

RE-INVENTING CRIMINAL JUSTICE:

THE FOURTH NATIONAL SYMPOSIUM

Final Report

The Fairmont Empress
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The Fourth National Criminal Justice Symposium

In January 2012, approximately 75 senior members of the criminal justice system¹ met in Victoria, British Columbia in the fourth of a series of unprecedented opportunities for police, defence counsel, prosecutors, judicial officers and government officials from senior levels across the country to discuss issues relating to the criminal justice system.

The primary purpose of the meetings is to allow members of the criminal justice system to share, off the record, candid perspectives on and solutions to the challenge of fashioning a responsive, accessible and accountable justice system. Unlike previous meetings, the Victoria meeting focused on one theme – the challenge to the criminal justice system posed by the changing nature of the bail and remand population in Canada. This theme raises numerous questions, among them: Why are remand populations growing when crime rates are declining? Why are more accused serving remand time than custodial sentences? What is the nature and extent of the impact on vulnerable communities (aboriginal, women and youth)? Are increasing remand populations undermining the safety of Canadian communities?

Presentations set the stage for discussions. The situation of pre-trial detention prior to the *Bail Reform Act* of 1972 and the underlying objectives of the *Act*, including the desire to deal more equitably with persons seeking bail, were canvassed. Studies were presented that examined the characteristics of the growing remand population. The data indicates that a majority of detained persons are detained for short periods while awaiting decisions on whether they will be released on bail. A relatively small number of persons are remanded in custody for longer periods of time pending resolution of their cases. It is this smaller group that is driving the remand population. The consequences to the correctional system of the growth in the remand population were also discussed. In addition, commentators reviewed the disproportionate number of aboriginal persons, particularly aboriginal women, detained and the significant effects of pre-trial detention on young persons, women and the aboriginal community. Finally, the importance of pre-trial release and detention decisions for public safety was noted.

¹ Participants to the symposium were invited in their personal capacity and not as representatives of their court, employer or organization.

Causes for Growth in the Remand Population

Symposium discussions first focused on identifying major contributing causes for the massive growth in the remand population. Causes identified included: 1) misunderstanding on the part of some police officers concerning the scope of their authority to release and leading these powers to be underused, and 2) the aversion to risk that marks decision-making at all levels of the bail process (i.e. police, prosecutors, defence counsel and judicial officers). A number of participants in the Symposium expressed the view that one of the causes for aversion to risk in bail decision making may be that decisions to release accused persons on bail are increasingly subject to public and media scrutiny and criticism. The exercise of discretion by police and prosecutors, an essential element of the bail process, may not always be exercised with a full view of the facts in a particular case and the proper application of the fundamental principles of the bail process. A further emerging trend identified is the increased use of administration of justice charges in many jurisdictions. As well, some accused coming before the courts have increasingly complex histories, including more frequently mental health issues. In addition, a greater number of bail reverse onuses have been legislated and more court time is expended for release decisions.

In light of these factors, Symposium discussions then focused on proposing solutions aimed at reducing the growth of the remand population without sacrificing public safety. Symposium participants came to a consensus on the recommendations that follow.

Symposium Recommendations Aimed at Reducing the Remand Population and Improving the Bail Process

As a starting point, Symposium participants emphasized the importance of this early stage of a criminal proceeding and the need to allocate resources at the front end of the criminal justice process. They agreed that Canada's bail system must ensure release or remand decisions are made in a fair, efficient manner and that such decisions must be applied to all detained persons without discrimination. When considering reforms to the bail system consistent with constitutional and *Criminal Code* requirements, improvements should aim to enable decision makers to make the best decisions in the interest of the accused person, complainants/victims, and the public interest, including, in particular, concern for the safety of the

public.

I. Risk Aversion or Risk Avoidance in the Exercise of Discretion in the Bail Process

Police, prosecutors, defence counsel and judicial officers face a significant degree of public and media scrutiny of their actions during the bail process. The risks associated with a decision to release and the benefits of a decision to detain can be more apparent to the public than the benefits of a decision to release and the costs to an accused associated with detention. As a result, public considerations in the decision to release are often scrutinized more rigorously and result more frequently in risk adverse behaviour than those considerations hidden from public view. An aversion to risk appears to characterize the exercise of discretion at all stages of the bail decision-making process and can increase the likelihood of decision-making that is not in accordance with the fundamental principles of the *Charter* and the *Criminal Code* provisions dealing with bail.

The Symposium recommends:

1. Conducting joint educational programming for all justice system participants (police, prosecutors, defence counsel and judicial officers) that reinforces the scope of police release authority, fundamental principles in the *Charter* and the provisions of the *Criminal Code* dealing with bail.
2. Senior levels of all relevant organizations (including the police, prosecution and the judiciary) should create an environment conducive to the appropriate exercise of discretion by providing greater public support, including in the media, for decision makers in the bail process.
3. The participation of more experienced and specialized police, prosecutors, legal aid duty counsel and judicial officers in making bail decisions;
4. Greater availability for police to real-time consultation with prosecutors regarding bail decisions;

5. Greater access by decision-makers to information about the accused and the circumstances of the alleged offence early in the criminal process in order to build confidence and enable better decisions to be made;
6. Supporting police and prosecution policies that favour release where the most serious charges against an individual are administration of justice charges that pose a lesser risk to public safety, taking into account the nature and seriousness of the alleged behaviour and the appropriateness of the conditions to be imposed.
7. Promoting and financially supporting community alternatives to bail, including bail supervision programs, to manage the risk of the accused in the community while taking care to avoid unintended consequences, such as “net widening” (e.g. requiring an accused to comply with the conditions of a bail supervision program when he/she could have been released without such conditions). The use of bail hostels could be explored.
8. Exchanging information about best practices more widely across jurisdictions; and
9. Encouraging justice system participants to make greater efforts to educate the public and the media about the principles and processes of bail.

II. Changes in Bail Decision Making

The following recommendations address concerns about the over and inappropriate use of bail conditions in decisions to release an accused.

The Symposium recommends:

1. Conducting joint education programmes to:
 - a) Reinforce that the three grounds contained in the *Criminal Code* for determining bail release or detention apply in all cases, including reverse onus cases;

- b) Promote the setting of appropriate conditions as are necessary for the primary ground (attendance in court) and the secondary ground (public safety) and discourage over reliance on standard or formulaic conditions;
 - c) Emphasize the duty on the prosecution and defence to be able to justify the bail conditions sought or agreed to;
 - d) Recognize the duty of the judicial officer to inquire into the propriety of bail conditions, especially those that do not appear to be realistic (feasible) or are unrelated to the primary and secondary grounds; and
 - e) Highlight the duty on the decision maker to provide reasons for any release or detention decision.
2. Applying a “principle of restraint” (*i.e.* that a more restrictive condition not be imposed if a lesser condition suffices) to the bail decision-making process;
 3. Making experienced legal aid duty counsel and prosecution counsel available in all bail courts;
 4. Encouraging the use of innovative alternatives to detention and centralizing information about available community services;
 5. Introducing practical measures to reduce non-compliance with conditions (e.g. automated reminders of court dates);
 6. Considering, where appropriate and to further efficient procedures, the use of adjournments to test the viability of proposed conditions rather than requiring a bail review to be brought;
 7. Supporting prosecution policies that favour the holding of variations of bail in Provincial Court, where possible, rather than necessitating bail reviews in Superior Court, and promoting simplified procedures for consent releases (e.g. forms); and
 8. Reducing reliance on cash and surety bails where estreat proceedings are seldom used to hold sureties accountable.

III. Police and Prosecution Policies and Guidelines that Affect Decision Making

The following recommendations support the overall goal of developing policies and guidelines to assist decision makers, police and prosecution to make appropriate decisions regarding release and to assess the impact of these policies on the bail and remand population or process at an early stage.

The Symposium recommends:

1. Gathering information about the policies and guidelines of police, prosecutors, defence and the courts relating to bail in all jurisdictions and making them publicly available;
2. Reviewing these policies and guidelines to identify (a) areas where police and prosecution discretion is unduly restricted and (b) best practices for bail decision-making. A “model set” of guidelines and policies for justice system participants in the bail process could be developed;
3. Supporting policies that permit the exercise of appropriate police discretion on release following arrest (e.g. endorsed warrants under s.507(6) of the *Criminal Code*);
4. Developing greater consistency in the application of police and prosecution policies in a manner consistent with the bail provisions of the *Criminal Code* within and, where appropriate, between jurisdictions; and
5. Assessing the potential impact of new laws and policies on the bail process and the remand population at an early stage in their development.

IV. Investing in Preventive Community Resources

Echoing discussions at the Third meeting in Toronto, the Symposium urged that greater emphasis be placed on community preventive policing and other early interventions to address criminal behaviour. In particular,

1. The Symposium emphasized the significance of bail decisions and the importance of allocating resources (financial and human) to the early stages of a criminal proceeding. Whether or not an individual is detained at the bail stage often affects their progress through the criminal justice system.
2. The Symposium also strongly supported the use of community and problem solving courts that can acquire greater understanding and support of the needs of an accused (e.g. mental health). Such courts can work with an accused to access existing community resources and work to promote their rehabilitation.

V. Delay and Judicial and Administrative Processes

A fair trial within a reasonable time is fundamental to the criminal justice system. The early resolution of issues within the trial process is thus essential. The recommendations in this section focus on the judicial and administrative management of the bail process and aim to reduce delay and thereby the remand population.

The Symposium recommends:

1. Establishing local bail committees that identify and address impediments to appropriate bail decision making and implementation of the decision to release in those jurisdictions where they do not presently exist.
2. Encouraging judicial and administrative practices including:
 - a) The increased use of smart technology during the bail process, including case management (including electronic disclosure), decision-making and the implementation of the bail decision be explored.

- b) The use of specialized bail courts, police, prosecutors, legal aid duty counsel and judicial officers and a more strategic use of provincial judges in special circumstances (e.g. a case involving multiple adjournments).
- c) The use of only meaningful adjournments, with a view to get to trial at the earliest possible time.
- d) Early access to the resources needed to implement release decisions (e.g. telephone access).
- e) Encouraging counsel to agree on the facts for purposes of a bail review to avoid the need of a transcript and further delay.

VI. Lack of Coordination and Cooperation between Justice System Partners

The recommendations below address how criminal justice system partners should work together in an era of increasingly scarce resources and given the high costs of detaining accused prior to trial.

The Symposium recommends:

1. Developing a more holistic approach to bail issues through increased coordination and cooperation between justice participants at the government level and the community and court level (e.g. issue funding rather than Ministry funding);
2. Increasing efforts to eliminate silos that divide justice partners and the justice system from other government and community agencies such as health, education, social services, housing, etc.;
3. Increasing collaboration at the local level to identify and deal with problems in the bail process (e.g. bail committees);
4. Allocating and managing resources more wisely with particular emphasis at the front end of the criminal process (e.g. less haste, more speed);

5. Encouraging research into the economic efficiencies of various bail and remand processes; and
6. Improving bail related data collection and for jurisdictions to make available data on the bail process and the remand population to allow a more complete understanding of the bail process and the size and nature of the remand population.