victims shall, on request, inform the victim of the identity of the person and how the offence has been dealt with.

Conferences

493.10. (1) A judge, a police officer, a justice of the peace, or a prosecutor may convene or cause to be convened a conference for the purpose of making a decision under this Act.

(2) The mandate of a conference may be, among other things, to give advice on appropriate extrajudicial measures and conditions for judicial interim release.

(3) The Attorney General may establish rules for the convening and conducting of a conferences other than conferences convened by a judge or justice of the peace.

(4) In provinces where rules are established under subsection (3), the conferences to which those rules apply must be convened and conducted in accordance with those rules.

Part E: Proposed Legislative Amendments: Detention by Police.

As discussed in Part A, police are gatekeepers to pretrial detention in the criminal justice system. Understanding the police decision-making process is important to understanding why large numbers of accused persons are detained or released with conditions not only by police but also at judicial interim release hearings. The more cases that the police can handle without detaining the accused, the fewer cases that will require a bail hearing, which, in turn, will further reduce the number of people detained by the bail court.

Under the proposed amendments relating to extrajudicial measures, discussed in Part D, the police would be required, before starting judicial proceedings or taking any other measures, including detention of a person, to consider whether it would be sufficient to use an extrajudicial measure - take no further action, administer a caution, or refer the person to a community program or agency that may assist the person not to commit offences.

Police have broad authority under of the *Criminal Code* to release a person who has been arrested. The police do not have the authority to release the person if the offence is a section 469 offence (murder, offences related to murder such as attempted murder, and other rare offences such as treason and intimidating Parliament). For non-section 469 offences, which make up almost all court cases, the *Criminal Code* sets out rules that vary depending on whether the arrest is without a warrant (s. 498) or with a warrant (s. 499). These sections will be summarized and followed by proposed amendments and commentary.

Key features of the proposed amendments regarding detention by police are:

- The scope of the authority of police to detain depends on whether the alleged offence is serious or non-serious. This distinction is similar to the proposed amendments on judicial interim release.
- A “serious offence” is an indictable offence for which the punishment is imprisonment of 5 years or more.
- If the alleged offence is not serious, the police officer may not detain the person.
- “in the public interest” is removed as a ground for detention by police.
- The proposed amendments attempt to structure the decision-making process of the police officer by setting out several considerations that are relevant to

whether detention is necessary. The considerations are similar to those that would apply in judicial interim release hearings.

(Note: In the proposed amendments, certain words are omitted that will remain the same as the current Code provisions. These omissions are indicated by three dots (...). Also, where the current Code provisions are summarized, see the Criminal Code for the exact wording.)

1. Release by a peace officer where arrest is without a warrant (s. 498)

Section 498(1) currently provides that, subject to subsection (1.1), if a peace officer arrests a person without a warrant for an offence, other than a s. 469 offence, the police officer must release the person as soon as is practicable if the peace officer intends to use a summons, an appearance notice, or the person gives an undertaking to the peace officer.

Subsection (1.1) states that the peace officer shall not release the person if the peace officer believes, on reasonable grounds, that it is necessary “in the public interest” that the person be detained, having regard to all the circumstances including the need to

- establish the identity of the person;
- secure or preserve evidence relating to the offence;
- prevent the commission of an offence; or
- ensure the safety of a victim or witness; or
- if the person is released, the person will fail to attend court.

The following proposed amendments set out rules that distinguish between serious offences and non-serious offences.

Proposed amendment

RELEASE FROM CUSTODY BY A PEACE OFFICER WHERE ARREST IS WITHOUT A WARRANT: NON-SERIOUS OFFENCE

498. (1) Subject to to subsection (1.1), if a peace officer arrests a person without warrant for an offence that is not a serious offence, ... the peace officer shall, as soon as practicable, release the person ...

(1.1) A peace officer shall not release the person if the peace officer believes, on reasonable grounds, that it is necessary that the person be detained... to establish the identity of the person or to secure or preserve evidence relating to the offence.

(1.2) After the objective in subsection (1.1) has been achieved, the peace officer shall release the person.

(Note: The remainder of s. 498 continues unamended.)

Commentary

Under the proposed judicial interim release provisions, a justice may not detain a person unless the person is charged with a serious offence (an offence punishable by imprisonment of five years or more). This proposed amendment addresses police authority to detain in cases in which the offence is not a serious offence. The rationale behind this amendment is that generally the police authority to detain should be limited in the same way. (i.e., only serious offence charges can result in detention); however, an exception should be made to allow the police to detain a person charged with an offence that does not meet the definition of serious offence, if detention is necessary to establish the identity of the accused or to secure evidence.

Once there is no longer a legal basis for not releasing the person (e.g., the identity of the person has been established), the officer must release the person. The police officer can then obtain a summons or issue an appearance notice or the accused can give an undertaking.

The phrase “necessary in the public interest” has been deleted in the proposed amendment because it is too vague and open to a wide range of subjective opinions. This reasoning is based on the Supreme Court of Canada’s decision in R. v. Morales, discussed above, in which the Court struck the public interest criterion from the grounds for pretrial detention.

RELEASE FROM CUSTODY BY PEACE OFFICER WHERE ARREST IS WITHOUT A WARRANT: SERIOUS OFFENCE

498.1. (1) Subject to subsection (1.1), if a peace officer arrests a person without warrant for a serious offence, the peace officer shall, as soon as practicable, release the person...

(1.1) A peace officer may detain a person under subsection (1) if the peace officer believes, on reasonable grounds, that it is necessary that the person be detained to

- (a) establish the identity of the person,**
- (b) secure or preserve evidence relating to the offence,**
- (c) prevent the commission of a serious offence, including an offence that endangers the safety of a victim of or witness to a the offence, prior to the person's next court hearing, or**
- (d) ensure that the person will attend court in order to be dealt with according to law.**

(1.2) In determining under subsection (1.1)(c) whether there are reasonable grounds to detain the person to prevent the commission of a serious offence prior to the person's next court hearing, the officer shall make the determination in accordance with the principles and considerations in s. 1 and after considering the following:

- (a) whether the person had a pending serious offence charge at the time of the alleged current offence;**
- (b) whether the person has a record of being convicted of a serious offence within the last five years;**
- (c) whether the person has a record of being charged with a serious offence while on release within the last five years;**
- (d) whether the person has a record of being convicted of non-compliance with previous releases within the last five years;**
- (e) whether the person has a record of complying with certain release conditions that are relevant to reducing the likelihood that the accused will commit a serious offence if released; and**
- (f) any other factor that has a direct, rational connection to the likelihood of the person committing or not committing a serious offence prior to the person's next court hearing.**

(1.3) It is less likely that detention is necessary if the person does not have a pending charge or does not have a record referred to in (1.2)(a)-(e).

(1.4) In determining under subsection (1.1.)(d) whether there are reasonable grounds to detain the person to ensure that the person will attend court, the officer shall make the determination in accordance with the principles in s. 1 and after considering the following:

- (a) whether the likely negative consequences of detaining the person are disproportionate to the negative consequences of the person not appearing in court;**
- (b) whether the person has a record of failing to appear in court when required by law to do so;**
- (c) whether the accused has a record of complying with certain release conditions that are relevant to reducing the likelihood that the accused will not appear in court;**
- (d) whether the person has a record of failing to comply with a pretrial release;**
- (e) the person's ties to the community;**
- (f) the level of potential supervision if the person is released,**
- (g) any other factor that has a direct, rational connection to the likelihood of the person not appearing at the accused's next court hearing.**

(1.5) It is less likely that detention is necessary if the person does not have a record referred to in (1.4)(c) - (e).

Commentary

These proposed amendments address the cases in which a person is arrested for a serious offence (an offence punishable by imprisonment for five years or more). In addition to the grounds for detention in s. 498, these proposed grounds include the grounds of preventing the commission of a serious offence and ensuring that the person will appear in court. These latter grounds parallel the grounds for pretrial detention that apply at judicial interim release hearings.

As discussed above, the grounds for detention by a peace officer should generally not be greater than those that apply at judicial interim release hearings. However, the standard for making the decision is lower for the peace officer than it is for a justice. As required in the current s. 498, the peace officer must "believe, on reasonable grounds" that detention is necessary. Under the proposed amendments regarding judicial interim release, a justice is required to find a "substantial likelihood" that detention is necessary.

These proposed amendments also attempt to structure the decision-making process of the peace officer by setting out several considerations that are relevant to whether detention is necessary. These considerations include many of the same considerations that apply at judicial interim release hearings. The basic question at both stages of the process is whether detention is necessary.

2. Release from custody - arrest with a warrant (s. 499)

The current s. 499 provides that, except in the case of an offence listed in s. 469, a judge or justice of the peace who issues an arrest warrant may, by endorsing the warrant under s. 507(6), authorize the peace officer to release the accused person. If the warrant has been endorsed, a peace officer may release the person with an appearance notice or an undertaking given by the accused person.

Subsections 501(2) and (3) set out the conditions that may be included in an undertaking.

Proposed amendment

(Note: Section 499, described above, would not be changed except for the following additional provision.)

RELEASE FROM CUSTODY WHERE ARREST MADE WITH WARRANT

499. (1) If the warrant has been endorsed by a justice under s. 507(6), the peace officer shall make the decision regarding release in accordance with s. 498 (non-serious offence) and s. 498.1 (serious offence).

Commentary

This proposed amendment structures the decision to impose a condition by inserting the requirement that the officer must comply with the principles governing the imposition of conditions. In short, the principles and considerations that apply in other contexts in which conditions may be imposed also apply under s. 499.

Conclusion

It has been more than fifty years since the last major reform of bail law in Canada. The concerns about bail and pretrial detention discussed in this paper suggest that it is time for another major reform. What is required is more than “tinkering” with specific provisions. This paper has attempted to take a more comprehensive approach to bail law reform that includes re-thinking some long-standing provisions. Some of the main proposals and principles in this paper include the following:

- Many of the major problems with the current use of pretrial detention are a result of an over-reliance on incarceration, particularly detention of innocent people charged with less serious offences.
- Pretrial detention should be a last resort and reserved for people who are charged with serious offences - offences which are punishable by imprisonment of five years or more.
- Serious offenders, particularly repeat violent offenders, must be dealt with seriously but without undermining basic principles of justice, such as the presumption of innocence.
- Reverse onus provisions should be repealed.
- The tertiary ground for detention - maintain confidence in the administration of justice - should be repealed.
- It must be recognized, and reflected in law, that pretrial detention can have significant negative consequences on the accused person and can increase the likelihood that the accused will commit a crime upon release.
- Vague and general provisions must not be the basis for depriving legally innocent people of their liberty.
- In order to provide greater clarity in how bail and pretrial detention decisions are to be made, legislative provisions must structure the decisions by being more specific, explicit and directive. This includes not only the grounds for detention but also specific considerations that must be taken into account in determining whether there is a substantial likelihood that the accused will commit a serious offence prior to the accuser’s next court hearing or that the accused will fail to appear in court.
- The predictions required in deciding whether an accused person should be detained must be made with great caution because research evidence makes clear that such predictions are likely to be wrong. This evidence reinforces the need to restrict pretrial detention primarily to serious alleged offenders who have a prior record of committing a serious offence or of not appearing in court.
- Pretrial detention and conditions of release must not be disproportionate to the risk that an accused person is alleged to pose.

- Bail reform must take account of the impact that pre-bail decisions by police and prosecutors can have on the number and types of accused persons appearing at bail hearings.
- The use of diversion (extrajudicial sanctions) by police and prosecutors can be an effective response to an offence and decrease the overload of cases in bail courts.
- The scope of the authority of police to detain should depend on whether the alleged offence is serious or non-serious.

Finally, it is important to recognize that effective bail reform requires more than legislative changes. A lesson from the *Youth Criminal Criminal Justice* is that various non-legislative efforts were important in bringing about the success of the *YCJA*. Those efforts included wide consultation on legislative proposals, research that provided evidence in support of the proposals, extensive professional education programs and materials, public education, pilot projects and their evaluation, and provincial/territorial implementation of the new legislation through programs, professional training, policies, and funding that was consistent with the legislative reform. Similar efforts would be important in making *Criminal Code* bail reform a success in achieving its objectives.