Submissions to the Standing Committee on Justice Policy Regarding Bail Reform

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Canadian Prison Law Association

The Canadian Prison Law Association ("CPLA") is an organization of lawyers, academics, and other professionals who work on behalf of prisoners, and who seek to protect and promote the constitutional rights, interests, and privileges of prisoners by advocating on their behalf within the community and in their dealings with prison and release authorities, by generating and sharing legal information, and by promoting adherence to the rule of law within the prison law environment in accordance with the highest standards of justice and fairness as required by and consistent with the Canadian Constitution and in particular the *Canadian Charter of Rights and Freedoms*.

Summary

While events like the fatal shooting of Constable Gzegorz Pierzchala are tragic, they are rare and do not warrant reforms to tighten an already onerous bail system. People on bail present a limited risk of committing substantive offences, including violent offences. Canada's bail regime is already onerous and overly risk averse, and further restrictions on bail are unnecessary. The existing bail system also creates barriers for or disadvantages marginalized groups. Ensuring the safety of the public by keeping legally innocent people in pretrial detention comes at a high cost to prisoners, who are forced to reside in overcrowded facilities where they face the possibility of physical and sexual violence and harm to their mental wellbeing. Prisoners also lose jobs, income, housing, and time with family, and their communities and families suffer as well. This risk-averse bail system also costs Ontario taxpayers millions each year.

The CPLA recommends:

- Increasing support for community resources that can help provide the social support and stability individuals need to successfully wait for the resolution of their charges;
- Providing courts with the resources they need to provide timely bail hearings;
- Working with legal actors to help ensure justices, judges, and Crowns are obeying the ladder principle and applying only appropriate forms of supervision and conditions;
- Reviewing the practice of having justices of the peace (not judges) preside over bail hearings, or making a law degree a prerequisite to be appointed as a justice of the peace and preside over bail hearings;
- Ensuring that bail verification and supervision programs are truly targeting individuals who cannot be released without a surety, and that they have adequate resources to avoid the overreliance on pretrial detention, particularly among marginalized populations;
- Partnering with legal education efforts to assist justices, judges, and Crowns with incorporating Gladue factors, Black social history factors, and the particular circumstances of other marginalized groups in bail decision-making;
- Decreasing reliance on pretrial custody, which exposes presumed innocent people to cruel, degrading, and dangerous conditions;
- Ensuring that the *Jahn* settlement and 2018 Consent Order are fully implemented to help reduce overreliance on segregation, especially for people with mental health conditions;
- Investing in community supervision rather than costly pretrial detention; and
- Reviewing the funding for Legal Aid Ontario to ensure defendants can receive timely bail hearings and effective representation.

People on bail pose a limited risk to the public

Events like the fatal shooting of Constable Gzegorz Pierzchala are tragic. However, events like these are also outliers that do not warrant tightening the bail system.

In a 2013 study by the Department of Justice, only 17.5% of defendants violated the terms of their release by the court, and 98% of those violations were for breaching release conditions or failure to attend court.[1] In other words, only 2% of defendants who breached their conditions committed a new substantive offence while on bail. There was no indication that any of the 2% had been accused or found guilty of committing a violent crime. This suggests that people on bail present a very limited risk to public safety.

Violent crime receives disproportionate media attention. However, in reality, violent crime is a small portion of the crime committed in Canada, and it has remained relatively low and stable over time.[2]

Accordingly, individuals released on bail present a limited risk to public safety. Systemic changes to the bail system that can have widespread consequences should not be made in a knee jerk manner, based on isolated incidents of defendants on bail committing violent offences. Many people in the criminal justice system suffer from mental health issues, substance abuse problems, and/or homelessness. Providing more resources to help people on bail maintain as much social stability as possible is a more useful and cost-effective means of protecting public safety than relying on pretrial detention.

The CPLA recommends:

- Increasing support for community resources that can help provide the social support and stability individuals need to successfully wait for the resolution of their charges.

Canada's bail regime is onerous and risk-averse, and further restrictions are unwarranted

The right to reasonable bail is enshrined in section 11(e) of the Canadian Charter of Rights and Freedoms. This includes the right not to be denied bail without just cause and the right to bail on reasonable terms.[3] This right "entrenches the effect of the presumption of innocence at the pre-trial stage of the criminal trial process and safeguards the liberty of accused persons."[4]

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[1] Karen Beattie, André Solecki and Kelly E Morton Bourgon, "Police and Judicial Detention and Release Characteristics: Data from the Justice Effectiveness Study" (Ottawa: Department of Justice Research and Statistics Division, 2013), 23, online: https://publications.gc.ca/collections/collection_2018/jus/J4-65-2013-eng.pdf.
[2] Statistics Canada, Table 35-10-0177-01, "Incident-based crime statistics, by detailed violations, Canada, provinces, territories, Census Metropolitan Areas and Canadian Forces Military Police"; Statistics Canada, "Chart 2: Police-reported crime rate, Canada, 1962 to 2020", online: https://www150.statcan.gc.ca/n1/daily-quotidien/210727/cg-a002-png-eng.htm.
[3] *R v Antic*, 2017 2017 SCC 27, at para 36.
[4] *R v Antic*, 2017 2017 SCC 27, at para 1.

Where an accused is charged with an offence, other than one listed in section 469 of the Criminal Code, the accused is to be released on an undertaking without conditions by default.[5] However, the Crown is allowed show why the accused should be detained or released under a more onerous form of release.[6] A justice can make a release order that requires the accused to promise to pay if they fail to comply with their conditions, an obligation to have a surety, or a requirement to deposit money.[7] The ladder principle requires a judge to not impose a more onerous form of release unless the Crown shows cause why a less onerous form of release would be inadequate.[8]

Yet, in practice, the bail system is onerous and risk-averse, as the John Howard Society of Ontario, Canadian Civil Liberties Association, academics, and judges have highlighted.[9]

The Criminal Code confers broad jurisdiction to deny bail:

1) where detention is necessary to ensure a defendant's attendance in court;
2) where detention is necessary for public safety, including the safety of a victim, a witness, or a young person, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice;
3) where detention is necessary to maintain confidence in the administration of justice, considering: the apparent strength of the prosecution's case, the gravity of the offence, the circumstances surrounding its commission, and the potential for a lengthy prison term.[10]

It can be challenging for defendants to secure bail, especially when facing charges involving violence or weapons. If a justice has any concerns about a defendant posing a risk to public safety, they can deny bail under the secondary ground for detention. Under the amorphous

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[5] Criminal Code, RSC 1985, c C-46, 515(1).
[6] *Ibid.*
[7] *Ibid*, s 515(2).
[8] *Ibid*, s 515(2.01).
[9] John Howard Society of Ontario, "Reasonable Bail?" (September 2013), 5, 7, online: https://johnhoward.on.ca/wp-content/uploads/2014/07/JHSO-Reasonable-Bail-report-final.pdf; Canadian Civil Liberties Association, "Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention: (July 2014), 83, online: https://ccla.org/wp-content/uploads/2021/07/Set-up-to-fail-FINAL.pdf; Cheryl Marie Webster, Anthony N Doob & Nicole M Myers, "The Parable of Ms. Baker: Understanding Pre-Trial Detention in Canada" (2009) 21:1 Current Issues in Criminal Justice 79, 99-100; Nicole M Myers, "Shifting the Risk: Bail and the Use of Sureties" (2009) 21:1 Criminal Justice 127; Cheryl Marie Webster, "'Broken Bail' in Canada: How We Might Go About Fixing It" (Department of Justice Canada, Research and Statistics Division, June 2015), online: https://publications.gc.ca/collections/collection_2018/jus/J4-73-2015-eng.pdf, 6-9; Raymond E Wyant, "Bail and Remand in Ontario" (Ontario Ministry of the Attorney General, 2017), 14-15, online: http://hsjcc.on.ca/wp-content/uploads/Bail-and-Remand-in-Ontario-Ministry-of-the-Attorney-General-2016-12.pdf; *R v Tunney*, 2018 ONSC 961, at para 29.
[10] Criminal Code, RSC 1985, c C-46, 515(10).

tertiary ground, justices also have wide latitude to detain someone, even in the absence of specific public safety concerns.

Moreover, there is a presumption of detention (a reverse onus) for defendants charged with certain offences, including certain offences involving firearms, which requires defendants to show why they should be released, rather than requiring the Crown to justify the detention.[11]

When defendants are released, the ladder principle, and the requirement that the least restrictive bail be imposed, is not always respected. Releases with one or more sureties (one of the most onerous forms of release) have become the norm.[12] Sureties are required to make sure the defendant attends court, complies with their conditions, and does not commit new offences, and a surety risks forfeiting the money they promised or deposited to secure the defendant's bail if they do not. Unfortunately, many marginalized individuals struggle to find a suitable surety: those without jobs, assets, strong family support, etc.[13] Bail verification and supervision programs in Ontario can play a similar role, but they are not available in all jurisdictions.

Often, conditions are imposed on defendants that are excessive and not directly tied to the risk of offending or flight, such as conditions about behaviour or character modification (e.g. completing schooling or seeking or maintaining employment).[14]

As a report by the Canadian Civil Liberties Association describes, excessive bail conditions can set defendants up for failure:

> 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

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[11] *Ibid*, 515(6).

[12] John Howard Society of Ontario, "Reasonable Bail?" (September 2013), 7-8, online: https://johnhoward.on.ca/wp-content/uploads/2014/07/JHSO-Reasonable-Bail-report-final.pdf; Canadian Civil Liberties Association, "Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention: (July 2014), 36-41, online: https://ccla.org/wp-content/uploads/2021/07/Set-up-to-fail-FINAL.pdf; Cheryl Marie Webster, "'Broken Bail' in Canada: How We Might Go About Fixing It" (Department of Justice Canada, Research and Statistics Division, June 2015), 10, online: https://publications.gc.ca/collections/collection_2018/jus/J4-73-2015-eng.pdf, 6-9; *R v Tunney*, 2018 ONSC 961, at paras 30-34; Nicole M Myers, "Shifting the Risk: Bail and the Use of Sureties" (2009) 21:1 Criminal Justice 127, 134-137.

[13] Canadian Civil Liberties Association, "Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention: (July 2014), 74, online: https://ccla.org/wp-content/uploads/2021/07/Set-up-to-fail-FINAL.pdf.

[14] John Howard Society of Ontario, "Reasonable Bail?" (September 2013), 10-12, online: https://johnhoward.on.ca/wp-content/uploads/2014/07/JHSO-Reasonable-Bail-report-final.pdf; Canadian Civil Liberties Association, "Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention: (July 2014), 49, 66, online: https://ccla.org/wp-content/uploads/2021/07/Set-up-to-fail-FINAL.pdf.

> failing to comply with a bail condition is a criminal offence, even if the underlying behaviour is not otherwise a crime.[15]

There is limited evidence that restrictive bail conditions actually reduce the risk to public safety. Rather, they can create the possibility of new criminal offences.[16] Having more conditions while on bail for long periods can increase the risk a defendant will breach their conditions.[17] This has the potential to further entrench accused people in the criminal justice system, while doing little to protect society from violent offending.

Failing to comply with bail conditions can result in a criminal charge that carries a possible sentence of up to two years and a criminal conviction that brings stigma and a range of collateral consequences.[18] People who have a criminal record with a conviction for a section 145 offences (including failure to comply and failure to appear) are more likely to be denied bail.[19] Restrictive bail conditions ending up creating a vicious cycle, as Professors Cheryl Webster, Anthony Doob, and Nicole Myer describe:

> 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.[20]

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[15] Canadian Civil Liberties Association, "Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention: (July 2014), 1, online: https://ccla.org/wp-content/uploads/2021/07/Set-up-to-fail-FINAL.pdf. See also John Howard Society of Ontario, "Reasonable Bail?" (September 2013), 10-13, online: https://johnhoward.on.ca/wp-content/uploads/2014/07/JHSO-Reasonable-Bail-report-final.pdf.

[16] Nicole Myers, "Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail" (2017) British Journal of Criminology 664, 680-681.

[17] See e.g. Jane Sprott & Nicole Myers, "Set Up to Fail: The Unintended Consequences of Multiple Conditions" (2011) 53:4 Canadian Journal of Criminology and Criminal Justice 404, 417-419.

[18] Criminal Code, RSC 1985, c C-46, s 145.

[19] Karen Beattie, André Solecki and Kelly E Morton Bourgon, "Police and Judicial Detention and Release Characteristics: Data from the Justice Effectiveness Study" (Ottawa: Department of Justice Research and Statistics Division, 2013), 17-18, online: https://publications.gc.ca/collections/collection_2018/jus/J4-65-2013-eng.pdf.

[20] Cheryl Marie Webster, Anthony N Doob & Nicole M Myers, "The Parable of Ms. Baker: Understanding Pre-Trial Detention in Canada" (2009) 21:1 Current Issues in Criminal Justice 79, 99-100. See also John Howard Society of Ontario, "Reasonable Bail?" (September 2013), 10, online: https://johnhoward.on.ca/wp-content/uploads/2014/07/JHSO-Reasonable-Bail-report-final.pdf; *R v Zora*, 2020 SCC 14, at para 57; Nicole Myers, "Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail" (2017) British Journal of Criminology 664, 677-679.

Administration of justice offences are "clogging the courts", representing about 20% of cases.[21] Simply making bail more onerous for those charged with a serious offence is not an effective strategy for managing risk. Such measures will only create more opportunities for defendants to receive administration of justice charges that contribute to the backlogs in the criminal justice system.

On top of this, defendants, who are entitled to timely bail hearings, often experience significant delays in getting bail. Police are required to bring an accused before a justice of the peace for a bail hearing without unreasonable delay, and within 24 hours, if a justice is available, or as soon as practicable, if a justice is not available.[22] A bail hearing cannot be adjourned for more than three days without the consent of the accused.[23]

In practice, however, delays are pervasive in bail court, due largely to a lack of judicial resources and available bail courts. As the Canadian Civil Liberties Association found, these delays were particularly acute in Ontario, where prisoners "languish in custody" because of a lack of time to hold bail hearings.[24] Defendants will often consent to very strict and onerous conditions to avoid more time in pretrial detention, even conditions that set them up for failure.[25] Crowns are rarely asked to justify these conditions.[26]

Moreover, as Justice Iacobucci observed, denying bail can impact the accused's ability to raise a defence, and defendants are more likely to plead guilty when denied bail.[27] Defendants unable to secure bail may enter a guilty plea just to secure their release, which can increase the risk of miscarriages of justice.[28]

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[21] Standing Senate Committee on Legal and Constitutional Affairs, "Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada" (Final Report), June 2017, 140-141, online: https://sencanada.ca/content/sen/committee/421/LCJC/Reports/Court_Delays_Final_Report_e.pdf.

[22] Criminal Code, RSC 1985, c C-46, s 503.

[23] Criminal Code, RSC 1985, c C-46, s 516.

[24] Canadian Civil Liberties Association, "Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention: (July 2014), 32-33, online: https://ccla.org/wp-content/uploads/2021/07/Set-up-to-fail-FINAL.pdf.

[25] Canadian Civil Liberties Association, "Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention: (July 2014), 46-47, online: https://ccla.org/wp-content/uploads/2021/07/Set-up-to-fail-FINAL.pdf; Nicole Myers, "Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail" (2017) British Journal of Criminology 664, 676-677.

[26] Carolyn Yule & Rachel Schuman, "Negotiating Release? Analysing Decision Making in Bail Court" (2019) 61:3 Canadian Journal of Criminology and Criminal Justice 45, 60.

[27] *R v Hall*, 2002 SCC 64, at para 59.

[28] See e.g. *R v Daibes*, 2015 ONSC 104 (accused entered plea in order to secure his release after being improperly being denied the opportunity to enter into a residential surety recognizance and not made aware of the availability of a potential surety).

The onerous and restrictive nature of Ontario's bail system is exemplified by the fact that 76% of people in Ontario's provincial correctional institutions were remand prisoners in 2021.[29] In other words, the majority of provincial prisoners have not been found guilty—they are presumed innocent people. This also means that the vast majority of the money being spent by Ontario to house people in the province's jails and remand centres is being spent on people who are legally innocent and have simply not been able to obtain bail, rather than on incarcerating those who have actually been convicted and sentenced to a period of incarceration of less than two years.

Again, events like the fatal shooting of Cst Pierzchala are tragic, but they are outliers. The bail system is not designed for preventing all instances of people offending on bail, and it cannot achieve this in a manner that is constitutionally compliant. Canada's bail system is already highly restrictive and onerous, and the bail system does not need to be further tightened. Instead, steps must be taken to reduce overreliance on pretrial detention. The CPLA recommends:

- Providing courts with the resources they need to provide timely bail hearings;
- Working with legal actors to help ensure justices, judges, and Crowns are obeying the ladder principle and applying only appropriate forms of supervision and conditions;
- Reviewing the practice of having justices of the peace (not judges) preside over bail hearings, or making a law degree a prerequisite to be appointed as a justice of the peace and preside over bail hearings; and
- Ensuring that bail verification and supervision programs are truly targeting individuals who cannot be released without a surety, and that they have adequate resources to avoid the overreliance on pretrial detention, particularly among marginalized populations.

There are systemic inequalities in the bail system

Marginalized people are overrepresented in the justice system, and they face specific barriers in the bail system. Ontario should be cautious about making any changes or recommendations that could exacerbate the systemic inequalities in the bail system.

Indigenous people, for example, are overrepresented in the criminal justice system.[30] They are disproportionately affected by unnecessary and unreasonable bail conditions and the resulting breach charges.[31] Denial of bail is a key factor for Indigenous people pleading guilty, and the

[29] Statistics Canada, Table 35-10-0154-01, "Average counts of adults in provincial and territorial correctional programs"; Sarah Speight & Alexander McClelland, "Ontario Deaths in Custody on the Rise", Tracking (In)Justice, (November 2022), 4, online: https://ccla.org/wp-content/uploads/2022/12/Ontario-Deaths-in-Custody-on-the-Rise-2022-8.pdf.
[30] Department of Justice, Research and Statistics Division, "Indigenous overrepresentation in provincial/territorial corrections" (November 2016), online: https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2016/nov02.html.
[31] *R v Zora*, 2020 SCC 14, at para 79, citing Jillian Rogin, "Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017) 95:2 Canadian Bar Review 325.

pressure can be particularly great in northern communities where court sits only a few times per year.[32]

Black Canadians are another marginalized group that experiences systemic racism, which can limit their odds of getting bail and cause them to spend longer in pretrial detention.[33]

The CPLA recommends:

- Partnering with legal education efforts to assist justices, judges, and Crowns with incorporating Gladue factors, Black social history factors, and the particular circumstances of other marginalized groups in bail decision-making.

Pretrial custody exposes prisoners to cruel, degrading, and dangerous conditions

As mentioned above, pretrial detention can have a "substantial impact on the result of the trial itself", but it also "affects the mental, social, and physical life of the accused and his family."[34]

Defendants who are awaiting a bail hearing or have been denied bail are "often subjected to the worst aspects of our correctional system."[35] Conditions in the provincial correction system are harsh—even harsher than in federal correctional facilities, due to a lack of programming, overcrowding, inmate turnover, labour disputes, and frequent lockdowns.[36]

Remand prisoners are in highly restrictive environments where their activities and movements are tightly controlled. They live in small cells, often with one or more cell mates, and they are locked in that cell for many hours each day. Prisoners in remand have little control over their lives, as staff make most decisions like what prisoners can eat, when they can leave their cells, how frequently they can shower, and what type of medications they can receive and when they can receive it. Prisoners are also extremely isolated from their family and friends. Visiting a prisoner can be challenging when they are in an institution far away, and visits can be cancelled when there is a lockdown (which happens frequently). Prisoners can make calls, but the high cost can be a financial burden for prisoners and their families. Phone access is also limited, as many

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[32] Angela Bressan and Kyle Coady, "Guilty Pleas among Indigenous People in Canada" (Department of Justice, Research and Statistics Division, 2017), 10-11, online https://www.justice.gc.ca/eng/rp-pr/jr/gp-pc/gp-pc.pdf.

[33] Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (Ontario Royal Commission, 1995); Gail Kellough and Scot Wortley, "Remand for Plea" (2002) 43 British Journal of Criminology 186; Anna Mehler Paperny, "New data shows race disparities in Canada's bail system", Reuters (October 19, 2017), online: https://www.reuters.com/article/canada-us-canada-jails-race-exclusive-idCAKBN1CO2RD-OCADN.

[34] Martin L Friedland, *Detention before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (Toronto: University of Toronto Press, 1965), 172, quoted in *Ell v Alberta*, 2003 SCC 35, at para 24.

[35] *R v Hall*, 2002 SCC 64, at para 118, per Iacobucci J. See also *R v Myers*, 2019 SCC 18, at para 26; *R v Summers*, 2014 SCC 26, at paras 2 and 28.

[36] *R v Summers*, 2014 SCC 26, at para 28.

prisoners must share phones on a range, and prisoners can only access phones for limited periods each day.

Conditions are particularly dire because of overcrowding, which is pervasive in provincial detention centers. Prior to the pandemic, 56% of institutions operated over the optimal occupancy rate, which is needed to accommodate influxes and ensure incompatible prisoners can be separated.[37] The Auditor General of Ontario observed that the Ministry of the Solicitor General had increased the capacity of 16 of the 25 institutions in Ontario by an average of 81% more than their original capacity.[38] But in 12 of the 16 cases, this was simply by adding more beds and putting more inmates in cells, not expanding facilities.[39] As a result, many prisoners are placed in cells holding more people than they were designed to hold. The Auditor General of Ontario described, for example, four prisoners in Thunder Bay Jail being forced to share a 40-square foot cell made for two, which required two prisoners to sleep on the floor.[40] To combat overcrowding, some prisoners are transferred to institutions outside of their communities,[41] which can isolate these prisoners from their families and make it harder for them to meet with their lawyers and participate meaningfully in their defence. While Ontario's jail population dipped earlier in the pandemic, these numbers quickly started to rebound,[42] and overcrowding remains a problem.

Overcrowded correctional facilities present a range of problems:

> Overcrowding impacts also on the quality of nutrition, sanitation, prisoner activities, health services and the care for vulnerable groups. It affects the physical and mental well-being of all prisoners, generates prisoner tension and violence, exacerbates existing mental and physical health problems, increases the risk of transmission of communicable diseases and poses immense management challenges….[43]

Furthermore, while it is well-established that segregation or solitary confinement can have profound consequences for the physical and mental wellbeing of prisoners,[44] this practice is still commonly used in the provincial correctional system. As a growing proportion of prisoners have

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[37] Office of the Auditor General of Ontario, "Chapter 1: Adult Correctional Institutions" in 2019 Annual Report Volume 3: Reports on Correctional Services and Court Operations, 30, online: https://www.auditor.on.ca/en/content/annualreports/arreports/en19/v3_100en19.pdf.
[38] *Ibid*, 31.
[39] *Ibid.*
[40] *Ibid*, 30.
[41] *Ibid*, 133.
[42] Statistics Canada, "Adult and youth correctional statistics, 2020/2021", online: https://www150.statcan.gc.ca/n1/daily-quotidien/220420/dq220420c-eng.htm.
[43] United Nations Office on Drugs and Crime, "Handbook on strategies to reduce overcrowding in prisons" (2010), 11, online: https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf.
[44] See e.g. Craig Haney, "Restricting the Use of Solitary Confinement" (2018) Annual Review of Criminology, online: https://www-annualreviews-org.myaccess.library.utoronto.ca/doi/pdf/10.1146%2Fannurev-criminol-032317-092326.

possible mental health issues, prisoners are often sent to segregation because of insufficient training and specialized beds.[45]

The 2013 *Jahn v Ministry of Community Safety and Correctional Services* settlement agreement included a range of public remedies aimed at addressing the use of segregation and treatment of prisoners (especially women) with mental health conditions.[46] Implementation has been fraught, and the Ontario Human Rights Commission has continued to raise concerns about overuse of segregation and discriminatory treatment of people with mental health conditions, filing a contravention application with the Human Rights Tribunal of Ontario. In 2018, a Consent Order was issued by the Human Rights Tribunal of Ontario that required Ontario to, among other things, comply with the *Jahn* public interest remedies. Justice David Cole was appointed under the 2018 Consent Order to review Ontario's compliance with the *Jahn* settlement and Consent Order, and he found that Ontario complied with neither. Between July 2018 to July 2019, more than 12,000 people were placed in segregation in Ontario, and 46% had mental health alerts on file.[47] More recently, from April 1, 2021 to March 31, 2022, 9,529 prisoners identified as having at least one placement in segregation, and 41% had an active mental health alert on file for at least one of their placements in segregation.[48]

While some placements in segregation are short, others can be much longer. Adam Capay spent well over four years in a windowless room with 24 hour artificial light, a severe violation of his Charter rights.[49] In any event, even short periods in segregation can be harmful, and the continued reliance on segregation in provincial correctional institutions is highly problematic.

Lockdowns are also a common feature of life in a provincial jail or remand centre, which are largely due to staffing issues.[50] Lockdowns can cause severe stress, anxiety, and tension, as prisoners are kept in close confinement and have limited access to dayrooms, exercise yards, showers, laundry, visits, telephones, programs, health care, and other services.
Remand prisoners generally lack access to the intensive treatment and rehabilitative programs sentenced prisoners have for mental illness, addiction, and behavioural issues.[51] Many remand

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[45] Office of the Auditor General of Ontario, "Chapter 1: Adult Correctional Institutions" in 2019 Annual Report Volume 3: Reports on Correctional Services and Court Operations, 33-35, online: https://www.auditor.on.ca/en/content/annualreports/arreports/en19/v3_100en19.pdf.
[46] Human Rights Tribunal of Ontario, *Jahn v Her Majesty the Queen in Right of Ontario*, HRTO, "Schedule 'A': Public Interest Remedies", online: https://www.ohrc.on.ca/sites/default/files/Jahn%20Schedule%20A_accessible.pdf.
[47] Justice David P Cole, "Independent Reviewer's Final Report on the Jahn Settlement Agreement" (2020), online: https://www.ontario.ca/page/independent-reviewers-final-report-jahn-settlement-agreement.
[48] "Human rights-based data collection for inmates in segregation" (2022), online: https://www.ontario.ca/document/2022-data-release-inmates-ontario/human-rights-based-data-collection-inmates-segregation#section-6.
[49] *R v Capay*, 2019 ONSC 535.
[50] Office of the Auditor General of Ontario, "Chapter 1: Adult Correctional Institutions" in 2019 Annual Report Volume 3: Reports on Correctional Services and Court Operations, 48-49, online: https://www.auditor.on.ca/en/content/annualreports/arreports/en19/v3_100en19.pdf.
[51] *Ibid*, 27-28.

prisoners have mental health and substance abuse issues, and the lack of treatment can have severe, even life-threatening consequences. At the inquest into the death of an immigration detainee at Central East Correctional Centre, a health-care manager testified they had one psychiatrist for 20 hours per week for a population of 1,200 prisoners.[52] This kind of underfunding leads to cruel, degrading, and dangerous conditions that impact all prisoners, including remand prisoners.

At most, a remand prisoner can get some enhanced credit for their time in provincial custody, though that is now limited by statute.[53]

For those remand prisoners who are found not guilty, have their charges withdrawn, or are past time served, there is no getting the lost time back. Defendants in these situations lose jobs, housing, and time with family. They can also experience ongoing mental health problems like PTSD because of their incarceration. Pretrial can also impact families and communities, who experience a loss of stability. Children, for example, lose a caregiver, and they also suffer when their detained parent loses their job and cannot support their family anymore.

As stated by Justice Iacobucci, dissenting:

> At the heart of a free and democratic society is the liberty of its subjects. Liberty lost is never regained and can never be fully compensated for; therefore, where the potential exists for the loss of freedom for even a day, we, as a free and democratic society, must place the highest emphasis on ensuring that our system of justice minimizes the chances of an unwarranted denial of liberty.[54]

The bail system is risk averse, favouring detention over releasing a defendant who might go on to commit an offence. In this way, the bail system secures the safety of some members of the public, but only at the expense of others. Tensions can run high in overcrowded prisons, exposing staff to stressful workplace conditions and even violence.[55] Correctional institutions are dangerous, and people's wellbeing and even lives are at risk in provincial jails. Deaths in custody

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[52] Nicholas Keung, "Jail where immigration detainee was held had one psychiatrist for 20 hours/week for 1,200 inmates, inquest hears", Toronto Star (Jan 26, 2023), online: https://www.thestar.com/news/canada/2023/01/26/jail-where-immigration-detainee-was-held-had-one-psychiatrist-for-20-hoursweek-for-1200-inmates-inquest-hears.html.
[53] Criminal Code, RSC 1985, c C-46, s 719(3.1).
[54] *R v Hall*, 2002 SCC 64, at para 47.
[55] United Nations Office on Drugs and Crime, "Handbook on strategies to reduce overcrowding in prisons" (2010), 11, online: https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf.
[55] Howard Sapers, "Independent Review of Ontario Corrections" (March 2017), 12, online: https://hsjcc.on.ca/wp-content/uploads/IROC-Segregation-Report-2017-03.pdf.

in Ontario are on the rise—there have been 280 deaths since 2010, and a record 41 in 2021 alone.[56] Those on remand face heightened risks of suicide, drug overdose, and suicide.[57]

Given that the bail system has serious consequences for the lives and wellbeing of defendants, the CPLA recommends:

- Decreasing reliance on pretrial custody, which exposes presumed innocent people to cruel, degrading, and dangerous conditions; and
- Ensuring that the *Jahn* settlement and 2018 Consent Orders are fully implemented to help reduce overreliance on segregation, especially for people with mental health conditions.

The overly risk-averse bail system is costly to taxpayers

In 2018/2019, the Ministry of the Solicitor General spent $817 million to run Ontario's correctional facilities, with a daily operating cost of $302 per inmate per day.[58] These costs have continued to climb. In 2020-2021, the Ministry spent over $924 million on institutional services.[59]

Community supervision is a much more cost-effective strategy. The 2012 Drummond Report, for example, found that community supervision costs $5 per day versus $183 per to incarcerate.[60] While the exact costs have no doubt changed over time, this nonetheless illustrates how much more cost-effective it is to invest in community supervision.

There is also the issue of legal aid. An estimated 60% of matters in the Ontario Court of Justice are Legal Aid cases, and duty counsel represents an estimated 80% of defendants in bail hearings in Ontario.[61] The lawyers serving as duty counsel are generally very skilled in running bail hearings and can help many people secure release expeditiously. However, duty counsel often have high case loads, and it is important to ensure that defendants with complex cases can obtain a private lawyer who has adequate time to prepare. In addition, it is important to ensure that low-income defendants have choice of counsel at the bail stage, given how the decision to detain or release can impact the outcome of a proceeding.

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[56] Sarah Speight & Alexander McClelland, "Ontario Deaths in Custody on the Rise" (Tracking (In)Justice, November 2022), 4, online: https://ccla.org/wp-content/uploads/2022/12/Ontario-Deaths-in-Custody-on-the-Rise-2022-8.pdf.
[57] *Ibid.*
[58] Office of the Auditor General of Ontario, "Chapter 1: Adult Correctional Institutions" in 2019 Annual Report Volume 3: Reports on Correctional Services and Court Operations, 23, 54, online: https://www.auditor.on.ca/en/content/annualreports/arreports/en19/v3_100en19.pdf.
[59] Ontario, "Expenditure Estimates for the Ministry of the Solicitor General (2022-23)", online: https://www.ontario.ca/page/expenditure-estimates-ministry-solicitor-general-2022-23#section-4.
[60] Commission on the Reform of Ontario's Public Services, "Public Services for Ontarians: A Path to Sustainability and Excellence" (2012), 353, online: https://www.opsba.org/wp-content/uploads/2021/02/drummondReportFeb1512.pdf.
[61] Legal Aid Ontario, "A legal aid strategy for bail" (July 18, 2019), online: https://www.legalaid.on.ca/documents/a-legal-aid-strategy-for-bail/#section.

Legal Aid Ontario provides very limited funding to private lawyers to conduct bail hearings and to bring bail reviews. Private lawyers receive very limited funding to conduct bail hearings, and many lawyers are forced to defer to duty counsel because of the insufficient allotment of hours to properly conduct bail hearings.

Tightening bail will also result in more court appearances and hearings, and therefore increased costs to accused people and to the public, through the funding of the legal aid system. Releasing an accused on unreasonable conditions that inevitably lead to breach charges is also costly. In 2017 alone, legal aid certificates where an administration of justice charge was the only charge cost Ontario $3.5 million.[62]

For these reasons, the CPLA recommends:

- Investing in community supervision rather than costly pretrial detention; and
- Reviewing the funding for Legal Aid Ontario to ensure defendants can receive timely bail hearings and effective representation.

[62] Legal Aid Ontario, "A legal aid strategy for bail" (July 18, 2019), online: https://www.legalaid.on.ca/documents/a-legal-aid-strategy-for-bail/#section.