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SOCIETY OF ONTARIO

# About Us

## The Centre of Research, Policy & Program Development at the John Howard Society of Ontario

The Centre of Research, Policy & Program Development was established in June of 2003 with the aim of providing direction and support services to our 19 Affiliate offices across Ontario. To accomplish this goal, the Centre engages in research and policy initiatives across the criminal and social justice and corrections fields. Staff at the Centre are also responsible for program evaluation and assessment, the development and implementation of evidence-based pilot programs and providing Affiliates with thorough, accurate and reliable information on an as-needed basis.

As the John Howard Society of Ontario also actively participates in broader public discussions and discourse surrounding criminal and social justice issues, the Centre is also responsible for developing policy positions, liaising with government and community stakeholders, disseminating educational materials and public education and analyzing information on past, present and future legislative/policy issues related to criminal and social justice.

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### **The Centre of Research, Policy & Program Development**

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# Bail

*The Canadian Charter of Rights and Freedoms, Section 11:*

*“Any person charged with an offence has the right...*

*(e) not to be denied reasonable bail without just cause.”*

We have a bail problem in Ontario.

The Canadian *Charter of Rights and Freedoms* clearly states that any Canadian, if charged with a criminal offence, should have a bail hearing within a “reasonable” amount of time. The *Criminal Code* of Canada prescribes that persons charged with a criminal offence should, in general, be released on bail unless the Crown can demonstrate that detention is necessary<sup>1</sup>. The *Criminal Code* similarly dictates that, generally, “the accused be released on his giving an undertaking without conditions.” It is well known that crime rates (both total and the severity of crime) have been on a decline for decades in Canada, and this includes Ontario<sup>2</sup>. Despite this decrease in actual crime and crime severity, a greater number of criminal cases in Ontario start their life in bail court - that is, detained pending a bail hearing - than ever before<sup>3</sup>. What is more, these bail cases are taking more time to process. Low-risk individuals charged with minor offences have their bail matters put over numerous times on account of the increasing reliance on sureties<sup>4</sup> as a condition of release, along with other delays<sup>5</sup>. Our situation in Ontario is, in short, as follows: less people are being released on bail, less quickly, and with more conditions, during a time of historically low and still-declining crime rates. These trends have not only impacted the amount of backlog in criminal court processes, but have also had a dramatic impact on provincial remand populations. The net effect is significant expenditures on criminal justice processes on the taxpayers’ dime.

Over the past year, the Centre of Research, Policy & Program Development carried out a research study on the Bail Verification and Supervision Program (BVSP) in Ontario. The BVSP, funded by the Ministry of the Attorney General (MAG), operates in court houses and communities across Ontario. The program seeks to provide reports to court personnel on detained individuals to assist the court in assessing charged persons’ suitability for release on bail (or “verification”) and, where appropriate, provides clients with access to bail supervision in cases where it would otherwise not be available (for example, in situations where the Crown stipulates a surety as a condition of release, and one is not available).

Contracted by the Ontario Association of Bail Verification and Supervision Services (OABVSS), Centre Researchers aimed to better understand the processes and practices that underlie the BVSP’s day-to-

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<sup>1</sup> Criminal Code, RSC 1985, c C-46, Section 515.1. Retrieved from: <http://canlii.ca/t/522v7>

<sup>2</sup> Statistics Canada (2012). Catalogue no. 11-402-X. <http://www.statcan.gc.ca/pub/11-402-x/2012000/pdf/crime-eng.pdf>

<sup>3</sup> Webster, C. M., Doob, A. N., & Myers, N. M. (2009). The parable of Ms Baker: Understanding pre-trial detention in Canada. *Current Issues in Criminal Justice*, 21(1): 79-102.

<sup>4</sup> A surety is a person who promises to a judge or a justice of the peace to supervise an accused person while he/she is out on bail. Sureties also pledge a specified amount of money to the court which they risk losing should the accused not follow his/her bail conditions or fail to appear in court when required.

<sup>5</sup> For further perspective, in Ontario, our criminal court system processes more than half a million charges annually. Last year about 43% of all adult criminal court cases resulted in stayed or withdrawn charges. (Source: Statistics Canada, from National Post article, “Courting disaster? The long, long wait for justice in Ontario” June 9, 2012).





# Re-Building Bail

The cracks in bail's foundation in Ontario – and indeed, in Canada – call for more than short-term, band-aid solutions. Any attempts to 'fix' bail in Ontario without addressing some significant systemic and organizational shifts that have occurred over recent decades, will be opportunities missed.

The present report's findings and recommendations support a growing body of literature on bail and remand in Canada which suggests that decisions made at various stages of the criminal justice system are increasingly influenced by organizational risk aversion<sup>8,9</sup>. As past studies have noted, the risk aversion starts at the policing stage, but by no means ends there<sup>10</sup>. Less people charged with criminal offences are released by the police on a 'promise to appear' or a summons, than they were historically<sup>11</sup>. This shift in practice translates into a greater volume of people being detained (in jail) until their bail hearing<sup>12</sup>. Consequently, being detained prior to one's bail hearing has negative bearing on the likelihood of being released on bail – particularly for individuals from racialized communities<sup>13</sup>. For those who do receive bail, it comes with far more conditions attached than it would have years ago, which invite a host of other issues (not least of which, more charges). These trends point to why solely targeting administrative delays – while important – will not cure what ails bail. Bail needs to be rebuilt from the ground, up.

To this end, we propose the following as the fundamental pillars of how bail court ought to operate, were we charged with envisioning the 'ideal' bail court, according to the *Criminal Code*, the *Charter of Rights and Freedoms*, and evidence-led best practice:

Ideal Bail Court				
Charged persons, detained upon arrest, are released on first appearance in bail court	Renewed focus on 'primary' ground, vis-a-vis secondary and tertiary, and return to true presumption of release on bail	Strong emphasis on the presumption of innocence, and the right not to be denied reasonable bail without just cause	All authorized bail conditions are objectively related to both the alleged offence <i>and</i> primary and/or secondary grounds	Accountability measures for court personnel

<sup>8</sup> Webster, C. M., Doob, A. N., & Myers, N. M. (2009).

<sup>9</sup> Myers, N. M. (2009). Shifting risk: Bail and the use of sureties. *Current Issues in Criminal Justice*, 21(1): 127-47.

<sup>10</sup> Department of Justice Canada. (2006). The Final Report On Early Case Consideration Of The Steering Committee On Justice Efficiencies And Access To The Justice System. <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/pdf/ecc-epd.pdf>

<sup>11</sup> Webster, C. M., Doob, A. N., & Myers, N. M. (2009).

<sup>12</sup> There are three criteria outlined in the *Criminal Code* s. 515(10) - respectively referred to as the primary, secondary and tertiary grounds - that justify the detention of an accused person: 1) To ensure that the individual appears in court; 2) For the protection or safety of the community; and, 3) To maintain the public's confidence in the administration of justice.

<sup>13</sup> Kellough, G., & Wortley, S. (2002). Remand for plea: Bail decisions and plea bargaining as commensurate decisions. *British Journal of Criminology*, 42:186-210.

In order to achieve these ideal ‘pillars’ of bail court, we propose the following three key changes to start with, which will be elaborated on in turn in the following pages:

1. The presumptive release of charged persons onto their own recognizances, and the reversal of the trend of overreliance on sureties;
2. A moratorium on the prevalent practice of affixing certain conditions to bail; and,
3. Administrative improvements and greater accountability in courts.





## Presumption of Release, Presumption of Innocence: Two Sides of the Same Coin

After legislative changes in 1972, the *Criminal Code* provisions pertaining to bail placed the onus of detaining an individual pre-trial on the Crown prosecutor, and established (in writing, at least) the presumption that individuals be released on bail, and released on the least onerous form of bail possible. The legislated approach to bail, sometimes referred to as a “ladder approach,” prescribes that:

*Each possible form of release is to be considered and ruled out in turn, until the court comes to the least onerous form of release that would be appropriate in the circumstances, while being mindful of the necessity of exercising restraint in the use of detention and imposing conditions of release. The mandated ladder approach is consistent with the notion of a presumption of release<sup>14</sup>.*

In practice, Ontario has witnessed the erosion of the presumption of release before trial, as well as the disregard for the letter of the law outlining a ladder approach to forms of release<sup>15</sup>. This trend can, in part, be attributed to the increase in reverse onus provisions, which stipulate that if accused individuals are charged with certain enumerated offences, the onus is placed on them, rather than the Crown, to show cause as to why they should be released. The reverse onus provision set out in Section 515(6)(c) of the *Criminal Code* – which includes all administration of justice charges<sup>16</sup> – casts a particularly wide net. There has been a dramatic increase in the number of administration of justice charges being laid in Canada despite overall declines in crime rates. As of 2012, over one fifth of cases completed in adult criminal courts are administration of justice cases<sup>17</sup>. Given the prevalence of these charges, and the liberal application of bail conditions (discussed later), bail is presumptively more difficult to attain.

Underpinning the broader tendencies to presumptively detain is system-wide risk avoidance. Organizational risk aversion, as it was noted earlier, tends to figure prominently in criminal justice system decision-making, and it is quite apparent in decisions involving bail<sup>18,19</sup>. For example, for accused persons who might be considered eligible for bail (that is, there is not an automatic reverse onus), there has been a dramatic increase in the practice of mandating a surety as a condition of release. A bail order that stipulates a surety is one of the most onerous types of release, and yet this type of release is now common practice. As other studies have demonstrated, the presumption of surety release in Ontario (without even considering less onerous forms of release) has become increasingly entrenched, irrespective of the ladder approach that the *Criminal Code* directs<sup>20</sup>.

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<sup>14</sup> Myers, N. M. (2009). Shifting risk: Bail and the use of sureties. *Current Issues in Criminal Justice*, 21(1): 127-47, p. 132.

<sup>15</sup> Ibid.

<sup>16</sup> Administration of justice charges include: 1) failing to attend court in accordance with an undertaking or recognizance or a court order, 2) failing to comply with a condition of an undertaking or recognizance or a court direction, 3) failing to comply with a summons, or 4) failing to comply with an appearance notice or promise to appear.

<sup>17</sup> Public Safety Canada. (2012) *Corrections and Conditional Release Statistical Overview*. [http://www.publicsafety.gc.ca/res/cor/rep/\\_fl/2012-ccrso-eng.pdf](http://www.publicsafety.gc.ca/res/cor/rep/_fl/2012-ccrso-eng.pdf)

<sup>18</sup> Webster, C. M., Doob, A. N., & Myers, N. M. (2009).

<sup>19</sup> Myers, N. M. (2009).

<sup>20</sup> Myers, N. M. & Dhillon, S. (2013). The Criminal Offence of Entering Any Shoppers Drug Mart in Ontario: Criminalizing Ordinary Behaviour with Youth Bail Conditions. *Canadian Journal of Criminology and Criminal Justice* 55(2):187-214.

Demands upon those who act as sureties today are high: sureties are required to make sure that the accused person attends all court appointments, complies with all of their conditions of bail, and does not commit a new offence, otherwise they risk forfeiting a specified amount of money. In essence, sureties are assuming risk management of the released person on behalf of the state<sup>21</sup>. The release to bail supervision programs operated by non-profit organizations – BVSPs in Ontario – rather than a surety is mandated for the same reasons.

One issue with this risk avoidance lies in the court's process of assessing "risk" at the bail stage. More so than at any other stage of the criminal justice process, subjective assessments of accused persons, rather than objective processes or facts, are determining factors in decisions to ultimately release or detain individuals. Furthermore, assessments of risk at the bail stage are also taking into account possible "risk" to the reputation of the criminal justice system. In order to successfully implement a ladder approach, a serious re-examination of how "risk" is defined by criminal court professionals, and the policies informing them, is required. From an academic perspective, the word risk has a very specific meaning: it is the score of an assessment conducted using validated, objective measures which are statistically tied to future (re)offending behaviour. Therefore risk in this sense does not include consideration of risk to public image. Similarly, assessing an accused person as "risky" because they have previous failure to comply charges (e.g. for being out past curfew) does not mean they are a danger to the public or a flight risk.

After reviewing BVSP case files, there were many instances where clients under BVSP supervision with minor criminal charges still lived with a parent (particularly among young clients), were employed and/or in school or noted that they currently resided with other extended family. These individuals should not be the target client base for BVSPs (or sureties for that matter). The shift in focus we are recommending requires that MAG reconsider referring clients for bail supervision who should be considered for release onto their own recognizance, regardless of the availability of a surety. Moving away from the automatic request for a surety would also result in significant improvements in court efficiency: many unproductive court appearances are the result of matters being put over by defense or duty counsel in an effort to find a suitable surety.

Sureties and bail programs should not replace accused persons' right to reasonable and the least onerous form of release. Using the ladder approach, bail supervision programs should be reserved for clients who would face probable detention (surety or not) but who are not necessarily a high-risk individual<sup>22</sup>. For example, this could include cases such as individuals with serious substance use issues who may have some patterns of failure to comply charges which flow from breaches<sup>23</sup> related to their addiction. If Crown counsel were more willing to immediately consent to the release of these types of cases the number of appearances prior to a bail decision (both unproductive or otherwise) could be reduced. In addition, remand pressures would decrease. Both of these outcomes save the Ministry and provincial government significant costs in the long-term; conversely, widening the justice supervision net to capture more low-risk individuals will only increase government costs. Literature indicates that over-supervising or over-treating individuals who are low-risk can actually do more harm than good, which is counterproductive to the Ministry's objectives. Thus the finite bail supervision resources should be dedicated to the higher-risk individuals who will derive the most

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<sup>21</sup> Myers, N. M. (2009).

<sup>22</sup> Note, by "high-risk" individual we are referring to an individual who poses a serious threat to community safety (i.e. secondary ground for detention), as determined by a validated risk assessment tool.

<sup>23</sup> If an accused person on bail fails to abide by any of his/her conditions, including appearing in court as required, or gets charged with a new criminal offence, the person is said to be in "breach" of his/her bail or court order. This can result in the individual being charged with a separate criminal offence (i.e. an administration of justice offence).



benefit from the referrals and case management, rather than low-risk individuals who should be released onto their own recognizance<sup>24</sup>.

In order to reverse the trend and move toward the presumption of release and the presumption of innocence, we make several recommendations. First, we recognize that the responsibility of releasing more persons on bail, as per the *Criminal Code*, is shared by the police and therefore recommend that police exercise more of the powers of release afforded to them in the *Criminal Code*. Second, we would recommend that MAG review and revise the current Crown Policy Manual, as well as common practices in courts, which result in the presumptive detention of most persons for a full bail hearing, and the frequent Crown position of detention. We outline our recommendation to repeal s515(6)(c) of the *Criminal Code* below, and recognize that this is beyond the jurisdiction of MAG. However, in the absence of legislative change, MAG should strongly encourage the application of Crown discretion, and the presumption of release.

**Recommendation 1.1:** That police draw on their powers of release, outlined in the *Criminal Code*, to release more charged persons onto their own recognizance, instead of detaining for a bail hearing.

**Recommendation 1.2:** Revise the Ministry of the Attorney General's Crown Policy Manual section entitled "Bail Hearings" to make the language and recommended approach to bail more consistent with the ladder approach outlined in the *Criminal Code*, placing greater emphasis on the presumption of release and presumption of innocence and to move away from reliance on sureties as a condition for consent release. In addition, it is recommended that primary grounds be reflected as such – of primary focus – relative to secondary and tertiary grounds in the Crown Policy Manual.

**Recommendation 1.3:** The mandating of bail supervision should be reserved for cases that would face probable detention, *after* the application of the new criteria stipulating presumptive release onto own recognizance.

**Recommendation 1.4:** That the government of Canada repeal paragraph s515(6)(c) of the *Criminal Code*, consistent with the Steering Committee On Justice Efficiencies And Access To The Justice System's recommendation in "The Final Report On Early Case Consideration"<sup>25</sup>.

**Recommendation 1.5:** It is recommended that MAG further encourage, through policy or directive, the application of Crown discretion in s515(6)(c) reverse onus cases, with the objective that fewer of these cases result in contested bail hearings.

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<sup>24</sup> Pierce-Danford, K. and Meghan Guevara (2013). Creating an Effective Pre-Trial Program: A Toolkit for Practitioners. Crime and Justice Institute. Accessed from: [http://libcloud.s3.amazonaws.com/211/9f/a/223/CSJ\\_pretrial\\_toolkit.pdf](http://libcloud.s3.amazonaws.com/211/9f/a/223/CSJ_pretrial_toolkit.pdf)

<sup>25</sup> Department of Justice Canada. (2006). The Final Report On Early Case Consideration Of The Steering Committee On Justice Efficiencies And Access To The Justice System. <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/pdf/ecc-epd.pdf>

# Bail Conditions Authorized: Mandating “Good” Behaviour and Policing Addiction

*Conditioning: The act of placing conditions on an accused through bail, parole, probation or immigration order<sup>26</sup>*

Authorized conditions placed on accused persons’ bail orders should, in theory, be minimally intrusive and logically related to the charges bringing them before the courts, to ensure attendance at court and decrease risk to the public (of offending while on bail). In practice, however, many conditions placed on bail orders in Ontario appear to be “boiler plate” in nature, or less tied to primary and secondary grounds and more concerned with behaviour or character modification. That is, conditions placed on legally innocent persons in Ontario can be exceedingly onerous, while having little to no objective connection to the alleged crimes committed or validated risk assessment.

As numerous commentators have pointed out, the widespread practice of conditioning accused persons presents layered problems. First, onerous conditions are invariably experienced as *punishment* before a finding of guilt<sup>27</sup>, which challenges the very notion of the presumption of innocence. Second, behaviours which do not conform to mainstream or pro-social values and/or health problems become subject to ‘policing’ and criminalization<sup>28,29</sup>. Third, restrictive and intrusive bail conditions are often described as “setting up people to fail” or “inviting breach”. Bail conditions that include curfews, non-association orders, drug and alcohol abstention clauses, and other conditions of more nebulous framing, can lead to failure to comply charges which carry significant consequences; at times more serious than the initial charges that led to the bail order.

While conditions may be referenced as an exercise in community safety, they more often result in the cycling of individuals in and out of court for reasons often unrelated to the nature of their first contact. The criminological literature highlights this affinity for conditions as contributing to the cyclical nature of crime by establishing the conditions by which crime can be committed (i.e. setting clients up to breach). As Webster et.al. (2009) note:

*“... [T]he rising number of charges being brought to court in Ontario is driven, to a large extent, by 'administration of justice' charges. With an increasing number of people being on pre-trial release - almost always with conditions - coupled with an apparently strong belief that a greater number of conditions will lead to less crime, the criminal justice system 'creates' the likely possibility of additional crime (that might not have existed before) in the form of a failure to comply with these conditions.”<sup>30</sup>*

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<sup>26</sup> Turnbull and Hannah-Moffat, as cited in Hannah-Moffat, K. and Maurutto, P. (2012). Shifting and targeted forms of penal governance: Bail, punishment, and specialized courts. *Theoretical Criminology: An International Journal*. 16 (2): 201-219.

<sup>27</sup> Sprott, J. B. & Myers, N. M. (2011). Set Up to Fail: The Unintended Consequences of Multiple Bail Conditions. *Canadian Journal of Criminology and Criminal Justice*, 53(4): 404-423.

<sup>28</sup> Turnbull, S. & Hannah-Moffat, K. (2009). Under These Conditions: Gender, Parole, and the Governance of Reintegration. *British Journal of Criminology*, 49: 1-20.

<sup>29</sup> Hannah-Moffat, K. and Maurutto, P. (2012).

<sup>30</sup> Webster, C. M., Doob, A. N., & Myers, N. M. (2009).pp. 99-100.

Our research findings support the previously highlighted issues associated with conditioning. Based on the bail supervision client case files<sup>31</sup> and bail orders reviewed at different BVSP sites in Ontario, it was found that **all** clients had conditions over and above “Keep the peace and be of good behaviour” and “Report to the Bail Verification and Supervision Program,” which were universal. The most common number of *additional* conditions assigned to the client case files reviewed was six, though it ranged between one and eight<sup>32</sup>. How these conditions broke down is shown in the chart below, which indicates how many clients received each type of condition:

ABSTAIN FROM ATTENDING ANY PLACE WHERE ALCOHOL IS SOLD/DISPENSED, EXCEPT TO CONSUME A MEAL.

NOT TO BE AROUND THOSE WITH SIMILAR (TRAFFICKING) CHARGES.

SEEK DRUG AND DETOX TREATMENT.

*-Examples of bail conditions from case files*

Condition	Number of Clients With Condition (Total Number of Clients: 158)
Court Mandated Programs/Treatment	12
Abstain From Alcohol	97
Abstain from Drugs	99
Curfew	91
No Contact	127
No Go Zone*	116
Do Not Possess Weapons	90
Other Conditions	63

\*No-Go Zone refers to a condition that prohibits released persons from entering a specific locale or building.

\*\*Note the numbers do not total 158 because most clients’ bail orders had more than one of the above conditions.

The “Other Conditions” category in the above table included conditions such as “Not allowed to use any phones or communication devices when you are at home,” “Not to reside in any place where there are weapons”<sup>33</sup>, and “Notify police of change of address.” Some of the conditions can be logically or objectively tied to the criminal charges an accused person faces<sup>34</sup>. However a number of bail conditions, on their face, cannot be objectively tied to primary or secondary grounds, and instead appear to be solely concerned with character modification or improvement. For example, one bail condition assigned to a young client was “Enrol in high school and attend fulltime.” While the court

<sup>31</sup> Of the 337 files reviewed during our research study, 158 were bail supervision clients; that is, 158 of the clients of the 337 reviewed were ultimately released to the BVSP for bail supervision.

<sup>32</sup> Again, this is over and above the aforementioned two conditions which were applied universally.

<sup>33</sup> “Weapons” was not defined; presumably most homes have knives, for example.

<sup>34</sup> For example, the bail condition of “Surrender weapons” being tied to firearms charges. Unfortunately, since we were not able to observe the cases in court and hear the facts of the cases read out, in-depth statistical analysis of the relationship of bail conditions to the facts of the cases, and their logical connection (or not), could not be undertaken in this study, as it has in others. We do however have data on the current charges, current bail conditions, case outcomes and the client’s profile, which allowed us to explore interesting relationships nonetheless.

(and likely the clients' parents) may understandably see value in the client's attendance and completion of high school, in making this a condition of bail, and therefore enforceable (and punishable) by law, bail is drifting far from its legislated purpose. Courts should not be in the business of mandating self-improvement for its own sake, or crafting bail conditions so vague or logically unconnected to the original charge and primary and secondary grounds as to invite breach. Bail conditions that mandate ambiguous (however well-intentioned) directions such as "seek treatment" could place individuals in a position to breach, widening the criminal justice net.

**Recommendation 2.1: It is recommended that, in accordance with the ladder approach outlined in the *Criminal Code*, MAG strongly discourage the application and authorization of any conditions logically unconnected to the initial charge, tenuously related to objective assessments of risk (e.g. curfews), and/or targeting improvement of the accused person (e.g. attend high school).**

Our data indicated that 70% of all clients had issues with substances (alcohol or drugs), over 40% reported that they have current mental health issues, 31% had concurring mental health and substance use issues, and approximately one-third reported being homeless. Of the supervision clients who reported having current issues with alcohol, nearly 81% of had a bail condition to not consume alcohol. Similarly, of the clients who noted that they have current drug use issues, over 81% of that group were required in their bail order to abstain from drugs. These substance abstinence conditions were less prevalent among those who did not report any such alcohol or drug use issues.

Though clients were typically found to have a range of conditions attached to their release on bail, it was found that the conditions of "abstaining from drugs", "abstaining from alcohol" and the presence of a curfew were all positively correlated with a client breaching. Put another way, as the frequency of these specific conditions increases, so too do client breaches. Finally, the research findings also highlighted that the majority of breaches while under bail supervision were related to failures to comply with release conditions, rather than committing a new offence or missing a court appearance. It does indeed appear then that accused persons are set up to fail: clients with underlying substance use issues are essentially 'set up' to breach by being given conditions that they may find difficult to abide by 100% of the time, given their addiction and/or mental health issues.

We already criminalize addiction and mental illness, however unintentionally, through legislation prohibiting the possession and trafficking of illicit and controlled substances; adding conditions of bail to completely abstain from the use of alcohol or drugs when one has a known (or suspected) addiction is doubly punishing individuals for what are recognized health concerns. Further, continuously cycling individuals through the courts makes it highly improbable that the individual will be able to participate in a structured rehabilitation program and treat the underlying cause of their substance use and, accordingly, remove him/herself from the cycle of arrest, release, breach and re-arrest. As our collective understanding of mental health and addiction issues (and their co-occurrence) increases, court practices should shift.

Mental health issues and addiction go hand-in-hand; to mandate the abstinence from a substance, illegal or not, to a person who currently suffers from addiction issues is not unlike 'mandating' a person abstain from his/her mental illness. Not only is this practice illogical, it could also be irresponsible. Abrupt abstinence from specific substances can cause significant, and sometimes fatal,



side effects for those with severe dependency<sup>35</sup>. It should be re-emphasized that individuals on bail are legally innocent, and any personal issues they presently face should not be 'policed' in a way that could impact the outcome of their case, and their future. While our provincial court systems have made some strides in recent years in efforts to reconcile the tension and intersection between mental health and addictions issues and the criminal justice system through the introduction and expansion of specialized courts, the practice of policing character and 'bad' behaviour – regardless of its objective correlation to offending – through conditions persists. Legal professionals working within Gladue courts often refrain from applying drug or alcohol conditions to accused persons being released on bail, and we would recommend MAG mandate that all bail courts follow suit.

**Recommendation 2.2: It is recommended that MAG issue a directive to court officials providing for a moratorium on the practice of affixing release conditions related to abstaining from drugs and alcohol.**

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<sup>35</sup> For example, alcohol, a legal and widely consumed substance in Canada, causes some of the most severe withdrawal side effects for seriously dependent individuals. These withdrawal symptoms can include hallucinations, seizures and delirium tremens; the latter can cause death if not managed properly.  
[http://www.camh.ca/en/hospital/health\\_information/a\\_z\\_mental\\_health\\_and\\_addiction\\_information/alcohol/Pages/alcohol.aspx](http://www.camh.ca/en/hospital/health_information/a_z_mental_health_and_addiction_information/alcohol/Pages/alcohol.aspx)

# Reasonable Bail: Administrative Best Practices

## Court Supports

The recommended approach outlined throughout this report – to presumptively release accused persons onto the least onerous form of bail – should itself result in significant improvements to court efficiency. The province of Ontario can further reduce pressures and delays in bail courts by better utilizing, resourcing and/or establishing weekend and statutory holiday (“WASH”) courts.

BVSP programs, which are currently operating in 16 courthouses in Ontario, can also have a role to play in expediting bail processes and ensuring that individuals be released onto bail rather than detained. Before outlining this role, it is worthwhile to first briefly highlight the impetus behind the creation of the BVSP in Ontario in the late 1970s<sup>36</sup>. The Ministry of Correctional Services recognized in 1979 that it had a growing remand problem. That is, the ratio of prisoners being admitted to Ontario’s provincial institutions was growing relative to sentenced prisoners. It was recognized that the remand population had two distinct sub-groups (much as it still does today), each with its own unique challenges:

- (1) Those temporarily detained who could be released on their own recognizance or to sureties more quickly if fuller and more accurate information were available to bail courts earlier.
- (2) Those with bails set but were detained in custody because of the absence of a surety with means to satisfy the bail. That is, those detained basically by poverty of resources supporting them.<sup>37</sup>

It was thusly decided to develop a two-pronged bail program, with verification to assist with the first sub-group, and supervision to support the latter. Historically the main issue (and hence focus of the BVSP) appeared to be chiefly on primary grounds – to prevent the unequal application of bail based on the availability of money or a surety, or lack thereof. Today, however, bail supervision programs, along with sureties, are increasingly relied upon for secondary grounds purposes – as risk managers on behalf of the state.

As this report has already described at length, the trend in Ontario has been toward the presumption of detention, and certainly toward more onerous forms of release. Earlier sections of the report have spelled out suggestions for reversing this trend. In so doing, the target groups of the BVSP should similarly shift. Low-risk individuals *should not* be the targeted supervision population – this results in net-widening and deviates from the original intentions behind establishing the BVSP in Ontario. Indeed, the program’s forebears expressed clear concerns about acting as net-widening agents: “So many efforts at alternatives had, it seemed, been used by the courts as an add-on to prison instead of an alternative, as was intended.”<sup>38</sup>

It is our view that the BVSP should be better utilized as a supervision option for moderate to moderate-high risk accused persons facing probable detention *after* applying the ladder

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<sup>36</sup> Morris, R. (1981). Toronto Bail Program. *International Journal of Offender Therapy and Comparative Criminology*, 25 (2):156-167.

<sup>37</sup> Morris, R. (1981). p 156.

<sup>38</sup> Ibid, p 159.

approach/presumption of release to one's own recognizance. In this way, the program can simultaneously ensure that low-risk accused persons are being released in a timely manner (i.e. at first appearance), and thereby are also reducing the amount of remanded prisoners awaiting trial. This may require changes in policies and practices with respect to the BVSP on both the Ministry side and the transfer payment agency side.

**Recommendation 3.1: It is recommended that MAG consider the expansion and more effective use of WASH courts.**

**Recommendation 3.2: It is recommended that MAG better utilize Bail Verification and Supervision Programs (BVSPs) for accused persons who are not low-risk and are facing probable detention.**

### **Crown Practices**

Crown counsel play a central role in the day-to-day operations of bail courts and as such, have an important responsibility in assisting MAG in meeting its JOT targets. In addition to encouraging the application of Crown discretion, as discussed earlier, we would further recommend that MAG consider the importance of continuity of Crown counsel in bail courts. Our research supports the Steering Committee on Justice Efficiencies and Access to the Justice System's recommendation that continuity of Crown counsel is best practice; specializing in bail court matters and building relationships with all of the professionals working at the bail stage enables the smoother functioning of courts.

During our research, we further identified the value of having a "Bail Vettor" Crown counsel "outside" the court, in addition to the Crown counsel designated to the bail courtroom. This new position is being implemented at several courthouses across Ontario as part of their respective JOT efforts<sup>39</sup>. At one site, Researchers were told how a Bail Vettor Crown counsel triaged bail case files by 9:30 am, screened out the files to be given consent-releases, which were all spoken to by the Crown counsel in the bail courtroom by 12:00 pm. Show-cause hearings were scheduled later in the day. This method allowed those clients with the highest likelihood of being released on bail, to their own recognizance, to surety release, or for supervision by the BVSP, to be processed first and released from custody. The use of a two-Crown system allows court resources to be directed where they are most needed (show-cause hearings, etc.) by expediting court proceedings for lower risk cases; as well, this system allows BVSP staff working in the courts to have a complete list of potential clients that are likely to be consented to release, allowing them to complete verifications on the basis that the client is almost sure to be released to the program. By cutting down the number of verifications that are done for clients who are not released, BVSP staff time is maximized.

**Recommendation 3.3: It is recommended that Crown counsel be designated to bail courts for the purposes of continuity and efficiency.**

**Recommendation 3.4: It is recommended that MAG consider expanding the "Bail Vettor" Crown Counsel practice currently in place at select courthouses.**

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<sup>39</sup> This Ministry of Attorney General document highlights several jurisdictions' use of a "Bail Vettor", among other local JOT initiatives: [http://www.attorneygeneral.jus.gov.on.ca/english/jot/court\\_improvements/default.asp](http://www.attorneygeneral.jus.gov.on.ca/english/jot/court_improvements/default.asp)

## Accountability

Any efforts to effect changes in policies and practices without a parallel commitment to monitoring and evaluation are opportunities (and efforts) lost. Ontario has an opportunity to be a leader in addressing issues associated with bail and remand; in order to demonstrate the success of efforts to expedite bail processes and reduce remand admissions, there needs to be accountability and outcome measurement. For example, there ought to be more accountability on Crowns and/or Justices of the Peace for accepting unnecessary adjournment requests and for requesting/imposing bail conditions or forms of release that are not consistent with the ladder approach in the *Criminal Code*. In order to successfully return to the presumption of release, as well as reduce unproductive appearances in bail court, there needs to be some degree of accountability that goes beyond courthouse-wide aggregated metrics.

**Recommendation 3.5:** It is recommended that MAG develop and implement more detailed accountability and evaluation measures to monitor the Ministry's efforts at improving bail processes.





# Reasonable Bail

The presumption of innocence is a cornerstone of our legal rights in Canada. Conversely, the restriction of liberty by way of incarceration is one of the state's most absolute exercises of power, especially when one is presumed innocent prior to trial. Pre-trial detention must necessarily be used with restraint; or so the *Criminal Code* suggests. In Ontario today, we spent hundreds of millions of dollars detaining legally innocent people every year. Our provincial jails are overcrowded and at capacity; prisoners, mostly on remand, sleep two to three to a cell designed for one, at times on a mattress on the floor. At the same time, crime rates are lower today than ever. There is something wrong with this picture.

Bail is an important piece of the puzzle, and it is time to seriously consider targeted and coordinated solutions. According to legislation, bail has to be reasonable, but it should also be well-reasoned. The findings and recommendations contained in this report aim to both demonstrate some of the issues around bail, and also to facilitate progress toward more reasonable bail in Ontario.

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