Bail and Remand in Ontario

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1. Background

Several noteworthy reports have been released in recent years that are critical of the bail and remand system and which contain recommendations for improvement. Some of these reports have been anecdotal and some have involved scholarly research. Their common theme is that the criminal justice system in Canada is failing in the way it detains individuals accused of criminal offences… all presumed innocent of the charges laid against them. Those failures, the authors point out, are varied and include charges that the police detain too many individuals accused of criminal offences and do not exercise their powers of release appropriately; that prosecution services through their policies and actions inappropriately oppose bail in too many instances; that police, judicial officers, both judges and justices of the peace, do not exercise appropriate discretion in releasing people awaiting trial and do not apply the Criminal Code release provisions appropriately; that there is too much of a delay in hearing applications for release; that too many unnecessary conditions are imposed on accused persons that inevitably, given the delay in time to trial, bring many back into custody on breach charges where the person does not necessarily pose a risk to society; that sureties are overused; that community alternatives to remand custody are underfunded, inadequate and not universally available in all jurisdictions; that individuals housed in correctional or detention centres are kept in conditions that are dehumanizing and overcrowded and that cause administrative headaches; that resources available to both private defence counsel and to legal aid are inappropriate and lacking; that too many vulnerable people or people accused of less serious offences are being detained and denied release which exacerbates the issues they face; that too many Indigenous Persons are detained in jail far outnumbering the percentage of their numbers in society as a whole, among a host of other charges and conclusions. As the John Howard Society concluded in its report on Reasonable Bail:

> “Our situation in Ontario is, in short, as follows: less (sic) people are being released on bail, less quickly, and with more conditions, during a time of historically low and still-declining crime rates. Those 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”.

Further, it is pointed out that the percentage of people locked up in jails in Canada who have not been convicted of a crime far outnumber those who have been convicted or sentenced. In fact, in Ontario a full 60% of inmates in provincial correctional centres or detention centres

have not been convicted of the crime for which they are incarcerated. In other jurisdictions, Manitoba for example, that rate is over 70%. At least one report described the bail and remand system as “broken”. The overall prison population is falling but more people are being locked up prior to determination of guilt or innocence in both real numbers and percentage and that number, generally, has climbed over the past 30 odd years. Meanwhile in percentage and actual number, the numbers of sentenced prisoners in jails are decreasing. This is all occurring in an environment where the crime rate is decreasing as is, generally, the crime severity index.

The potential reasons for what has happened over the years are varied and have been the subject of much discussion. For the purposes of this report, those reasons will not be studied but it is simply a fact that far too many of our prisons, jails and detention centres are populated with people not convicted of criminal offences and who are presumed innocent and that is something that requires attention and change.

Pursuant to their respective mandates, the Ministry of the Attorney General (MAG) and the Ministry of Community Safety and Correctional Services (MCSCS) in Ontario have been asked to review the current bail and remand system in Ontario and to develop a strategy to address challenges.

In partnership with the Province of Saskatchewan, the project will take a system-wide approach to identify issues of bail and remand in at least two communities in each province. In Ontario, the communities of Ottawa and Brantford were chosen, not because there are any particular or unique issues in those communities, but rather because they were presented as communities in Ontario that were similar in many respects to the communities in Saskatchewan that were being studied (Regina, Saskatoon and Prince Albert). The goal is to develop a set of concrete and affordable recommendations that will improve province-wide effectiveness and efficiency in both bail and remand, related to issues such as police and court release and detention procedures; developing community alternatives to detention; reducing systemic issues and delay involving remand and reducing the rate of new charges and breaches while accused are awaiting trial in the community. All these goals have the overarching mandate to both protect and enhance public safety and to strike an appropriate balance between the rights of individuals and the rights of the community at large.

This project will have both a quantitative and qualitative component. This report represents the beginning of the qualitative study of bail and remand. The quantitative component is in progress and is on-going. It is intended that the quantitative and qualitative parts of the project will meet up and the information will then be analyzed to prepare an action plan for solutions to some issues and further study of others.

In the area of remand detention it is important to note that there are two primary components to the remand population. In short, they can be described as short-term and long-term accused. Those on remand for a long-term are fewer in number overall in comparison to the short-term offenders. However, they account for a much larger use of bed space in detention facilities. The longer one spends on remand the longer that bed is unavailable to others.

Those on short-term remand outnumber those on long-term but the vast majority are in custody for one to 14 days. In fact one study showed that 50% of remand admissions are in for eight days or less. Another report suggests that the average length of stay on remand is just over 11 days. This report will focus primarily on those short-term people. It is hoped that by making recommendations for further study, the number of short-term admissions can be reduced. If the police release more people, that will reduce the numbers. If the courts release more people that will reduce the numbers and even if the courts simplify and make their procedures more efficient that will reduce the length of stay. In other words, we need to find out why so many people are in for such short a time and at such a cost. Do some need to come into the system at all? If inside an institution, do they need to spend as much time on remand? Reducing this number may not have the dramatic effect on freeing up bed space as reducing the number of long-term inmates might but it would create some capacity, reduce cost and frankly be a fairer and more just system. In terms of long-term inmates, further study is needed to determine the reasons behind the length of stay. It may very well be, ultimately, related to time to trial issues. The longer the delay in getting a trial date because of court backlogs the longer someone who is detained is going to sit. Creating capacity in the court will reduce the time to trial and then serve to reduce the long-term remand population. Simplifying the bail procedures may create court capacity to lessen the time to trial and reduce the long-term remand population. There may be many sub-components to this issue and it alone needs to be addressed in a separate study. We need to do an in-depth study of the demographics of those on long-term remand. Who are they? Why are they there? We know that about 45% of those on remand never apply for bail. Why is that? Is it because they know it is a lost cause? Is it because they have mental health issues? Is it because they are "gaming" the system for one reason or another? A study of that population as well as the causes of the delay in time to trial is a necessary study.

1.1 Recommendation:

That MAG, the Ontario Court of Justice (OCJ) and MCSCS conduct an in-depth study of those on long-term remand to determine what measures can be put into place to lessen the length of their stay on remand.

1.2 Recommendation:

That MAG and MCSCS undertake an indepth study into the demographics of and the reasons why many remand prisoners never make an application for release on bail.

2. Methodology

This report is primarily based on three components:

1. A Review of Literature and Reports and other public comment relating to bail and remand, particularly in Ontario, some but not all of which are referenced at the end of

this report.

2. Observations of process made by the author that included police observations, court observations and detention centre observations amongst others.
3. Wide ranging interviews with key stakeholders both internal and external to the system including judges, justices of the peace, police, crown counsel both provincial and federal, private and legal aid defence counsel, correction and probation officials, community organizations including non-government organizations, bail verification and supervision programs (BVSP), academics, court staff, justice officials, service providers and advocacy groups and others. In total, approximately 175 people were interviewed by the author mostly all in person with a few limited phone interviews.

It should be noted that interviewees were told that their comments would be taken in a confidential manner and that nothing they said would be attributed to any particular individual or organization. This was key in order to ensure a candid and frank interchange of ideas and suggestions. As a result, no person will be identified in this report nor will any comment be attributed to any particular individual. The conclusions and recommendations are entirely those of the author. Further, any conclusion or recommendation should not be viewed, nor is intended to be, a criticism of any particular individual or organization. Finally, the use of the terms bail hearings, bail applications, release applications and show cause hearings refer to the same thing and may be used interchangeably in this report.

3. Acknowledgements

The author is deeply indebted to a number of individuals for their cooperation and assistance in facilitating the research for this report. There are too many to mention but particular thanks goes to staff at both MAG, particularly members of the Criminal Modernization Division and MCSCS for their accommodation and assistance. It is also vitally important to thank all those who gave of their time to be interviewed and who provided valuable information and insight in the research phase of this project. Those interviewed, almost unanimously, were extremely cooperative and candid and generous with their time. Regardless of the issues or perspectives that those interviewed brought to the process, it is quite clear that the level of dedication to service is impressive and something all Ontarians should know about and be proud of.

4. Limitations of this Report

It is imperative to state that this report should not be viewed as the seminal research or final word into, or one that will provide the definitive answers to, the issues of bail and remand in Ontario. The purpose of this report is for the author to identify those issues that the author believes, based on interviews, observations and his own perspective, are issues that need to be addressed in further research and review in the areas of bail and remand. This report is a discussion paper and is only a beginning. It is not an end. The intention of this report is to

have one individual, independent and not connected to the justice system in Ontario, make observations of the issues he believes have been raised and to propose, where applicable, recommendations for solution or for further study. This report was prepared largely in isolation to the concurrent quantitative research that is presently ongoing although the author is certainly aware of many of the studies that have already been undertaken. Not all the information, observations and opinions of those interviewed could be verified and some of the information is anecdotal.

In this perspective then, it is important to emphasize that no one person could write the seminal and definitive report on bail and remand. The issues are too complex and too intertwined and no one person has a monopoly on wisdom. Further, this study is the result of one person interviewing fewer than 200 people in Ottawa, Brantford and Toronto and bringing to the investigation and observations his own perspective and most likely biases and opinions. It is very dependent on who was interviewed, what processes were observed and the opinions of the people interviewed. Ontario is a little country in many respects. It has a large population and it is diverse. What happens in downtown Toronto is different to what happens in Ottawa, which is different to Brantford which is quite different to what happens in Kenora or Brampton or any other jurisdiction. The justice system cultures are different and while many of the issues are the same, there are always issues unique to different communities and court locales. This report clearly cannot, nor is it intended to, investigate or comment on every issue or solution. It is ignorant, for example, of all the unique procedures and best (or worst) practices and initiatives that exist in the many court locations in Ontario. However, by the same token, it is clear that Ontarians are not served equally by the justice system. Some have more access to services than others and the administration of justice works better in some places than others. Those things need to change.

But all of this is not to say that this report is without value or should be ignored or summarily dismissed. Quite the contrary. It is hoped that this report will confirm issues that are already known or that may identify other issues so that, as the process for reform proceeds, that process can proceed with some assurance that the issues that need to be addressed have been identified and that where further investigation and research is necessary, it will be done. There is ample evidence gathered in this research and in other research studies to demonstrate that substantial and significant change is necessary in the areas of bail and remand in Ontario. In most cases, there will be no “quick fix” or “silver bullet” that will magically deal with issues of bail and remand. Some issues may be dealt with by legislative changes but that is beyond the jurisdiction of the province and will require federal government action; some may require the infusion or re-allocation of resources, for example. It may be a daunting task. However, it is a task that must be performed. Those in the justice system have a trust…….to ensure public safety, to serve and protect victims, to ensure that those presumed innocent of crimes are treated humanely and appropriately and to ensure the proper expenditure and allocation of public funds and resources. Finally, one thing should be noted. This report is not intended for anyone to conclude that somehow the issues of bail and remand are unique to Ontario. Almost every jurisdiction in this country faces those same issues. Ontario is no worse than elsewhere and, in many instances, does a pretty good job at

least in comparison to elsewhere. But that should not be interpreted as concluding that things should not change. They have to. To be sure, that change must be transformational. Simply tinkering with the system will not be effective.

I am acutely aware that many of the recommendations in this report may come with a substantial cost although I believe many recommendations will save costs in the long run. The issue of cost was not considered in the making of these recommendations. Finally, some suggested initiatives could start as pilot projects which, after proper evaluation, could then be expanded as deemed appropriate.

4.1 Recommendation:

That a further in-depth study of issues of bail and remand be undertaken in all of Ontario.

5. Another Study?

A familiar theme I discovered is that many people viewed this study with skepticism in large part because so many studies have already been undertaken in Ontario on bail and remand. Many felt the issues and solutions have already been studied to death and expressed concern this would be yet another report that would go nowhere. There is some sympathy for this view. There have been many studies and, in fact, currently other concurrent studies on specific issues regarding bail and remand in Ontario are on-going. For example, MAG has been very active and proactive on both the provincial and national stage in studying issues related to bail and remand and are to be congratulated for that leadership. Presently, studies involving targeted pilot programs and research on bail conditions and sureties or embedding crown input with the police on bail as well as increased crown education and other bail strategies are being done in any number of areas. Many involve working with other stakeholders in the justice system including MCSCS and the Ontario Court of Justice. These initiatives are to be commended.

However, not all these programs comprehensively involve participant stakeholders like the defence bar, legal aid, the courts or relevant stakeholders. It is important that studies and initiatives on bail all involve, where possible, the partnership of internal and external stakeholders in order to ensure that duplication in the collection of information is eliminated and that study results contain recognition of the impact of changes by one part of the system on the other and that consistency in information gathering is optimized. That can be the danger inherent when studies do not involve all the relevant stakeholders. Valuable information may not be gathered and the effect of changes by one agency may not be understood or appreciated on another.

5.1 Recommendation:

That where possible and practicable, studies and investigations into issues of bail and remand, both qualitative and quantitative, be conducted cooperatively between stakeholders.

5.2 Recommendation:

That to the extent possible, Ontario justice partners abandon the siloed approach to information collection and cooperate in data collection and sharing of information on a system-wide approach with appropriate firewalls to protect confidential information and privacy.

6. Damn Statistics

There is no shortage of statistics related to a variety of the component issues of bail and remand. How many people are on remand; what is that percentage of the total jail population; how many arrests are made; how many people do the police release without detention; how many people never make an application for release on bail; how many people are released on sureties; how long is the average time to get an application for bail before a judicial officer… the list goes on and on and on. Further, in addition to the many studies and statistics available, a flurry of work is ongoing on a host of fronts, both provincially and federally, investigating all aspects of bail and remand and its individual components. The problem has been that, largely, studies have been done in silos and information-sharing has been problematic. There is a significant move afoot in Ontario, particularly through this study, to change that culture and that history and to develop information and data gathering tools that are consistent and which will provide all stakeholders with information that is reliable and measurable, useable and useful across the justice system. That is a welcome development and one that will only serve to assist an effective justice system. But old habits die hard. I found, despite what people say in relation to cooperation, that the justice system in Ontario still very much works in silos and that the lack of information sharing, the obtaining of consistent information and the lack of common data gathering and turf protection still exists.

I expect that some of the conclusions and recommendations in this report will be confirmed by statistical data and quantitative analysis. I also expect some of the recommendations and conclusions will be contradicted by data or that data might be used in order to argue against some of the conclusions and recommendations. That is inevitable. I also fully expect that I might have just got some things wrong. That is inevitable. However, I do hope that those who read and rely on this report will not just summarily dismiss conclusions or recommendations they don’t agree with or don’t like. I hope that it is particularly the case that data and statistics aren’t trotted out to conclude “Wyant just got this wrong”. For example, there is data that shows that Ontario does a pretty good job at providing bail hearings soon after arrest. Over 70% have a hearing within one to three days of arrest and that half of those detained have their bail decided on their first appearance. Further there is data to show that, in some locales, over 60% of those arrested by the police are released by the police without ever coming into detention. (Of course this begs the question, and the need for further examination, as to why in some other locales, that number is quite a bit lower). Those are heady statistics and, on the

surface, pretty impressive. We can probably trot out statistics to dispute or negate anything we want to. But that will miss the point. What statistics fail to tell us is anything about the PEOPLE that they are talking about. And this is, after all, about people, not statistics. Statistics don't tell us if we are locking up the right people for the right reasons. In fact, studies have shown we lock up far too many people with mental health issues or addiction issues, just as an example. (One federal study by Beaudette and Steward put the national prevalence for mental disorders at 73% in federal institutions). These people do not get better in jail. Studies show they get worse. Those with mental illness suffer even more. Jail is no place where people get better. Studies show that there is a higher risk of suicide in the first few days of incarceration. People get separated from society and they get warehoused. They get separated from their families, their loved-ones, their job and their way of life. People remanded into custody are more likely to plead guilty rather than sit for an extended period of time. Even a short period of jail has been proven to have a significantly deleterious and debilitating affect on people, sometimes irrevocably. We marginalize the marginalized. We impoverish the impoverished. So when we don't release people from police custody when they could be released or when we don't release them from court, expeditiously, when they could be released or when we keep those on remand for excessive time periods, we fail PEOPLE. So when we detain someone in custody, presumed innocent, it must be done carefully and appropriately. It can't be done just because we don't know what else to do with that person. These are critical decisions and can be life-altering for those affected. Statistics won't tell us the toll that detention takes on people. In my opinion, the fact, for example, that over 70% of people detained by the police have a bail hearing in one to three days doesn't make me feel better. It doesn't tell me if all of those had to be detained in the first place. It doesn't tell me why it took say three days. If we are going to ensure we serve people the best way we can, then we need to look at what those statistics represent and who are those people who comprise the statistics. What are they charged with? What is their background? Was there something we could have done differently or better? We know, for example, that about 45% of those who are detained by the police never make a bail application at all. Why is that? Who are they? Why do they act that way? Is it because they are "gamers" playing the system? Are they looking for a warm bed and three squares a day? Do they have some diagnosed or undiagnosed mental illness? Have they concluded that, given the way courts work especially with the reliance on sureties in Ontario, they don't stand a hope of getting out anyway? We just don't know but we need to know the answers to these questions and countless others by drilling down and finding out the nature of our clientele. Only then can we develop plans to manage their risk appropriately either in custody or on the street. All of that should not be taken or interpreted to mean that no one should be in jail. Quite the contrary. Detention is quite appropriate to ensure that an accused will appear in court or to protect public safety or the safety of any individual but we should not just default to detention in all cases. Rather we need to ensure we get the right people in jail, not the wrong ones. Presently, we defer to detention.

What we do know from observation is that too much of our valuable court time is being used for administrative acts, essentially the shuffling of paperwork. People appear again and again and again while the crown awaits information from the police or the defence awaits disclosure

from the crown and while positions on release or pretrial motions or trial preparation cause delays. Some of this is inevitable in the proper preparation of a case. Cases can be complex in their investigation and preparation. However, an investigation needs to focus on whether or not far too much of our valuable court time is spend on processing cases as opposed to dealing with cases in a meaningful way. It may not be necessary, for example, to continually bring back accused to appear in court simply to rubber stamp a remand while a case is being prepared. Efforts to speed up judicial processes and free up court time and therefore trial dates can be critical in hastening the time to trial and thus reducing the length of the average length of stay for remand prisoners. Generally speaking, court time should be reserved for meaningful acts to occur. Other provinces, Alberta and Manitoba for example, have instituted alternative administrative procedures to handle administrative matters outside of court time which have had the result of freeing up valuable court time for meaningful acts such as bail applications, sentencing hearings and trials for example, to occur. This can be a complicated task but one that needs to be undertaken in Ontario.

We must recognize that we are in a service industry. We have clients including the public, victims and the accused. Far too often it seems that our first priority is to focus on what works best for those who manage the process such as judges, crowns, lawyers, the police and corrections rather than what works best for our clients.

6.1 Recommendation:

That the Ontario Court of Justice in consultation and cooperation with MAG, MCSCS, the Public Prosecution Service of Canada (PPSC), the police, private counsel, legal aid, court supports and service providers, conduct a process review of court use with a view to streamlining administrative processes in court and courtroom utilization with the goal to free up court time in order that meaningful acts, such as bail applications for release, can occur in a timely fashion.

7. A Note About Culture

The justice system, like any other system, has its own culture and, within that culture, are a host of sub-cultures. The police have their culture, the crown theirs, the judiciary as well and so on. And it is probably incorrect to describe it as a system at all. It is a collection of fiercely independent organizations that function in an adversarial system. There is no CEO; there is no org chart. That has led to a situation, not unique to Ontario, where cross-cultural cooperation and cross-cultural studies and solutions are difficult to attain. As I said earlier, there is movement in Ontario to inter-agency cooperation but it isn't good enough and it isn't coming fast enough. It should be more than protecting one's turf or view of the world or, most importantly, protecting one's budget line. The public is the client in the end. We say that but we don't always practice it. In a larger context, we need to discuss how the various parts of the system work together in a way that maximizes resources, reduces duplication of services and breaks down barriers, particularly related to access to justice. We need to understand that

the legal system has been fashioned largely by lawyers for lawyers and we need to deal with how we have made the system cumbersome, confusing and damn well scary to many people. We need to talk about a system where the police work 24/7 but, with some exceptions, the rest of the system works banker's hours Monday to Friday. Well the banks have changed. We better have that discussion too. We should stop talking about why we can't do things and start talking about why we can and must. Turning the ship around is not going to be easy. But tinkering with the system isn't going to work either. We need transformational change in the justice system and people who aren't afraid to lead that change. It will simply not work just tinkering with the system as Dr. Webster has noted. I agree. Change will require the goodwill, cooperation and collaboration of all parts and parties to the justice system. It may even take an overhaul of the bail provisions in the Code to change, fundamentally, the issues of bail in Canada in much the same way as changes with the Youth Criminal Justice Act changed the culture of detention in the youth system. Certainly it is hoped that legislators will look at issues such as widening the police powers of release and providing them with the opportunity, for example, to release an individual that they want to release but can't right now because of limitations such as the types of conditions that could be imposed and reviewing some of the reverse onus provisions on bail, particularly section 515(6)(c) which makes an allegation of breach of bail a reverse onus situation. But those issues are outside the scope of this report.

There are no shortages of leaders or of leadership. Ontario is blessed with dedicated public servants in all branches of the system that have passion, ideas and energy to make changes. You can see it in many jurisdictions where you can trace the innovations in a locale to one or a few people who have led change. Those changes and those best practices and the process by which they were achieved need to be studied and incorporated in a bail system in Ontario that provides equal services to all citizens. Each court centre in Ontario has its unique issues and unique culture. Each, additionally, have best practices and much can be learned from the practices in various centres and sharing those practices will improve the delivery of justice services province-wide. Having said that, many might say that local cultures and practices should remain and that a "one size fits all" approach to bail and remand in Ontario would not be wise nor would it serve the interests of citizens in local jurisdictions. I disagree. Citizens in Ontario should be, and deserve to be, served by a justice system that is transparent, fair and consistent in its approach throughout the province. The current state of affairs is confusing and disorganized. During my review I had the opportunity to visit court centres or talk to people about court centres not connected with the two jurisdictions in this study. The practices and procedures in the various court centres in Ontario vary significantly from jurisdiction to jurisdiction. That is not to say that certain local customs and procedures haven't assisted efficiency and effectiveness and it is not to say that each jurisdiction has a clientele that is similar. Our justice system must be flexible to respond to the specific needs of local communities. But overall, one should be able to go into each and every court jurisdiction in Ontario and see the same processes and policies and see the same court supports in each. That is simply not the case at this time. Some jurisdictions for example, have well supported community supports, some very little if at all. Further, for example, each jurisdiction does things a little differently whether it is related to surety verification or video appearances or a

myriad of other procedures. Local jurisdictions should be able to respond to local needs and issues but the basic structures should be the same. Far too often, personalities in jurisdictions, be they crown or judicial for example, have driven how things proceed and that needs to change. We should study and institutionalize the processes of change. It should not be the case where we rely too much on the personalities of individuals to either initiate change, maintain it or, worse, be a barrier to change in the effective administration of justice.

7.1 Recommendation:

That MAG review the procedures for bail with a view to ensuring that consistent structures, policies and practices are implemented thoroughout the province while taking into account and being cognizant of local and unique issues and the demographics present in each court locale.

8. Risk Aversion

Not surprisingly, I found that risk aversion permeates the justice system, which includes issues of bail and remand, in Ontario as it does elsewhere. Simply put, people are reluctant to make decisions that might later come back to haunt them. No one wants to have their name on a file where someone was released and while on bail became re-involved, particularly in a heinous or violent offence. My observations and discussions with representatives across the system confirmed this. Police officers told me that in a close call they would opt to detain and let the Crown or court decide if someone could be released. The Crown, in cases of doubt, would let the judicial officer decide. While no judicial officer confirmed they would opt to detain rather than release there is, in my opinion, a disturbing trend where some “hear the footsteps” and may opt to make the decision to detain rather than find out in the future that someone they released then reoffended. Some of this reluctance on the part of people to exercise discretion may arise from a number of factors. Some reported that they felt they would not have the backing of their superiors in the event that one of their decisions “went south”. In the case of the Crown, many younger crowns who are anxious for advancement or, more particularly, those who are not permanent and who may be on term contracts felt that their future employment, chance for advancement or obtaining permanent employment would be put in jeopardy by a decision that, retroactively viewed , might have resulted in a serious re-involvement. I was informed that per diem or part-time crowns will almost always defer to a position of opposition to release in order to protect future employment. Even where some really do feel release is appropriate, they would rather have the justice of the peace decide and will say they have “soft opposition” to release. I believe that is another way of saying “I think the accused should be released but I don’t want to make that decision”. That is wrong and can lead to undue remand detention. It is clear that, insofar as the Crown is concerned, policies regarding issues of bail and directions to crowns have focused on reasons why detention orders ought to be sought and reminders of past tragedies have not only occasioned changes in policy manuals but reference to them has had a chilling effect on the exercise of discretion.

In fairness, no one wants to make a decision that might put the health or life of any individual at risk. In fact, it is the responsibility of police and crown and justice officials to exercise discretion in the public interest. But hindsight is always 20/20 and while there are clear cases where an individual needs to be detained to protect the public or any particular victim, the fact is that the fear of making a mistake, or rather making a decision that in light of subsequent events might seem to be a mistake, is not a proper exercise of the independent discretion that police officers, judges and crown attorneys must always exercise. The fact is that no one has a crystal ball to predict the future. And as sad as it is to say, crime will always be with us and bad things will happen no matter how hard we try to avoid them. Many things are simply unpredictable and no one possesses a crystal ball or a monopoly on wisdom. Our society isn't perfect and people aren't perfect and there are bad people amongst us and people who do really bad things. In the pursuit of public protection, however, we must not paint everyone charged with offences with the same brush. Where there is clear evidence of the need to detain then people must be detained. When we just worry about re-involvement without any substantial basis for that worry or when that risk will not substantially affect public safety or when we warehouse the vulnerable or marginalized for relatively low-level offences, we run the risk of perverting the course of justice and treating as guilty those who are presumed innocent.

It is not easy to overcome a fear that somehow one will be left out to dry in the event a decision leads to a re-involvement in a serious matter. However, it is urged that organizations create a culture from within that supports the exercise of discretion when it is done for clearly articulated and supportable reasons no matter what may happen in the future.

9. An Overview of Brantford

Brantford is served by the Brant County OPP, the Brantford City Police and Six Nations Police services. Brantford scores high on the crime severity index and Six Nations scores even higher. It was reported that addiction and mental health issues are of significant concern in the Brantford area.

The Brantford Courthouse has its physical limitations. There are only two rooms for interviewing individuals in custody. On any given court day, defence counsel, duty counsel, mental health workers from the Canadian Mental Health Association, representatives from St. Leonard's Society which provides the Bail Supervision Program in Brantford, the aboriginal court worker from the non-profit Brantford Native Housing amongst others, vie for that space. It always makes for lengthy delays in interviewing those in custody which, inevitably, leads to delays in developing plans for release and having hearings in court. In addition, there are no phones for accused while in custody at the courthouse. At times, things can become very congested and quite chaotic with little or no room for privacy in conversations.

There is no office for legal aid in Brantford though there used to be. There is a legal aid intake worker present on most days for some of the day in the courthouse but often their office is closed. Applications for legal aid are not taken from those in custody until they have been

remanded and then taken while at the detention centre. All others are required to call a 1-800 number to apply for legal aid. It was reported that this can be a frustrating experience and one that leads to lengthy delays in processing applications for the appointment of counsel and, consequently, to delays in court awaiting such processing. A great number of applications for release are conducted by duty counsel although there are a small number of private lawyers that do a considerable amount of court work.

There is a courtroom with video capability, presided over by a justice of the peace, that does video remands and bail applications on a daily basis. Applications for bail are set according to a schedule. It appears unlikely to be able to do an application on the first day of custody even if one was ready to do so given the court calendar. Consent bail applications and surety verification hearings are conducted after video remand that starts at 930. It is done this way to accommodate the jails which have to serve more than one courthouse or judicial centre. These are supposed to start at 10 but don't start until after 11 or 1130 in the morning. Contested applications are heard in the afternoon. The court runs a second bail court on Friday and on Tuesday after a long weekend. It was reported that when an application for bail is scheduled and if your surety isn't there on time, the matter won't be brought back later that day if the surety shows up late. Bail applications are done in person, not by video.

The bail crown, it is reported, does not arrive in the courtroom until 10 or so. Counsel complains that this does not allow sufficient time to discuss potential release positions. This practice appears to be much different to Ottawa.

There is a bail committee in Brantford that involves all stakeholders and, by all reports, appears to function well.

Reports received suggest that, if the police have not released, it is rare an accused is released in court on a recognizance without a surety and rarer still on an undertaking. Surety releases, it appears, are the norm in Brantford on both consent and contested releases.

Six Nations Reserve is the largest in Ontario and Brantford handles matters from that community. There is no public transportation available from the reserve to town and so individuals appearing in court must make their own way there. Some even walk a huge distance. A cab ride is about $40 each way. It is very difficult for many community members to make it to court. As a result, there appears to be a large number of failing to appear charges laid against members of Six Nations. Additionally, if sureties are required, it is difficult for many people to make it to court and so indigenous accused are often disadvantaged not only because getting sureties can be difficult, if not impossible for many, but because sureties have such a great difficulty making it to court often resulting in longer waits in custody for indigenous accused. Six Nations Police have video capability in their service.

The local men's detention centre is a stone's throw from the courthouse. The Brantford Jail was originally constructed in 1852 with an addition in 1982. It has been slated for closing since 2012. At present it is to close once the Toronto South Detention Centre is fully operational and detention centre re-alignment takes place. The players in Brantford fear the

closing as it will take remand prisoners about 40 to 50 minutes away from Brantford. Aboriginal accused account for 30 to 35% of the population at any point in time. The jail capacity is about 90 and it is always full. There are significant physical limitations in the institution in terms of space. The administration does a great job of doing what they can with what they have. Women are held in Hamilton and transported to court. All calls made from the jail to the outside must be collect calls. Cell phones don't accept collect calls. One lawyer reported his telephone bill for calls from clients in jail is usually over $1,000 a month, a sum for which there is no reimbursement. It appears few lawyers ever see their clients in jail despite the proximity to the courthouse.

As noted, St. Leonard's operates the bail supervision program. I am informed that there is no bail supervision on Six Nations, no indigenous specific programming at St. Leonard's and little collaboration with Six Nations justice officials. The Canadian Mental Health Association provides services for individuals as well as the aboriginal court worker from the Brant Native Housing Association. Victim services both provided initially by Victim Services of Brantford, a non-profit organization and then by the province are excellent.

10. An Overview of Ottawa

Ottawa uses video a great deal more than many other places. In fact there are video facilities in several courtrooms. Bail applications occur daily in courtroom Six which starts every day at 9:30 a.m. but stops twice a day for "polycom". These are video remand appearances by accused in custody. "Polycom" which is a colloquial term used for the old technology, happens at 11:30 a.m. and 2:30 p.m. The accused appears on video for people in the courtroom. Unfortunately, the timing of "polycom" is such that whatever is going on at that particular time is interrupted. So bail applications are often interrupted for "polycom".

Ottawa also has a second bail court each day of the week. Courtroom #3 on Monday, Thursday and Friday and Courtroom #9 Tuesday and Wednesday after youth and federal remands. Bail applications are booked in slots, usually allowing for at least 1 ½ hours or more for the application. There is capacity for bail applications. They could be made the same day although that rarely happens because counsel are arranging for sureties or otherwise preparing their applications and John Howard needs time to prepare a bail supervision report in cases they are involved in. Oftentimes, the second bail courts are not needed or close early if they have opened at all. Often too, bails that are set are adjourned as counsel need more time to get their plan together or sureties are unavailable for court. It appears few, if any, contested bail applications are done on video.

Ottawa has a bail committee. I received many reports that although the committee meets, it doesn't appear to be as effective as Brantford although those reports were not unanimous.

Many describe the atmosphere in Ottawa as much more litigious and that relationships with the Crown can become strained at times. It is never surprising to hear that personalities play a part in the perspective people bring to the table. It is impossible to make comment on the truth

of these comments and I wish to stress that I make no judgment on the attitude or performance of any individual.

The John Howard Society provides bail supervision in Ottawa. As well, other non-profit agencies are present to assist accused in custody. The Ottawa Native Friendship Centre provides services to indigenous accused and offenders. There is one worker who does a great job but more resources are needed. Ottawa is home to many indigenous people, particularly Inuit. As well, Ottawa has many immigrant populations who appear to be, like indigenous people, over-represented in the justice system and who need supports that are lacking in the court system.

Policing for Ottawa is done primarily by the Ottawa Police Service. The OPP also has a presence in the Ottawa courthouse due to their jurisdiction.

Ottawa appears to have the highest percentage of administration of justice charges in the province and extensively uses “red zones” (areas where an accused is banned from entering) and “keep the peace and be of good behavior” in many of its releases.

The Crown employs a “bail vettor” who is available early each morning to review files, prepare positions including consents to release and meet with counsel. This person is always an experienced Crown. This individual also screens potential sureties and, if approved, these sureties do not testify in court. Statistics provided showed that almost 50% of those cases reviewed resulted in a consent release of some kind. It was also apparent that some of those so released could have been released earlier by the police.

Duty Counsel, as with most of the province, does the vast majority of applications for release. Private lawyers also attend although the delay in getting a certificate may keep some from appearing for a bail application, deferring to duty counsel. As well, with the tariff limitation of $200 for bail, many private lawyers avoid the process altogether. Like Brantford, applications for legal aid are only taken once an accused is remanded in custody. If out of custody, it is up to the individual to apply for legal aid although Ottawa provides great information and support for this in the courthouse. Accused in custody can only apply for legal aid once remanded into custody and those applications are usually taken by video by an intake worker while the accused is in the Ottawa-Carleton Detention Centre (OCDC). Applications are not taken while in custody with the police or at the courthouse.

The OCDC is the detention centre for Ottawa for both women and men. Long-term remand accused can be transferred to other institutions, likely the Central East Correctional Centre at Lindsay which is about two to three hours away.

11. Release by the Police

Sections 493 to 502 of the Criminal Code outline the powers of release for the police. For certain less serious offences the police can release on a summons, promise to appear or an

appearance notice or in some instances on a recognizance or undertaking with conditions. The police are limited in the types of conditions that can be imposed.

In Ottawa about 60% of those arrested by the police are released by the police without being detained for an appearance before a judge or justice of the peace. That is an impressive number although I am informed that percentage has declined over the past few years.

Notwithstanding this significant figure, a number of people are detained for a judicial decision on bail that should be released by the police. In some instances this can be put down to risk aversion and in some instances to some police members not fully appreciating their powers of release. Of course there are some instances where the police would seek to release an individual but are constrained to do so because they may not have the power to impose a desired condition of release on the accused. For example, the police may not oppose release on someone charged with a drug trafficking offence but wish to impose a condition not to possess a cell phone or someone may be charged with possession of pornography and the police would release but for the fact they cannot impose a condition to not possess a computer and there are many more examples. Apart from pursuing legislative changes that would expand the powers of release, which MAG is properly pursuing with the federal government, there are things that can be done to ensure that police personnel who have the ability and power to release do exercise that power appropriately. Certainly the arresting officers have certain powers of release by way of a summons or appearance notice and that if conditions are required the Officer-in-Charge can release under certain circumstances. Education is a key component of that. I am aware that in Ottawa, for example, as well as in other jurisdictions, MAG conducts release training seminars for Officers-in-Charge.

Not all jurisdictions have such a regularized program I am advised. As personnel changes, continuing education and training of police on their powers of release needs to be continued and expanded. It is sad to see a case where the police have detained someone in custody only to have the Crown consent to that release a day or two later on an undertaking or a recognizance which could have been done by the police. Notwithstanding the education and training, some police officers in Ottawa reported they considered it a privilege for the accused to be released and not a right, which is what it is and this attitude speaks to the need for continuing in-depth education and training.

On occasion as well, there can be a misunderstanding of the types of offences for which an accused can be released. One police agency reported that they interpreted the provincial policing standards manual on violent crime and on domestic violence to mean that they must detain in all cases of domestic violence. This is a misinterpretation of those policies. It speaks to the need for more education and training and a review of policing standards, manuals and policies and practices. In another example, two police officers from the same service debated openly about whether they had the power to release an individual charged with breach of probation. One said yes, one said no.

I am aware that MAG is conducting a pilot pre-trial custody project in one jurisdiction by embedding a crown to advise the police on bail matters. This is a worthwhile endeavor.

Certainly it would be beneficial for the police to have access to Crown Attorneys to receive advice on release matters. While this would involve the expenditure of resources for MAG to provide such access across the province, such access should undoubtedly result in better and timelier decisions on release or detention and lessen the number of individuals detained in custody for judicial review of bail. One of the issues that came up in the review was whether or not, in certain circumstances, the police detain someone because they think a crown would want a surety. This could be avoided by having access to crown attorneys. Finally, it is hoped that the police, with proper support and education, would begin releasing more individuals. As well, programs for diversion might assist in keeping some alleged breaches from entering the bail system.

11.1 Recommendation:

That the initiative of providing police access to crown attorneys for advice on release be expanded in order to support police decisions on bail.

11.2 Recommendation:

That MAG continue and expand and refine continuing education programs for police officers and officers-in-charge on their powers of release.

11.3 Recommendation:

Adopting recommendation 13 from the Ottawa-Carleton Detention Centre task force report, that MCSCS should develop a policy for police services with a goal of diverting low-risk individuals away from pre-trial detention. Specifically, explicit guidance should be given to arresting officers and officers-in-charge regarding what classes of offences should be presumptively subject to release from police stations. In implementing these recommendations, links with social services and health services should be established to assist in diverting or releasing vulnerable low-risk individuals from custody.

11.4 Recommendation:

That MAG and MCSCS consider the development of a pilot project of not laying charges in cases of minor breach of bail allegations.

11.5 Recommendation:

That MAG continue to press for legislative changes that would widen police powers of release particularly providing the police the power to impose certain conditions that they currently do not have the power to do and pursue other legislative changes such as the repeal of the reverse onus provision for breaches of bail in section 515(6) of the Criminal Code.

11.6 Recommendation:

That MCSCS and MAG investigate the disparity in the percentage of individuals released by the police in different jurisdictions to determine what the reasons for such a disparity might be and to take action to rectify such disparity if such is deemed necessary.

12. MCSCS and Policing Standards

The External Relations Branch of the Public Safety Division of MCSCS provides quality assurance services and has the responsibility to maintain Police Service Guidelines and to ensure that police agencies in Ontario follow the designated policies and standards. It is incumbent on police boards and Chiefs of Police to have policies and guidelines consistent with the manual. MCSCS provides a process of inspection pursuant to the Police Services Act and conducts audits of police boards and police services to ensure the appropriate policies and standards are in place. There are two problem areas however. One is that parts of the policing standards manual have not been updated since 2000. That is certainly true of the violent crime policy. That means some of the required policies and procedures may be out of date or inaccurate. That minimizes the value of the audit of boards and chiefs. Further, the audit of policies and procedures does not go so far as to audit what actually happens in the implementation of the policies on the ground by police officers.

12.1 Recommendation:

That MCSCS conduct a full scale review of the Policing Standards Manual with a view to bringing it up to date and implement a plan for continuous review of that manual and further that, in auditing compliance, that MCSCS also audit the implementation of the policies in various police agencies.

13. The Prosecution

It was impossible to determine whether either Brantford or Ottawa are appropriately staffed in the provincial Crown's office. However, there appeared to be much comment about Brantford being understaffed. In Ottawa, there were many comments about vacancies and the high number of crowns on term contracts due to vacancy management policies.

I was impressed with the position of bail vettor both in Toronto and Ottawa. I understand such a position does not exist in all jurisdictions. The bail vettor, an experienced crown attorney, reviews files prior to court and provides a Crown position on release. They provide an excellent service and clearly facilitate the release process for many individuals.

I understand that there may be an ongoing review of the Crown Policy Manual on Bail Hearings and its Practice Memorandum to Crown Counsel. If not, there should be such a review. There has been much comment about the emphasis in the Policy on the potential for

tragedy that can occur when some individuals are released on bail. Emphasis is placed on situations where accused persons were released on bail and then committed murder/suicide. While these considerations, the consideration of protection of the public and the protection of victims, is very much a legitimate consideration and always one that must be considered and included in such a policy, the policy in the way it is worded, clearly has had a chilling effect on how Crowns might approach their positions on bail.

However, the policy should also include an emphasis on the right to reasonable bail and the "ladder principle" of release as outlined in the Criminal Code and the presumption of release in appropriate cases. It should also emphasize principles of restraint in the number and types of conditions sought on applications for release and should also emphasize restraint in the need for surety releases and it does not. In my view, the Policy needs to be amended and re-written to reflect more balance in its approach.

Further, the policy should reflect MAG's position on bail verification and supervision programs including that such programs should be reserved for those facing detention not release and generally give guidelines as to when such programs should be considered and for whom.

13.1 Recommendation:

That MAG conduct a review of and revise its policy on bail to emphasize the right to reasonable bail, the ladder principle, and principles of restraint in the use of sureties and the imposition of conditions of release.

13.2 Recommendation:

That the policy and procedures on bail emphasize the principles of Gladue in bail consideration.

13.3 Recommendation:

That MAG conducts a review of staffing needs in Crown offices and, where feasible, reduces its reliance on term and contract Crowns.

13.4 Recommendation:

That the bail vettor program be expanded to other bail court locations in Ontario.

14. Support for Legal Aid

The funding support for legal aid programs across the country has been the subject of much discussion. Generally, legal aid plans are seen as being under-funded and, in my opinion they are. There are political and jurisdictional issues and it is not the focus of this report to get into

the reasons for such under-funding. The fact is, though, that Legal Aid is a pillar of our criminal justice system in the same fashion as the Crown or the judiciary or the police. Ensuring a level playing field between the resources of the state and the accused is critical to ensuring fairness in trials and to avoid wrongful convictions and to ensure applications for release on bail are done in a timely fashion to avoid unnecessary remand time for accused persons. In the bail context in Ontario, Legal Aid, through its duty counsel program, does the lion's share of applications for release. In fact, one report estimated that Duty Counsel may do as many as 70% to 80% of the release applications in the province. It means Duty Counsel are very busy all the time.

In Ottawa it is estimated that 30% of all the charges laid are for administration of justice (AOJ) charges such as Failing to Appear, Breach of Probation, Unlawfully at Large and Fail to Comply with Conditions of Release. Those breach allegations cost Legal Aid a lot of money in representation costs, which is another reason why moves to reduce the number of AOJ charges would be worthwhile.

In addition, Legal Aid pays private counsel on certificates $200.00 for bail applications but the fact is that counsel can spend a great deal of time on these applications including perhaps 2 to 3 hours in court. Many lawyers simply defer to Duty Counsel as a result because they cannot afford to appear for bail applications in some jurisdictions. If someone is going to be retained on a legal aid certificate a delay in receiving that certificate may result in a delay in an application for release awaiting an issuance of a certificate I was informed.

Legal Aid provides such a critical service not only because they provide legal advice to those in need but because, by and large, their clientele are the neediest. Indeed Legal Aid has a mandate to assist those in need.

Further, it has been noted that support services for Legal Aid have been cut back. There is no longer a Legal Aid office in Brantford for example and administrative staff does not have the resources to take applications from everyone arrested. Those applications are only taken if the person is remanded into custody from court. Certainly, the earlier an application for legal aid can be taken, the earlier a determination of qualification and appointment of counsel can be made. This would serve to reduce pre-trial delay.

It was reported that many find the 1-800 application process in Brantford to be confusing and difficult and many give up leading to delays in the issuance of certificates and, by default, to delays in case processing in court while an accused awaits a lawyer.

Finally, the opportunity to make application for Legal Aid should be extended to the weekend WASH courts.

14.1 Recommendation:

That funding support for legal aid be reviewed and enhanced to ensure those in custody charged with offences have an application for legal aid taken at the earliest opportunity and

that the access to duty counsel support for those in custody be made available at the earliest opportunity in order to facilitate early bail hearings.

14.2 Recommendation:

That the funding amount for bail applications on legal aid certificates be reviewed and enhanced for private counsel.

14.3 Recommendation:

That legal aid provide for in-person applications for legal aid to be taken in Brantford and eliminate the 1-800 application process.

14.4 Recommendation:

That legal aid hastens its certificate approval processing time.

15. Adjudicators on Bail

Section 515 of the Criminal Code of Canada outlines the rules regarding judicial interim release in this country. Offences committed under section 469 of the criminal code, (for example, first and second degree murder, piracy and treason) are ones that come under the exclusive jurisdiction of the superior courts in this country. In Ontario, that would be the Superior Court of Justice. For all other offences, bail applications are heard in the provincial courts in Canada. In Ontario that is the Ontario Court of Justice (OCJ). Since virtually all bail applications are held in the OCJ, for purposes of this report only the workings of that court are under study.

Section 515 provides the rules regarding bail and detention orders in Canada. Generally stated, every individual charged with a criminal offence is presumed innocent and has the right to reasonable bail. Bail applications are probably one of the most important functions of a judicial officer. Those charged are protected with fundamental rights such as the right to counsel, the right to remain silent and the presumption of innocence. No matter how horrific a crime with which the accused is charged may be and no matter what the public outcry might be over a particular allegation, it is critical that the presumption of innocence be zealously guarded and why the right to reasonable bail is a fundamental right in Canada. Section 515 of the Code says that people should only be detained if one of three grounds is established, known as the primary, secondary and tertiary grounds. Generally put, a person should be detained only to ensure they attend in court, where their detention is required for the protection and safety of the public and where there is a substantial likelihood of re-involvement if released, or in order to maintain confidence in the administration of justice having regard to the seriousness of the case, the strength of the crown's case and the likelihood of a substantial period of incarceration if convicted. In most cases, the burden of

showing why a person should be detained rests on the Crown. In other words, it is not up to an accused person to show why he or she should be released but rather it is up to the crown to demonstrate why they shouldn't be or why, if released, certain conditions should be attached to their release. This is called the "ladder approach" to bail. There are some cases where the onus to show release actually falls the other way, to the accused. There are specified circumstances such as when a person has allegedly become re-involved in an offence while already out on release or in some circumstances where they are charged with a specific offence enumerated under the Code or under the Controlled Drugs and Substances Act (CDSA). These are called "reverse onus" provisions.

In Ontario, the overwhelming numbers of bail applications are decided by provincially appointed justices of the peace. There are some instances where provincial court judges will also hear bail applications but they are, relatively speaking, few in number. For example, in specialized courts like the Gladue Court in Toronto presided over by provincial court judges, bail applications are heard for people appearing in those courts. As well, the writer was informed that, in some jurisdictions in Ontario, provincial court judges will "chip in" and help justices of the peace when bail dockets are long and the courts are overwhelmed. In fact, I was informed that, in some locales, provincial judges won't leave at the end of the day if justices of the peace are still conducting bail applications. Such action is exemplary and certainly represents the best traditions of the bench. However, it appears that such behavior is not widespread and that many provincial judges do not preside on bail applications. It is, parenthetically, unfortunate that such disparity exists in judicial locales in Ontario. It does not serve the public well and does not reflect well on the OCJ. This is one of many examples where locale traditions have sprung up, largely based on the personalities of the justice leaders in those locales, that both well-serve and not-well-serve the public. In many instances, I heard people comment that things work well in location A because of who the Crown(s) is/are or who the judge(s) or justice of the peace(s) is/are and don't work well in location B for exactly the same reasons. While personalities will always play a part in how justice is administered, policies should be implemented that are transparent and consistent throughout the province. This will serve the citizens more effectively and reflect better on the justice system. Certainly both the OCJ and MAG need to study the impact of local ways of doing things and implement policies, province wide, that are consistent as noted earlier in this report.

The fact that justices of the peace do virtually all of the bail applications in Ontario is pretty unique in Canada. In virtually all of the other jurisdictions, it is Provincial Court Judges who have the primary responsibility for bail. A typical scheme would have provincial judges presiding in court Monday to Friday during business hours conducting release applications. Justices of the peace would be responsible for those duties in the evening and on weekends but the number of applications actually done during those time periods would be dwarfed by the ones done by judges.

I am informed that used to be the case in Ontario and that some years ago, the responsibility for bail applications shifted from judges to justices of the peace. Before that time, justices of

the peace were responsible for all sorts of other duties such as search warrants, traffic matters etc., duties they retain to this day. However applications for bail were shifted from the judges to justices of the peace, all of whom come under the jurisdiction of the Office of the Chief Justice for the Ontario Court of Justice. There may have been, and one assumes were, important reasons for this change. It might have had something to do with workload allowing the judges to spend more time on trial matters and therefore reducing the time to trial. Certainly, justices of the peace are paid less than the judges so such a move might have had cost saving elements to it. The reasons are immaterial. The fact is that now justices of the peace do virtually all the bail applications in Ontario.

So who are they? There are about 350 justices of the peace in Ontario. All are subject to appointment by the government after undergoing a review by an independent selection committee and meeting the qualifications for appointment. I don't intend to go into the selection process nor the qualifications in any depth for the purposes of this paper although there are statutory requirements to be met. There is no requirement that one have a law degree even though the justices of the peace exercise powers in matters of search warrants under the Criminal Code and other statutes and hear applications for bail among many other duties. It seems that more people with law degrees are now being appointed as justices of the peace but a vast number of sitting justices of the peace in Ontario have no such degree. They come from a variety of backgrounds, they could be retired teachers or business people or former politicians to name just a few examples. Once appointed, they are subject to training and education under the responsibility of the Chief Justice of the OCJ. In fact an Associate Chief Justice has responsibility for the justice of the peace program in Ontario assisted by a Senior Justice of the Peace for the province and others. I am informed that approximately 10% of the justices of the peace in Ontario have a law degree.

Ontario is blessed with a highly developed and excellent justice of the peace training program. It is the leader in Canada in justice of the peace education and regularly assists other jurisdictions in justice of the peace training. Those responsible now and in the past for the development and refinement of the program have done a terrific job and while the training and education programs are continually under review, refinement and improvement there is no suggestion that there is any problem or deficiency in the programs offered to new justices of the peace and the continuing education of seasoned justices of the peace, particularly when it comes to bail.

During my study, I had the chance to meet, interview and watch in action a number of justices of the peace. As well, the subject of justices of the peace doing bail applications came up in virtually every interview I conducted.

It would not be fair or accurate to broadly label all justices of the peace and to comment on their competency. In fact, to be quite fair, I met and observed justices of the peace who were very good and professional in their job. One justice of the peace I observed in Brantford, for example, did not have a law degree but was as good as any judge I had ever seen on bail. She/he was knowledgeable, professional and possessed a keen degree of common sense

and great leadership for changing processes. I feel confident in stating she/he would not be alone and that many justices of the peace in the province conduct themselves in the same way.

However, based on my observations and interviews, I came away convinced that it should be judges and not justices of the peace who have the primary responsibility for applications for bail in Ontario. It was a constant theme in many of the interviews I conducted. People felt strongly that only judges have the necessary tools to properly conduct such hearings. I base my conclusion on a number of factors including the following:

1. Both in observation and comment, I found some justices of the peace lacked a full and complete understanding of the law on bail and the onus provisions on release or detention notwithstanding the training they had received.
2. Both in observation and comment, I found that some justices of the peace lack a basic understanding of the presumption of innocence and conduct bail applications as if the accused has already been found guilty of the offence they are facing. In fact, many justices of the peace insist that the accused testify on their application for bail notwithstanding the right to remain silent. I will comment on this practice later in this report. Not only is this practice fundamentally wrong in my opinion and violates the right to silence and the presumption of innocence, it is clear that, in some cases, that some justices of the peace appear to consider the accused to be guilty of the offence notwithstanding they may pay lip service to the presumption of innocence. This is exemplified in situations where the accused testifies and the questioning by the justice of the peace seems to suggest that they have concluded the accused committed the offence for which she/he is being charged.
3. It is readily apparent that many justices of the peace are not held in the respect that their office should command. I do not mean respect in the personal sense but respect for the office both in and outside of court. Counsel, on both sides of the bar, in far too many cases, do not treat the justices of the peace with the respect that should be afforded them. There may be many reasons for this but it appears, in my opinion, to be related generally to the way many justices of the peace conduct themselves in the courtroom and to the quality of the justice they dispense. For example, I heard many stories of justices of the peace who were more concerned about limiting the hours they sat in court by having their breaks at certain times and for a certain duration or ending court at designated times regardless of the number of matters before them. (One justice of the peace was noted as saying as of 3 pm Friday their court was closed). There is, of course, nothing wrong with ensuring that a work day is manageable and that people get appropriate breaks. The work is not easy and can be mentally exhausting. However, many complain that some justices of the peace just simply don’t want to work that long or that hard and live by the clock. This was a recurring and constant theme and complaint. The result in some instances is that people can be held in custody awaiting bail applications longer than they should have to wait.

4. Both in observation and comment, it appears that many justices of the peace do not have the skills necessary to control the courtroom and its processes. In many instances it seems that control of the courtroom is defaulted to the Crown. I observed situations where overly aggressive and inappropriate questioning of an accused or sureties by the crown on a bail application was not properly sanctioned by the presiding justice of the peace.

5. Further, it appears that some justices of the peace rely too heavily on the Crown in matters of bail. In some instances it appears that a justice of the peace is, in some instances, a second Crown attorney and that the justice of the peace does not act like the independent and impartial arbiter of adversarial arguments between the Crown and the defence. One justice of the peace indicated they felt they must give a great deal of deference to crown positions on bail.

I completely appreciate that moving back to a situation where provincial court judges have the main responsibility to conduct bail applications in Ontario would require a fundamental shift, particularly in the area of resources. However, cost and the availability of resources should not take a back seat to the proper administration of justice. There is probably no judicial act more important than a decision on whether to release or detain an individual. It is at least as equally important as decision on guilt or innocence or on sentence. It is my opinion that only legally trained individuals who have the education and experience to appreciate the nuances of the law and the proper application of the rule of law should preside on matters of such importance. Again, that is not to say that some justices of the peace don't do a great job. However, the inconsistency of their work is something of great concern. Given the extensive education already afforded them by the Ontario Court of Justice it is my opinion that the deficiencies that exist cannot be rectified simply by more education and training.

I am aware that having judges do most of the applications may requires a shifting of resources from the justice of the peace program and require the appointment of more judges. The implementation of such a change could not be done overnight and would require further study and a plan of implementation that might have to be gradual. Such a plan would have to consider the staffing of WASH courts appropriately. Such a plan might be a combination of provincial judges doing applications during the week supported by legally trained justices of the peace where needed and those legally trained justices of the peace presiding in WASH courts.

15.1 Recommendation:

That the Chief Justice of the Ontario Court of Justice review the practice of having justices of the peace conducting all bail applications with a view to having judges perform this function at least Monday to Friday during normally scheduled court hours.

15.2 Recommendation:

In addition or in the alternative, that the Government of Ontario amend the requirements for appointment as a justice of the peace to mandate a law degree as a prerequisite for appointment such as exists in Alberta and that, where practicable, only legally trained justices of the peace be authorized to hear applications for bail.

15.3 Recommendation:

That in any case, appropriate resources be provided to the Ontario Court of Justice to allow for judges and/or legally trained justices of the peace to conduct all release applications.

16. A Note About Independence, Particularly Judicial Independence

It is fundamental that the players in the justice system, whether they be the police, crown attorneys, lawyers or judges enjoy independence in the proper execution of their duties. It is even more fundamental that judges and judicial officers, like justices of the peace, are protected by judicial independence in order to ensure that the justice they dispense is done so fairly, equitably and without influence of any kind. To that end, it is understood that, to a degree, a judge controls the process in his/her courtroom. I am quite sensitive to the need to zealously protect the principle of judicial independence as it has been defined by the Supreme Court of Canada. But like all principles, it is not unfettered. While a judge has the right to control the process in the courtroom it cannot and doesn't mean that anything goes. There must be an understanding of what is and is not appropriate in a courtroom. In that sense, there are and have to be reasonable limits in how a judge can conduct proceedings in a courtroom. It is entirely appropriate for the Chief Justice to set administrative guidelines and procedures as to how matters will proceed in the courts. That does not offend the principle of judicial independence. In Brantford, I learned that justices of the peace conduct bail hearings quite differently even in the same jurisdiction. For example, in a consent bail situation, one justice of the peace is satisfied with the filing of an affidavit and doesn't need to hear from the surety. The next justice of the peace doesn't need the affidavit but wants the surety to testify nonetheless. The third justice of the peace not only wants the affidavit but wants the testimony as well. The rules change from justice of the peace to justice of the peace and counsel on both sides has to play by different rules depending on who is sitting. This type of conduct has the potential of bringing the administration of justice into disrepute. Litigants and the public have a right to know what the rules are ahead of time and to see that the rules are applied consistently in one jurisdiction and, for that matter, across the province. It matters what the administrative rules are that are agreed to. It matters more that they are the same and uniform. They are not at all in Ontario. In my respectful view, it is entirely appropriate for the public to see that justice is administered in as much a uniformed pattern as possible and not the current situation of confusing rules.

All of this is not to take away from the independence judicial officers have in making their decisions. Many complained about inconsistencies in judgments. That is nothing new and is a

product of a system that has a personality bias to it. Two judicial officers, applying the same rules and standards, may possibly view a case differently. This is inevitable.

16.1 Recommendation:

That the Chief Justice, in consultation with the bench, develops rules of court that will guide the consistent administrative practices regarding bail applications in Ontario.

17. Bail Application Practices, the Use of Sureties and Surety Verification Processes

Cheryl Webster has written: “Particularly for the most vulnerable populations (e.g. poor, aboriginal), this requirement for release (sureties) often constitutes a permanent impediment to release. Even for those with surety possibilities, the time needed to identify, contact, and convince an individual to act as a surety as well as the frequent practice of having the surety attend court and submit to an interview by the Crown (despite their being no formal requirement that the potential surety appear and/or be examined in court) translates into additional time in remand until the bail process is complete”. I agree. Too often our poor, impoverished, vulnerable and marginalized people have little or no access to sureties and if they do not qualify for a BVSP they are effectively denied an opportunity for release.

It is difficult to analyze bail application practices in Ontario because the procedure can differ from jurisdiction to jurisdiction. What can be said is that it appears to be common place for most accused to be released on bail on a recognizance with at least one, if not more than one, surety (even sometimes in relatively nominal amounts). The verification process for that surety differs from jurisdiction to jurisdiction.

To begin with, I restate in basic terms, the release provisions in s. 515 of the Criminal Code of Canada. In cases where there is no reverse onus, an accused should be released on the least restrictive bail unless the crown has shown cause otherwise. In cases of reverse onus, it falls on the accused to show why they should be released and, if released, on what form of release and with what, if any, conditions of that release. The release application process starts with the police. There are many provisions that allow the police to release an accused. If the police do not release for whatever reason, either because the law doesn’t allow them to or because they have concerns about the release of an individual, the person is brought into custody for the courts to make a determination as to whether they should be released or not. The next decision lies with the Crown Attorney. The Crown may look at a case and decide they do not oppose the release of an individual. If so, that person should be released on an Undertaking with or without conditions. If the Crown feels an Undertaking is not appropriate then the person can be released on a Recognizance with or without conditions. The next step up the ladder is a Recognizance with a surety or sureties. Sureties are individuals who come forward and say they are prepared to sign for the accused and to guarantee in a certain sum of money, a bond. If the accused breaches his or her recognizance then the surety or sureties

could be liable to pay the sum of the bond if the crown proceeds with estreatment proceedings. The surety or sureties, in order to be confirmed as appropriate, must meet certain pre-determined requirements such as being of good behavior (no prior criminal record generally for example) and that they are “worth” the sum of their bond which is usually evidenced by the holding or real property or gainful employment, for example.

It appears that, in some locations in Ontario, there is little reliance on the ladder principle. The only instances I observed where someone was released on an Undertaking came in Ottawa where the Crown consented to such a release at a WASH court. For the most part, the general scheme seems to be that most releases start “up the ladder” so to speak and that the most common form of release is a recognizance with a surety or sureties.

In the event the police do not release an individual or the crown does not consent to the release of an individual, then a justice of the peace must decide whether or not to release that individual. Again, absent the application of reverse onus provisions, the onus is on the crown to justify detention or to convince the court why the accused should be detained or released on anything more than an Undertaking without conditions. However, despite what the Criminal Code says, in Ontario in practical terms, if the police have not released or if the Crown has not consented to release, there is really a de facto onus on the accused to show why he or she should be released. In other words, the letter and spirit of the Criminal Code provisions are not followed in Ontario. It appears that if an accused wants to be released on bail and the crown is opposed, practically speaking, it is up to them to show why they should be released and to provide a plan to satisfy the court that such a release is appropriate. This is ‘practical reverse onus’ is wrong and puts the Crown in the position of being the main determiner of bail in the province. In fact, that is even reflected in the language some Crowns will use. On many occasions I heard a Crown Attorney tell a defence counsel that they would be willing to release an individual if certain conditions are met. In fact, the crown never releases, they only consent to release. The language is telling in terms of a misunderstanding of the role of the Crown.

If the Crown has not consented, the matter goes to a contested hearing. As indicated, it is my opinion that the practice has developed in Ontario that, in effect, once it goes to a contested hearing the accused bears the practical onus of showing why he/she should be released and on what conditions.

In the vast majority of contested applications, if the accused is to be released it is with a surety or sureties and usually with a host of boiler-plate conditions designed to limit their freedom in the community. Those conditions, which will be described later, are supposed to be imposed in order to manage the risk of the accused in the community and to be related to the offence and the risk of re-involvement but, far too often, are simply imposed because everyone in the system wants to minimize their exposure to criticism and because they are risk-averse.

So what happens on a typical contested bail application in Ottawa and Brantford? First, the Crown tells the Court why they are opposed. In some cases this may involve the calling of evidence by the Crown at the bail hearing but, in many cases, involves the Crown reading in

the allegations and the criminal record, if any, of the accused and stating why they are opposed and on what ground or grounds under s 515. Most bail applications do not, in these two jurisdictions, involve the calling of witnesses by the Crown. However, I am told that other jurisdictions do more regularly call, for example, the investigating officer to testify as to the investigation. In some cases, the calling of those witnesses can both delay and lengthen an application for release depending, as it might, on the availability of the witness and the time it takes to conduct the application in light of the availability of court time to hear it. I am further informed, that in some “project cases” which involved lengthy investigations by the police with perhaps informants and wire-taps, that witnesses are often called and that it might not be uncommon for an application to take up to 5 to 7 days. That can result in a significant delay in a hearing based again on the availability of witnesses, the schedules of both crown and defence and finding sufficient court time to hear the matter.

However, as indicated, in a typical contested bail application in Ottawa and Brantford, the Crown supplies the information. However, the same rules do not apply to the defence. It is expected in this ‘practical reverse onus’ environment that exists in Ontario that the defence will call evidence. That usually involves calling sureties to the stand for the purpose of giving evidence under oath that they understand the obligations of a surety and are “worth” the sum of a bond they might sign. This procedure raises a host of issues and concerns. First of all, the onus is on the accused or his/her lawyer to find these sureties and to bring them to court. This can be a difficult and time-consuming endeavor. Sometimes the accused isn’t sure where the proposed surety lives or has a phone contact number. It might be that this contact information is on a mobile phone that has been seized by the police or correction officials. Access to this information and then the ability to contact someone becomes extremely difficult for an accused. Equally, it can be difficult and time consuming for a busy lawyer. The result is, inevitably, an unacceptable delay in the accused being able to apply for release in many cases. Sure, sometimes the proposed sureties become apparent when they show up for court, but not always. It takes time to formulate a plan, time during which the accused sits in remand custody.

In the case of some people, it may become practically impossible for them to obtain a surety. In those cases they may or may not be able to turn to a bail verification system perhaps because they don’t meet the qualifications. If not, practically speaking, they may be in a position where applying for bail becomes a “lost cause” because they simply can’t meet their presumed onus. It is estimated that 45% or so of those that are detained in Ontario never apply for bail. There may be many reasons for that. Perhaps there are people “gaming” the system. Perhaps some prefer detention, particularly during the winter, in order to have three squares and a warm place to sleep. Perhaps it is because people just feel they can’t win their release. Whatever the reason and there may be others, as already indicated, it is vitally important to find out the reasons why so many never apply for bail and to develop strategies to deal with that issue.

As indicated, the usual procedure is for the defence to call the surety to the stand and to conduct direct examination on their background, relationship to and knowledge of the

accused, their own financial and work status and the obligations of a surety among other questions. The crown then cross-examines. Testifying in court can be a frightening and intimidating process for anyone, even for those familiar with the court process and, without doubt, for those who are not. It is no wonder some people simply do not wish to go through the process. When that happens, an accused may be denied access to release. I observed instances where the cross examination by the Crown was unnecessarily aggressive and intimidating. Some sureties are treated like accused or accomplices. In fact, on one occasion in Brantford, I came close to standing up and objecting myself to the line of questioning and the tone of crown counsel when defence counsel did not. I later asked defence counsel in that case why he/she did not object to the line and tone of questioning and the answer was that it would be to no avail since the justices of the peace would always rule in favour of the crown and allow all sorts of inappropriate questions in any event. In that case and in some others, the sureties were treated as if they themselves were on trial. It was unnecessary and inappropriate. To be sure not every surety is treated as such but since the crown appears in an adversarial position to the plan to release it follows that such aggressive examination may, on occasion, be inevitable. But that doesn't make it right. Further, I witnessed many instances where the line of questioning was simply unfair to the surety and where questions were impossible to answer and were not related to the issue at hand. The surety seemed to be the one on trial.

Some counsel say that some crowns use the surety investigation as a fishing expedition or as an attempt to investigate an alleged offence or gather more evidence for the prosecution. Some sureties may, in fact, become witnesses in a case. I reviewed one such transcript where proposed sureties were extensively cross-examined on issues that related to the prosecution's case despite the objections of defence counsel. In my opinion, the crown was looking for further evidence rather than focusing on the suitability of the surety themselves or their understanding of their responsibility and role as a surety. Those sureties were not charged but were related to the accused and the crown appeared to be attempting to elicit information that might, it appeared, be helpful to the prosecution. They were looking for information about the surety(ies) knowledge of the case and the role of the accused in the allegations. Objections from the defence on the basis of relevancy were overruled. One of those witnesses had, at one time, been charged with an offence which had been dropped. He/she had no record and yet the crown was allowed to question the accused about that charge which is something highly inappropriate. Further, in Ottawa and other locales for example, it seems expected that the accused will also testify on the bail application because the justice of the peace wants to hear them say they understand the implications of complying with conditions should they be released. I doubt anyone would ordinarily say anything else. However, once under oath the accused is vulnerable. Some defence counsel complained that the expectation that the accused testify has, on occasion, led the crown to treat the testimony as a part of the investigation of the case. Now it would be entirely improper for anyone to ask the accused anything about his/her guilt or innocence but while that may be avoided directly, it can come through the back door. For example, lets say that an accused was charged with a break and enter occurring at 2 am. He or she may not be questioned on whether they are guilty but may

be asked why they were out at 2 am. It's a subtle difference but could have significant consequences. An accused should never have to testify at all. They have the right to remain silent. All representations on their behalf should be made by his/her counsel if they have one. The right to silence is fundamental to our system of justice. Yet when we have a convention or expectation, as exists in Ontario, that an accused really has to testify, it violates a fundamental tenet of our criminal law. It must be stopped immediately. I am informed that many justices of the peace want to hear from the accused. That they are not satisfied with the words of counsel. Defence counsel have informed me they feel compelled to put their client on the stand even though they don't want to because they feel there would be no chance of release if they didn't do so. Further, in some of the hearings I observed, justices of the peace went perilously close to the line in their follow-up line of questioning of an accused after direct and cross. While only allowed to seek clarification, some conducted extensive examination above and beyond those of the lawyers. On more than one occasion, I was left with the distinct impression that the justice of the peace presumed the accused guilty and that the justice of the peace's questions, which should only be related to clarifying evidence, went almost directly to the issue of guilt or innocence. Further, I witnessed where "calls for service" to the police where no charges were laid were used by Crown Attorneys to show why someone should not be released. To be sure, the criminal record of convictions is an appropriate tool to be used as evidence on a bail application. But just as it is entirely inappropriate to use cases where charges were stayed or dismissed or where the accused was acquitted as evidence, so is information about the accused's contact with the police where either no charges were laid or no convictions were entered. Such information is highly prejudicial and offends the rules of evidence and such a practice needs to stop immediately. Finally, and probably most egregiously, in spite of the effort to avoid the ultimate and completely improper line of questioning as to whether the accused committed the crime or not, some actually admitted it on the stand. I don't think that should come as much of a shock given how applications are conducted, but it is wrong.

In the end, my conclusion is that contested bail applications in Ontario have the appearance of being conducted against the law (de facto reverse onus), unfairly weighted towards the Crown, unduly and unnecessarily long which denies applicants right to reasonable bail at the earliest opportunity and have aspects that are contrary to the letter and spirit of the law (the accused testifying) and in some cases treat sureties without the measure of respect that they deserve.

This whole process of conducting bail applications in Ontario is long and unnecessarily cumbersome. While I was informed that some contested applications can take days or weeks, most are conducted in 1 and a half to 2 and a half hours. Really like half day or mini trials. That means that on an ordinary day a court can only hear maybe two or three contested applications. So you have to make an appointment. In Ottawa and Brantford, the court keeps a calendar and counsel sets a time for their application. Given the number of applications it usually can take several days to find a slot that is open for defence counsel to ask the application be heard. In the meantime, the accused sits. Now to be fair, in many cases it takes time for counsel to appropriately prepare an application so delay is not necessarily unusual.

What is unusual is the length of the delay because counsel must go to the steps of contacting sureties, having them come to court on a particular day, booking an appointment in an already busy court calendar and somehow matching that with their own commitments. Sometimes, to make matters worse, counsel will book an application for a particular day just to hold that time slot hoping they will be able to arrange a plan for the accused, contact sureties and have them attend in court for that day. But sometimes it doesn't work out and the matter has to be adjourned. That results in wasted court time and even more delay for an accused. But lawyers argue they must do that because if they wait until they have all their ducks in a row, they will be delayed even further by the unavailability of court time. Further, getting sureties to court is no easy task. Even if one is lucky to be able to contact them in short order, the fact remains that by compelling them to come to court to testify you are asking people to take time out of their day that may not be convenient to them (child care commitments, job commitments etc) because the testimony of sureties must be done in court during court sitting hours. It isn't fair to people in many instances.

Much has been written on the use (or some say) the misuse of sureties in Ontario. Some commented to me they recall a time when sureties were used in only a small number of cases. When and why the change occurred isn't particularly important although it is I think possible to speculate on the reasons. The important thing to note is that statistics show that sureties are required in the vast majority of contested applications in Ontario and have become the norm and expectation in many, if not most, cases even where the crown is consenting to release. In my opinion, the system is weighted unfairly against the release of the accused.

In the past, surety use was largely it appears directed to the primary ground…..to ensure the attendance of the accused in court to be dealt with according to law. Where there was evidence or suspicion an accused might not answer the bell, sureties are seen as a means by which it is more likely the accused will be there. The surety has something to lose if they didn't and therefore a surety will likely make efforts to keep an eye on the accused. The type of evidence used to show that an accused might not appear might be related to their transient nature or previous convictions for failing to appear in court or perhaps the nature of the offence where the motivation to flee to avoid a significant period of jail might tempt some to avoid court.

However, in Ontario, the use of sureties has shifted greatly over the years and is widely used for secondary ground reasons. In many, many instances even where the Crown consents to bail they do so with the stipulation that a surety or sureties are needed. In addition, in contested bail applications, with few exceptions other than where bail verification programs or the like are used, sureties are overwhelmingly needed in order to secure release. And it isn't just for primary ground purposes. Sureties are asked to in effect become "jailers in the community" in order to ensure that the accused abides by his/her bail conditions and does not re-offend while out on bail. Signing as a surety means that you are guaranteeing you will supervise the accused and if he or she becomes re-involved or breaches their bail the surety will be subject to default. Many times the surety is asked to provide the residence for the

accused in order that they can maintain almost constant supervision. But whether the accused is ordered to live with the surety or lives elsewhere but the surety signs this guarantee of the good behavior of the accused, the surety is on the hook if bail is violated. It is an awesome and frankly impossible guarantee and therefore it is no wonder many people decline the ask. No person could possibly make such a guarantee. Even if the accused resides with the surety, if the surety is away at work or elsewhere there will always be times when supervision will be impossible. This notion of 'jailer in the community' is something that might be appropriate in some circumstances but the wide and extensive use of such a practice is unfair and could lead to some people unable to present a plan for release or lead to unnecessary detention. It has been said that there is no evidence such practice doesn't work. The question that should be asked is does the practice, in fact, work and are Ontarians safer as a result. There is no evidence to show that sureties reduce crime and make people safer. Legal Aid Ontario reports that in British Columbia and Manitoba, which do not have wide-spread surety use, the charge and conviction rates for breaches of bail orders are almost identical to Ontario. A proper balance needs to be struck between public rights and the rights of those presumed innocent. It is noteworthy that Ontario stands almost alone in its widespread use of sureties in relation to the practice in other provinces. Although sureties are used in all other jurisdictions they are not used, in most, on the same scale and for the same purposes.

Again, it must be emphasized that this over-reliance on surety use in Ontario can and does lead to lengthy and unnecessary delays in the release of individuals who should be released. This puts undue pressure on remand facilities and is prejudicial to the rights of the accused. There are cases where an accused, even with no record and obtaining the consent of the crown for release, spend several days in custody arranging their plan for sureties when they could have been and should been released days earlier but for the requirement to have sureties. One case in Toronto, where a woman with no record spent six days in custody putting her plan together, for a consent bail, is one I won't soon forget. In that case, sureties were required by the Crown in order to obtain their consent to release and the accused agreed to a number of conditions, few of which related to the risk she posed in the community or the offence. This person was, in my opinion, completely entitled to be released without sureties and with a minimum of conditions. Sometimes it seems as if sureties are imposed for no particular reason other than it is the expected thing to do.

Ironically and sadly, some commented to me that, in jurisdictions where surety verification takes place in court even on consent releases, those consents can sometimes take longer than contested applications.

In Brantford, the requirement of sureties and surety verification can be especially difficult on indigenous accused from Six Nations. In her report, R.v Gladue and Judicial Interim Release: A proposed Framework, Jillian Rogin states that the over-reliance on surety forms of release presents multiple and significant barriers to accessing bail for aboriginal people. Many do not have access to qualified sureties and even when they do, many potential sureties do not have the means to make the trip to court. That can mean that an accused may be denied access to reasonable bail, particularly in a timely fashion. Video facilities exist with Six Nations Police.

Investigation should be made as to the possible use of that video capacity for surety verification. Further, many accused have difficulty making it to court. This can result in warrants for arrest and charges of failing to appear which may ultimately result in an accused's detention for breach of bail and their inability to access bail verification support. If video can be used from Six Nations to the Brantford Court house, many of these issues that particularly affect indigenous people can be rectified making access to justice easier. As noted later in this report, the use of video could also be investigated making prisoner transport to the Brantford courthouse unnecessary.

At the present time, the practice of surety verification varies from jurisdiction to jurisdiction and even from judicial officer to judicial officer in the province. In Ottawa, for example, the bail vettor will review a file prior to court in the morning and be available to meet with defence counsel. If the Crown is agreeable to release but wants a surety or sureties, the Crown will make themselves available to interview those individuals. If the Crown is satisfied that the individuals meet the requirements, they will sign off on bail and the accused can then be released upon both the accused and his/her sureties or surety signing the recognizance of bail. This saves valuable court time. In other places, however, I am informed that, notwithstanding a Crown consent as to sureties, some justices of the peace still want to have the surety testify in court. In some locales or before some justices of the peace this happens 100% of the time. This practice is unnecessary and duplicitous and wastes valuable court time. In addition, it runs contrary to the Justice on Target Bail Experts Table recommendation to utilize out of court surety approval mechanisms where appropriate and that witnesses should not be called on most consent bails. It is also, again, an example of the widespread and conflicting practices that exist in different locales. Such different practices do not serve the public well nor do they reflect well on the administration of justice.

Further, there is no need, in my opinion, to have sureties testify in court even on contested applications except in the rarest of circumstances and that surety verification can be done administratively outside of the courtroom. Curiously enough, I was informed that the Ontario Court of Appeal uses an administrative process for surety approval and that affidavit evidence is presented and vetted and this in cases where the accused has been convicted and then released on bail pending appeal.

The situation, in most other provinces, regarding surety verification involves an administrative process. In those cases where a surety is proposed and ordered by the court, a surety can simply present themselves to a court office before a justice of the peace and, once deemed appropriate, can sign the recognizance. For example, let's say that the crown articulates why a surety is required and/or the judicial officer orders one or more. The order can be made that allows the accused to be released on a recognizance with such surety or sureties. It is then up to the accused and/or counsel, to arrange for those sureties. The sureties can then attend before a justice of the peace during specified hours, either during the day or evening or on weekends and then go through the process of verification in an administrative way at a counter. If they qualify, they sign and the accused signs and then can be released. This procedure allows for greater flexibility. It means that valuable court time is not taken up with

surety verification. It means sureties can attend at flexible times more convenient to them to be verified. It also means that more applications for release can be heard on a particular day. Such administrative schemes exist in many jurisdictions in Canada. In Manitoba, for example, a surety can attend in the evening, usually seven days a week from 830 am to 1030 pm and be vetted at a counter. The result is that it might not be uncommon for perhaps 10 contested bail applications to be heard in a court Monday to Friday during regular court hours. Those applications, unless they are more complicated usually can be conducted in less than 30 minutes. Even in the event of a longer more complex matter, most bail applications can be done in less than half a day. Eliminating the practice of the Crown calling evidence on those matters and simply relying on oral arguments from both sides results in a more efficient system and one that is probably equally effective. Most provinces do not have the situation as exists in Ontario where evidence is called. Both sides make oral arguments and the judicial officer decides. Even in the case of the most complex matter, the summary of the evidence by the crown and the argument of the defence should take no more than a day. These are, after all, applications. There is no requirement in the Code for evidence to be called. A simpler more refined process, particularly for surety verification, could free up valuable court time without sacrificing public safety.

I am informed that section 11(i) of the Crown Attorneys Act is used by the Crown to support the position that they have a duty to agree to the sufficiency of the surety and examine the surety. Section 11(i) reads:

“Where a prisoner is in custody charged with or convicted of an offence and an application is made for bail, to inquire into the facts and circumstances and satisfy himself or herself as to the sufficiency of the surety or sureties offered, and examine and approve of the bail bonds where bail is ordered.”

In my opinion, surety verification is a judicial function and does not require crown input. If necessary, this section should be repealed.

17.1 Recommendation:

That releases on bail in Ontario should follow the ladder principle in the Criminal Code and that an accused, when released, should be so released on the least restrictive bail possible that the particular circumstances call for.

17.2 Recommendation:

That the Province of Ontario end its widespread practice of requiring sureties and move to a system that requires sureties only in those cases of greatest need, most particularly where primary ground concerns exist.

17.3 Recommendation:

That the practice and expectation that an accused testify in court on an application for release be ended.

17.4 Recommendation:

That the province of Ontario develops an administrative model for surety verification that does not involve a surety testifying in court except in exceptional circumstances.

17.5 Recommendation:

That the process for surety verification be flexible to allow sureties to be verified seven days a week from 8:30 a.m. to 10:30 p.m.

17.6 Recommendation:

That in-court witness testimony should not be required where the crown is consenting to bail and should not be required in contested applications except in exceptional circumstances.

17.7 Recommendation:

That section 11(i) of the Crown Attorneys Act be repealed.

17.8 Recommendation:

That video capability be utilized for surety verification where appropriate in order to facilitate the release process.

17.9 Recommendation:

That the practice of introducing information such as “calls for service” or similar information where the accused has not been convicted of an offence be halted.

Parenthetically, defence counsel have said they experience the situation where they feel they have a plan for release that is less onerous, perhaps not involving the use of sureties but when presented with a consent release, even one they feel is too onerous, they are most apt to consent to such a release for fear that contesting the application could lead to a worse result such as a denial of bail. A bird in the hand… so to speak.

18. The Culture of Remand

A great deal has been written on the culture of remand adjournments in Ontario. Like other jurisdictions, Ontario is not alone in relation to concerns regarding remand. To be fair, there is

a legitimate amount of work that goes into file preparation for the police, the crown and defence counsel. The more complicated the case, the longer it takes. That can lead to delay. What is of concern is the constant bringing of people back to court simply to confirm another adjournment. Much has been written on the responsibility of judicial officers to take control of the courtroom and demand reasons for remand requests. I agree. One of the most interesting reasons put forward for an adjournment is for the matter “to be spoken to”. Frankly, I don’t know what that means. It appears to be a catch-all phrase that everyone uses to justify an adjournment when no other justification can be found. It appears that very few questions are ever asked of a counsel who adjourns a matter “to be spoken to”. That should change.

In relation to the remand issue, this can be a real problem. Due to overcrowding, various detention centres have policies on the movement of inmates. If someone is on long-term remand (perhaps a trial date has been set many months away) it is likely that person will be transferred out to another institution farther away. That, of course, causes hardship for many inmates who are separated from their families and the ability to speak in person to their counsel. Depending on jail counts I am advised that policies for transfer could affect anyone remanded for more than 14 days in some instances to 30 days in others. To get around that, many counsel employ the “to be spoken to” reason to bring their client back to court for remand after remand. It isn’t for any particular purpose other than to ensure they aren’t adjourned for a time period longer than the jail’s rules regarding long-term inmate transfer to a different institution. The trial date may be months away but the accused is brought back to court every week or two “to be spoken to” simply to ensure the accused is not singled out for transfer to another institution. While this is understandable in one sense, it is an abuse of the court system and puts an undue strain on transport and court resources. This practice should stop and it can only stop by judicial officers taking steps to stop it by demanding legitimate reasons for adjournment requests, particularly when the accused is in custody. Further, many people in custody are transported to court simply so that counsel can speak to them and not for any particular court purpose. Some never even appear in court. I will comment on this practice later in the report.

18.1 Recommendation:

That judicial officers diligently inquire of counsel as to the reason for a remand adjournment where the accused is in custody to ensure the request has a legitimate basis and to ensure that those in custody have their cases proceed as expeditiously as possible.

19. The Use of Video and Bail Triage

The use of video for bail and remand matters is expanding in Ontario but it appears that such use differs from jurisdiction to jurisdiction. In Ottawa, video is used extensively for remand matters. In other words, where the accused is not required personally for court because his/her matter is simply being adjourned for a variety of reasons, the accused will appear from a detention facility (OCDC) by video or the Ottawa police station and the matter will be spoken

to. Such use of video is positive. It saves time and money and reduces the need for transport of prisoners which certainly reduces risk. However, if the accused is required for court, they must be transported. If it is from the Ottawa Police Station, the trip is short. If it is from OCDC it is much more time intensive. In the latter case of OCDC, the transport of the accused must be arranged so that the accused is up early enough to be processed by the institution, transported to the courthouse and then lodged. If not released, the same process occurs after the court appearance.

Transport is always costly and risky. Many inmates do not like to be transported for court purposes especially when a remand is expected. They have to get up quite early in the morning, go through security screening, they get back late to the jail and go through yet another screening. Many inmates find the transport system to be very disruptive and prefer to appear by video. In many cases in Ottawa and elsewhere, accused are transported unnecessarily. Some come to court and are just adjourned with many often not even making an appearance before a justice of the peace because their appearance was waived by counsel. (A study in Manitoba several years ago estimated that 60% of those transported on any given day had their matters adjourned). Oftentimes, the accused comes to court not because something meaningful will occur, such as a sentencing or bail application, but because the lawyer just wants to meet with his/her client in person. Such requests for personal contact are understandable but people should not be transported to court just for that convenience. It is costly, unnecessary and risky and takes up valuable time and resources. Lawyers argue they need to be able to do this because they have limited opportunity to meet with their clients once in a detention facility. There is truth to this argument. The fact is that meeting rooms for lawyers are limited in OCDC. Many organizations use the limited meeting space at that facility and there is great demand. So if a lawyer wants to meet with a client they must contact the facility and make an appointment. That could take several days to get an appointment. Many lawyers complain about the delay and lack of access. Further, lawyers say that even when they attend for a scheduled appointment, such appointment might be cancelled due to a security lock down in the facility or lack of staff. Hence it is just easier to transport. In fairness, video access has been arranged in the Ottawa Court House for lawyers to contact their clients at certain times. This is to be lauded. At least three problems exist. One, it appears, some lawyers don’t want to use the access and, two, the times are limited and may not fit with the lawyer’s schedule or with the schedule of the institution and, three, the access might be cancelled due to problems in the institution.

Further, fewer and fewer lawyers want to go to jails to see their clients. That seems to be a shift from the past. Even the Ottawa Police report that they see few lawyers on weekends coming to see their newly arrested clients. In Brantford, the jail reports few lawyers ever attend there even though the jail is a stone’s throw from the courthouse.

Technology can be very useful to make the system more efficient without sacrificing the integrity of the processes. However, simply layering technology on top of the present system is costly and duplicitous. In Ottawa, for example, resources have been spent on video technology in OCDC and in the courthouse but there is little evidence it has saved anything in

return. People in custody are still being transported which requires huge resources for transportation and huge resources to monitor the accused in lock up. A transport vehicle that requires say two guards and can house 15 prisoners is going to cost the same whether it runs full or half empty. A more extensive review of the implementation and philosophy and cost of video roll out must be undertaken. I think it is fair to say that you have to be “all in or all out”. That is not to say that all matters should appear by video. Far from it. Some vulnerable people, particularly those with mental health issues, may be better served by appearing in person. Protocols could be developed to identify those types of cases or those types of individuals who should appear in person. However, if the province wants to make transport and court appearances more efficient and effective it needs to study the full ramifications of the use of video and must do so in consultation with the various stakeholders. But, at the very least, consent bails should appear, where possible, on video as the JOT recommendation suggested.

There is much resistance to the use of video it appears. Many defence counsel don’t like it because it removes the personal contact with a client. Many judges and justices of the peace don’t like it because they feel the accused should be in the courtroom and make a personal appearance, particularly if something meaningful is going to happen. Consultation and reflection on these issues is important and a balance needs to be struck and obtained and the various stakeholders need to be open to change. Certainly it became apparent in Brantford that many stakeholders were quite opposed to the extension of video use. Yet there are structural impediments to meaningful and timely interaction for lawyers with their clients. In the courthouse there are only two locations for lawyers and others to interview accused persons and there are often long waits for that to occur. A proper application of video and allowances for counsel to consult their client confidentially and by video could, in many cases, be quite helpful in facilitating interviews and speeding up the release process.

In other jurisdictions, the use of video has been longstanding and extensive. In Manitoba, for example, video has long been used for most applications for bail. The Provincial Remand Centre is right across the street from the courthouse and yet few prisoners make that trip in person. The default position of the court is that those applying for bail will appear by video for their application regardless of what provincial institution they are located in. On a daily basis, those applying for bail appear on a video screen while their counsel, crown counsel and the judge appear in the court room. Counsel has secure access by phone to the inmate. The crown, judge, accused and defence can all see each other. The bail application proceeds and is adjudicated on. This is the case whether or not the accused is across the street or housed in a number of other provincial facilities in the province. Almost all appear by video. The result is that costs and time and risk in transport have all been substantially reduced. Video is the default. In spite of reservations and some resistance, particularly in the beginning, this is the system that is accepted and that works. Such a system also has another benefit. If an accused is granted release, he/she is released from the institution they are located in. They are released with all their personal belongings. Such is not the case in Ontario. At present, for example, if one is transported from OCDC in Ottawa to court and is released on bail, they come to court without their personal belongings which are left at the jail. That means the

accused is required to find their way back to the jail to retrieve their personal effects. That can be difficult for a lot of people. The problem is magnified in rural areas where an accused can be transported great distances. If they are released it can prove to be difficult, if not impossible, for them to get back to retrieve their property which might very well include their most important and personal identification. It appears that the only exception to the practice of leaving personal belongings with the accused occurs in the case where important medication is required particularly for those who suffer from mental illness and require such medication. In such cases, the police will take such with them along with needed personal identification for the accused. This program is called the RED ENVELOPE program but it only exists in limited cases.

Even in urban areas like Toronto this problem is acute. A female will be transported from the Vanier Centre for Women and a male from the Toronto South Detention Centre, both great distances from the various court locales in Toronto. It can prove to be difficult, if not impossible, for these people, many of whom have few resources, to make it back to the jail. I was informed that a lot of personal property is never reclaimed by someone released from court. If that person had appeared by video such a problem would not exist. Further, in Toronto, unlike Ottawa and Brantford, inmates were transported in their prison garb not their personal clothes……..orange jumpsuits for males and green for females. If they were released on bail from court they literally walked out of court with their prison garb on right onto the street. I understand a review of such procedures would take place. I hope it has. It is a costly practice and quite frankly humiliating for the individual.

Any properly functioning use of video technology must come with the appropriate supports. Access to a client in a detention facility, jail or prison must be afforded to defence counsel. That means that sufficient time and technology, all private and secure, must be developed. The practice of transporting individuals to court just for a meeting must end but it can only end if communication between counsel and his/her client is facilitated. Further, if such a video scheme is implemented, the rules must be clear and must be adhered to by all parties including the judicial officers. Transport should only occur in defined and clear circumstances. An effective use of video technology would also allow the system to be more flexible and responsive. For example, at the present time, arrangements for transport in Ontario need to be done ahead of time and with sufficient notice to an institution to arrange for such a transport. Given the exigencies that exist in managing risk in any jail, planning for transport needs notice and even the process of getting an accused ready for transport to court is extensive. With video appearances, such decisions can be made with less notice. In Manitoba, all those matters appearing on a bail docket list will appear in the morning before a justice of the peace. Counsel will then inform the justice of the peace if the matter is proceeding to a bail application. If so, a simple call to the respective jail alerts them to those who will need to be available for a video appearance. With this manner of triage, court dockets are run much more efficiently and are not bogged down with administrative requests for adjournments. Judges can spend their time doing meaningful work and adjudicating on matters instead of simply rubber-stamping consent requests for adjournments. Of course, all individuals without counsel will appear in front of a judge.

It is clear that the author is supportive of the increased use of video. That decision however is up to Ontario. I believe that a principled and transparent approach to the use of video can result in efficiency, risk management and cost effectiveness without interfering with the integrity of the system and the rights of any individual. The details of such planning is beyond the scope of this report or the expertise of the writer but the present system of video use is not as effective as it could be and results in many cases in duplicitous services and increased cost. At present the vast majority of people appear in person with video appearances layered on top.

It should be noted, as an aside, that Manitoba also uses video for many sentencing hearings subject to a protocol. That program has been quite successful again in achieving many of the goals that video bail has achieved. It is recommended that in reviewing video use that Ontario look to other jurisdictions to obtain information on how those systems work and what challenges lie in the use of video.

Certainly it would appear that video would ease many problems in rural and remote areas of the province, particularly noting that the OPP has video capability in every detachment I am informed. I emphasize again that the increased use of the video capability that currently exists on Six Nations would enhance services to members of that community, whether in custody, out of custody or appearing as sureties.

19.1 Recommendation:

That Ontario develop a province-wide strategy on the use of video technology in court and, in partnership with the OCJ, plan for the reasonable use of video technology in court proceedings in most bail hearings with a view to reducing unnecessary prisoner transport to court without compromising the fundamental rights of the accused.

20. A Further Note on Prisoner Transport

In Ontario it falls to MCSCS to transport inmates from one institution to another and to the various police forces to transport individuals from jails or detention centres to court. In Toronto and Ottawa, for example, special constables are hired to perform this function. The same is true in some other jurisdictions. The OPP also performs this function in those areas it polices. The OPP has its own transport unit composed of special constables and has so for the past 7 or 8 years. In some cases, it may fall to regular officers to provide transport. Police forces in Ontario that have fewer than 20 members provide their own transport services and I am informed that involves largely the use of regular members. It is the writer’s opinion that it is not a good use of police resources for regular police officers to be involved in prisoner transport except in limited cases. It is costly and takes someone off the road whose primary responsibility is policing the community. Further, the use of local police forces to provide transport in their jurisdiction can lead to different practices. On balance, it seems to me that the responsibility for all transport, whether from institution to institution or from institution to

court and vice versa should fall to the province and not the police. It does not appear to be legitimately a core police function. Further, a province-wide transportation policy should be more cost effective and efficient in its operation and management.

20.1 Recommendation:

That the province consider a province-wide program of prisoner transport under MCSCS that would shift responsibility from municipalities to the province through the use of a transportation unit for all inmate transfers.

20.2 Recommendation:

That in any case, where a prisoner is transported to court that, absent exceptional circumstances, they be transported in their personal clothes and with their personal property.

21. Weekend and Statutory Holiday Courts (WASH Courts)

All provinces have some sort of scheme that allows people, arrested on the weekend or on statutory days when the court is not ordinarily open, to apply for release. In Ontario this occurs through WASH courts.

The idea behind these courts is sound and laudable. However, the writer found many deficiencies and room for improvement in the functioning of these courts.

In Ottawa, WASH court is held in the Ottawa Court House and serves Ottawa and other communities. Hamilton WASH court serves Six Nations, Brant County OPP, Hamilton and Brantford City Police. Such is the case around the province. There are not WASH courts in every jurisdiction but rather hubs that serve more than one jurisdiction as Ottawa and Hamilton do.

Unfortunately, WASH courts are under-utilized. I received information that, depending on the location or amount of work, they can last less than an hour, perhaps a matter of minutes. One study suggested the average length of sitting time was 44 minutes. I was informed that it is unusual for them to last more than a couple of hours. Contested hearings in many WASH Courts can be rare. Many described WASH courts as simply “remand courts” that take up resources and time but do not significantly advance the administration of justice. There seem to be many reasons for this. One is a result of human nature. Most who participate in a WASH court, justice of the peace, and the Crown for example really get a day in lieu for their work. (It appears that Duty Counsel are usually private lawyers paid per diem on contract). So whether they work 1 hour or 4 it is all the same. It is a weekend or holiday and people want to get finished their work and enjoy what is left of the day. There can be perceived to be pressure on each person to make quick their work. I received information that some lawyers feel pressure from some justices of the peace to get the work done quickly so everyone can leave. I have heard that some justices of the peace won’t wait for an accused who was recently arrested

and was in the final stages of processing by the police even though the day was young because their work was done. It was also reported that even when bail is consented to with a surety but the surety is unable to make it to court before closing, the accused is then put over in custody to the next regularly sitting court day. Such a practice is unnecessary and unfair to the accused. It is hard to measure the truth or accuracy of these anecdotes but a common theme emerged. Few put in a full day and yet they get paid for one.

Well some may say that is the nature of the beast. You can't make work when there isn't work to do. I disagree. At the present time, if you are arrested say Friday after normal court is over and you don't make the docket for Friday, you will appear Saturday in WASH court. If your matter doesn't proceed on that day (say you were awaiting counsel) your case isn't put over to Sunday. It goes to a regularly scheduled court sitting. If you appeared on Thursday and weren't prepared for whatever reason to proceed, you can go to Friday or the next Monday if it is a regular court day and not a STAT day but you can't adjourn to Saturday or Sunday. In other words, only those matters that are processed after court on Friday or on Saturday in time to make Saturday WASH Court can appear on Saturday. The same applies to Sunday. No remanded matters from any other day can appear on either Saturday or Sunday or a Stat Day. It is no wonder there are fewer matters to deal with. Since WASH Courts are full day courts staffed by the same judicial officers, legal aid and Crown as on any other day, paid for a full day, those courts should allow any matter to appear no matter what the day is they originated from. Of course, this would require changes in the supports offered to the courts including video accessibility or transport services or enhanced court services (most of the usual court supports are not available for WASH courts) all of which would require funding. It would require the kind of staffing and access to information that is available during the regular court sittings. But such infusion of support resources would make these courts more useful and efficient and would assist in the timely processing of cases. This is not only fairer to the accused and would serve to lessen time on remand for many but would also free up valuable court time in the system.

Further, all services such as bail verification and supervision should be available on the weekend. At present they are not which can serve to delay the release on an accused who might qualify for such support. Again, an example of keeping people in custody longer than necessary. These programs need to be available at the earliest opportunity to assist in the early release of accused persons.

It is certainly noteworthy that it appears a small number of private counsel attend WASH Courts it seems. That may not change. However, given that the vast majority of matters appear to be dealt with by Legal Aid Duty Counsel, it appears there would be no shortage of work for an expanded WASH Court.

A great example of the lack of effectiveness in WASH courts is illustrated by the fact that, in Brantford, there needs to be an extra bail court after a long weekend. Surely that should not be necessary with a properly functioning and properly supported WASH Court. Further, one

report from a corrections official in Ottawa said that about 25% of people detained on the weekend receive bail on Monday. It begs the question then why this can't occur earlier.

The Hamilton WASH court presents problems for people in the Brantford area and Six Nations communities. If sureties are ordered, those sureties must attend in Hamilton before the close of the court to be verified and sign release documents. Otherwise there is no process to release the accused. That kind of travel can be difficult if not impossible for many people and may result in a delay in the release of an accused. The use of technology and/or an administrative scheme for surety verification could assist. If a surety could appear by video without travelling to Hamilton the adjudication of the matter could be hastened. Six Nations, for example, has video capability for a surety to appear by video. Of course additional resources would be required to staff the video appearances but releases could be processed much more expeditiously. Papers could be signed and faxed to a court office, perhaps one that is open extended hours on the weekend to deal with administrative releases.

21.1 Recommendation:

That the province review the operation of WASH courts to ensure that they are appropriately staffed and resourced and available to be used as full day courts, without restriction on what matters can appear in those courts.

21.2 Recommendation:

That the province amend the practices and procedures of WASH courts in order to facilitate the surety verification process, including the use of video technology.

21.3 Recommendation:

That support services, particularly for indigenous accused, be provided in WASH courts.

22. The Use of Conditions on Release

Much has been written about Ontario's reliance on conditions of release in the vast majority of releases in court. Ontario is not alone in this regard as most jurisdictions in Canada have seen an increase in the use of conditions in releases on bail. The reasons for this are speculative. Some argue they arise out of instances of tragedy where someone was killed by another out on bail. Some argue the development of standard conditions of release have led to a culture where the imposition of conditions is seen as natural. Some say defence counsel and/or their clients will agree to anything in order to get out of jail as fast as they can. The reasons are not as important as the result and it may yet all come back to a culture of risk aversion.

It's not that conditions attaching to a release on bail are a bad idea. Quite the contrary. They can be very helpful to manage the risk of an accused in the community. No-contact orders can

help protect victims for example. There are a host of good public policy reasons why conditions, in appropriate cases, should be considered. But when imposing conditions those conditions should relate to the risk the accused poses in the community and related to the alleged offence and the concerns on the primary, secondary and tertiary grounds in the Code. In fact many argue now we just have a culture of imposing conditions…..the more the merrier. In addition, in our zeal to "assist" and treat (seek counseling and treatment) the accused we often pose conditions that are impossible to meet. Demanding a chronic alcoholic abstain from drinking is a pipedream in most cases. Mandating that an accused reside at a certain address and advise the police in advance in writing of any change of address (a familiar condition in Ottawa) ignores that plight of many vulnerable people who do not have the luxury of a fixed address and couch surf or often don't know where they might sleep on any given night. And asking them to write a note to the police, well that's not going to happen particularly when they are facing issues of homelessness and hunger and may also be functionally illiterate too. Further, restricting their movements by geographical boundary ("red zones" which are quite popularly used in Ottawa) might, in some cases, be appropriate but for many the few supports they have maybe within that in one locale. They may have nowhere else to go and such a condition can impose unnecessary hardship. But that doesn't mean they pose a risk to society or that they won't show up in court. Additionally, imposing a curfew or house arrest when unnecessary can unduly interfere with employment or employment opportunities or just ordinarily daily life. There are many other examples. Further, the more conditions that are imposed the more likely it is that the accused will fail to meet them all. Hence why many argue we set people up to fail. Some have trouble doing one thing at a time. If they are vulnerable or suffer from mental illness or have cognitive impairments, 10 conditions or more written in legalese will be impossible to live by. In fact some statistics seem to suggest that contested successful applications for release usually result in 6 or more conditions and many are over 10. And the longer someone is out on release because of delays in the time to trial, the more likely it is they will be unable to comply with the terms of release. And the statistics seem to bear this out since the single largest group of charges that cause someone to be detained are breach of conditions of release. In fact, breach of administration of justice charges including breach of probation and breach of bail, seem to be increasing year to year and Ottawa has one of the largest numbers of breach of administration of justice charges.

Not only do we see far too many people locked up for administration of justice charges, many of these people are our most vulnerable. Providing other methods of managing their risk by providing bail beds and other programs (to be discussed later) would provide an alternative to simply locking them up.

There are many in our court system whose record, in large part, has been manufactured by the system. Originally charged with one offence, these people, often the most needy and vulnerable come back time and time again on breach charges whether they be breach of conditions of bail or breach of probation. Many are incapable of complying with the myriad of confusing conditions we put them on. Just getting through the day or finding a place to sleep is overwhelming for many. I recall, for example, the record of a young woman who appeared in front of me. Her only substantive offence was related to prostitution. She was a drug addict

and an extremely vulnerable individual but no threat to society. Yet her first sentence was probation. She breached that for violating a red zone (the only area she knew as home and where her few supports lived). From then on it was one breach after another…….bail, probation…….it didn't matter. A dozen or more convictions later and now never released on bail because of her breach record, a look at her record revealed that the prostitution charge was still the only offence, other than breaches, that she had ever been convicted of. We, the system, made that record for her and there are countless other people in the system that are in the same position. We make our own business and, often, we do it on the poor, the needy and the vulnerable who do not pose a threat to society.

The issue of the use of conditions has been flagged in Ontario as one that needs study and addressing. I am aware that such study is ongoing and that is welcome news. It is hoped that such research will provide insight and concrete recommendations in this area.

Additionally, the condition to keep the peace and be of good behavior (kpbgb) was, I understand, widely used in bail orders in Ontario. That practice has diminished significantly. However, there are still far too many bail orders where that condition (which is mandatory in probation orders or conditional sentence orders but not in bail orders) is used. It has the real potential of setting up an accused for a breach of bail for behavior not related to any risk to the community nor to the commission of any particular offence.

Further, many other conditions imposed are simply too vague or unnecessary.

It has been said that we, far too often, lock up people we are mad at (for breaking our orders), when we should be locking up people we are scared of.

22.1 Recommendation:

That MAG, MCSCS, and the OCJ continue their research into the use of conditions on release orders with a view to making their use more restrained and relevant to the nature of the offence charged, the ability of the accused to comply and the risk the accused poses to commit a serious or violent offence, in order to reduce the number of administration of justice charges and admissions into custody.

22.2 Recommendation:

That the use of the condition to keep the peace and be of good behaviour be eliminated in release orders.

22.3 Recommendation:

That "red zone" conditions be limited in their use in order to ensure the rights of the accused are not unduly limited and should only be used in cases where the threat of a serious violent offence is present.

22.4 Recommendation:

That the use of “reside” conditions be curtailed and that sensitivity and common sense be applied in directing people who are essentially homeless or transient to report changes of address to anyone.

22.5 Recommendation:

That the use of other vague conditions of release such as “not to go to any place where the protected person may be” be eliminated.

22.6 Recommendation:

That the use of the condition to abstain from alcohol or drugs be used sparingly in order to prevent setting up an addicted person for failure when such a condition cannot reasonably be met and where public safety or the safety of any individual would not be compromised.

23. The Use of Therapeutic or Behaviour Modification Conditions of Bail

This issue of using bail as an instrument for rehabilitation is a thorny one. Many, including the Elizabeth Fry Society, argue that it is inappropriate and discriminatory to apply bail conditions to a person presumed innocent to take treatment or fulfill any condition intended to “treat” a perceived need in the accused. They point out, correctly, that many accused will agree to anything in order to be released from custody. Not only does the imposition of these conditions have the potential to set the accused up for failure, it isn’t the function of bail to “cure” the presumed innocent. I agree to a point. But it is quite true that many individuals facing charges are in need of treatment and support. It cannot and should not be ordered without consent of the accused but where that consent is forthcoming and informed, it may be quite appropriate to impose these conditions if it means that the risk the accused might pose in the community can be effectively managed and diminished and where the alternative might be incarcerating them for long periods of time. When imposed, however, there should be the appropriate restraint and investigation into the appropriateness of these types of conditions.

23.1 Recommendation:

That therapeutic or behaviour modification conditions be imposed with restraint and only after proper investigation and informed consent of the accused.

24. Bail Verification and Supervision Programs

For those individuals who may require sureties or other supports in order to be released, Ontario has, in many jurisdictions, bail verification programs (BVSP). These programs are run by non-profit organizations and operate under an agreement which includes standards and procedures with MAG.

These organizations do a terrific job. In Ottawa, the John Howard Society has the contract and in Brantford it is the St. Leonard's Society. Each agency operates independently within the guidelines and, as a result, the actual method of delivering service will be different from place to place. Without taking away from the dedicated work these organizations perform, it was clear that a number of problem areas exist.

1. The contract is with MAG. In my opinion, this creates the appearance of conflict given that agents of MAG (Crown Counsel) appear in court on applications for release. It is important that these BVSP organizations not only be independent from agencies that perform functions in the bail process but be seen to be independent. In fact, I did receive information that, in some locales, crown counsel will put pressure on representatives of bvs programs in terms of who they should accept or not and impose local conditions on these programs. It would be wise to transfer responsibility for these programs to MCSCS for administration.
2. By and large, these organizations are limited on who they can accept into their programs. In general, people released to these programs appear to be either low-risk or individuals who have committed less serious offences. In fact, one estimate suggested that 87% of those in these programs were considered low-risk. In other words, these are people who should be released on bail anyway but perhaps are without access to a surety. It is important to provide opportunity to those who may be of higher risk to be released on bail. Generally, it can be said there may be three categories of accused. Those who should be released, those who should be detained and those who have a higher risk of re-involvement who can only be released if such a release involves managing their risk in the community. By and large, this last group is denied access to bail verification programs. The criteria for acceptance must be widened in order to capture a larger number of accused persons whose only alternative is to be remanded in custody pending the outcome of their offences. In general, bail supervision programs should be reserved for those who probably face detention, not release.
3. These programs have their own internal qualifications for admission. In both Ottawa and Brantford, if an accused has a certain number of breach of administration of justice charges in a certain time period (e.g. 2 in four as it is in Ottawa or 3 in 4 in Brantford) they are automatically denied consideration. These breaches could be for breach of probation or prior breaches of bail for example. Such an automatic and arbitrary rule eliminates the opportunity for some to avail themselves of these programs. While prior breaches are good evidence of future behavior, they aren't determinative. A bail verification and supervision program could very well provide the resources necessary to prevent a future breach and sometimes in the course of human rehabilitation it is two

steps forward, one step back. Individuals should be judged on a merit basis and not automatically disqualified by certain criteria.

4. As noted earlier, these programs do not operate on weekends and so those appearing in WASH courts cannot avail themselves of the service but rather must wait until a weekday to be considered, remaining in custody in the meantime. This adds to increased pressure on the remand population.

5. These programs are not universally available in the province. I understand that bail verification programs only serve about half of the court locations in the province.

6. Some individuals are released on both surety releases and with bail supervision programs. That seems to contradict the intent and purpose of these programs.

7. Despite the obvious good and worthwhile work they do, questions were raised as to whether this role is something that should be performed directly by government. In other provinces, bail programs are run as part of a community correction scheme. There are obvious advantages to such a scheme in Ontario. For one, community corrections has offices and reporting centres all over the province and could supply this service almost universally through their current scheme of offices and reporting centres. Further, if operated by one agency, consistency and uniformity in approach would be enhanced. As well, information on an offender would be much more readily accessible. Many have already had probation files and probation officers familiar with their background and risk factors and risk assessments may already be available. Such information would be valuable in assessing risk for bail and for providing appropriate supervision in the community. At present, information from probation officers on issues of bail appears to be sporadic. On occasion, a crown attorney may inquire of a probation officer as to background of an accused and, on occasion, a probation officer may reach out to the crown if they have concerns. But these are individual and not regular occurrences. The benefits of information access and sharing by one supervising agency are enhanced. At present, probation cannot share information on an accused with a bail supervision program without written consent of the accused. This is a real barrier to information sharing which could put the public at risk. At the very least, the more information you have about an individual, the better you can program for them. Further, probation and parole are risk managers. They have the expertise and they are also familiar with electronic monitoring. Some individuals on bail supervision even have active community supervision at the same time. To offset some costs, those people who are hired as bail supervisors could be so hired at a different classification to probation officers. But this would have the advantage of providing valuable training for potential probation officers. Certainly if such a switch was being considered it could not be done on the backs of the current probation complement. Their workload is already stretched to the limit.

All of this is not to say that the current providers of bail verification and supervision programs don’t do a great job……they do. However, there may be ways to deliver a more consistent, more effective, more inclusive and more integrated service in Ontario at a lower cost.

24.1 Recommendation:

That the province review the current practice of providing bail supervision programs in Ontario with a focus on determining if such programs could be run more universally, effectively and efficiently throughout the province by MCSCS.

24.2 Recommendation:

That regardless of who delivers the service, bail verification and supervision programs be expanded to all court locales in Ontario.

24.3 Recommendation:

That MCSCS be responsible for the contracting of and oversight of non-profit BVSP in Ontario and that all programs be consistent in their rules and applications.

24.4 Recommendation:

That BVSP be expanded to all WASH courts.

24.5 Recommendation:

That the policies or rules of automatic disqualification such as two breaches in four years or other such rules for consideration into BVSP be eliminated, and that BVS programs be appropriately resourced to handle the increase in workload.

24.6 Recommendation:

That BVSP concentrate on accepting higher risk individuals and that entrance into the program not be limited to those who are entitled to release in any event.

24.7 Recommendation:

That a culturally appropriate bail supervision program be instituted for indigenous persons in Brantford.

25. Community Supports and “Bail Beds”

In addition to the bail verification and supervision programs, many other not-for-profit, non-government agencies provide services for those accused of criminal offences. The list is varied and includes the Canadian Mental Health Association, The Elizabeth Fry Society and many other agencies providing support for the homeless, the addicted, the disadvantaged and

the vulnerable. In addition, as noted, various agencies provide support for indigenous people and other groups.

Apart from the bail process, many organizations provide support but many do not do so in the bail context. It is important to recognize the great work that they do. Harvest House in Ottawa, for example, provides intensive support for those with addictions. Their record of service is impressive. They have turned around the lives of so many people……..many who would otherwise have perished or languished in our jails and court system. The minimum stay is a year but many stay much longer and the list of successful graduates is impressive. Many have gone on to lives of sobriety and have firmly established themselves in the community. It's a great investment of time and money (they rely on public donations and fundraising) but the rewards for individuals and for society are priceless. Programs such as this clearly demonstrate that every life has value and that, with the proper supports at the appropriate time, many can be diverted from a life of misery and crime. As a society, we should all support these efforts.

What do these types of programs tell us? They tell us that if we offer proper support to those in need, we can indeed change lives. Not every life will be changed and sometimes it is a "two step forward, one step back" process in rehabilitation. We must be prepared for failure along the road to success. For that, we need flexibility in our court system. As one person told me, it's the difference between opportunity versus inevitability.

Translating the success these therapeutic programs have to the bail arena, we need to provide more funding and more support to those organizations that can provide needed service and, in doing so, manage the risk of accused in the community where appropriate. Over the years we have, sadly, seen the death and dearth of such supports in the bail context. These types of programs need government support and they need support from the non-profit and private sector. These types of partnerships are key. There is an old Fram Oil Filter Ad that told us we can "pay now or pay later". The same applies here. In actual fact, it costs less to keep someone in the community even where under an intensive program than it does to keep them ware-housed in jail.

After the OCDC report, where more funded bail beds were recommended as they had been in previous reports, it appears the province is moving in that direction. It is a direction to be encouraged. Those who are homeless need beds or hostels; those who are addicted need addiction support; those with mental illness need community and medical support. Far too often, those with pervasive mental illness have nowhere to go when arrested. We lock them up because we have nowhere else to send them. Ontario requires a mental health strategy for bail that will see the justice system link with community mental health resources and specialized programs of supervision for those accused with mental health issues. I also emphasize the need for more support for indigenous offenders as I have elsewhere in this report. The availability of these community resources would allow the police, Crown and the court more flexibility in crafting releases on bail for many individuals where now the absence of such supports often leads to their detention because there are not sufficient services

available to manage their risk in the community. The availability of these programs may also have the benefit of reducing the reliance on or need for sureties when no other alternative to release seems appropriate. It must be emphasized that the cooperation of other government agencies that have responsibility for health (particularly mental health), housing, education and social services is vital and key to success.

25.1 Recommendation:

That the Government of Ontario, in cooperation with community agencies, move to provide more bail beds for the homeless, more shelters, additional support for those suffering from mental illness including residential support, mental health crisis beds and community mental health supervision programs for those released on bail, more support for addictions programs (including the consideration of “wet facilities”), more support for women, more support for indigenous offenders and others in need to ensure that, where appropriate, alternatives to custody can be utilized in the bail context.

26. Domestic Violence

Domestic violence cases, especially partner assaults, make up a large number of cases that appear for bail in court in Ontario. MAG funds excellent victim witness programs throughout the province to assist victims of domestic violence. The bail stage can be extremely critical as we have seen through far too many tragedies. In Brantford, for example, victim services of Brantford, a non-profit community based agency, works in the bail stage to provide safety planning for victims and provides information on terms of release for accused persons. Their work includes the Hamilton WASH Court. They rely on funding from MAG and private funding and do a great job. They also provide a link for victims to the victim-witness program. Additionally, there are community non-profit agencies that provide counseling for offenders. There is always a delicate balance between the right of the accused to reasonable bail at the earliest opportunity and the need to ensure that the right risk assessment information is in place to ensure, as much as possible, that release conditions are appropriate. Generally speaking, those agencies working in the domestic violence field expressed the need for more support. In short they articulated their concerns as follows:

1. More money is needed to fund partner assault programs for offenders and for information gathering at the bail stage to ensure appropriate risk assessment and safety planning for victims.
2. There is a lack of information sharing between justice and social services.
3. They would like to see GPS technology used on some offenders to ensure breaches of no-contact or non-attendance can be avoided.
4. They would like to see dedicated Domestic Violence bail courts staffed by trained personnel.

26.1 Recommendation:

That a province-wide study be undertaken aimed at identifying gaps in service for both victims and offenders in domestic violence cases, especially involving the bail stage and that additional resources be provided to government and non-profit community organizations to allow for better information gathering and sharing, risk assessment and counselling as appropriate for both victims and offenders.

26.2 Recommendation:

That the province investigate the use of GPS technology particularly for accused in domestic violence cases to support no-contact and non-attendance conditions of release.

26.3 Recommendation:

That, where possible, the Ontario Court of Justice consider establishing specialized domestic violence bail courts to deal with domestic violence bail issues staffed and supported by personnel trained in the dynamics of domestic violence and that the Ontario Court of Justice review its education and training of justices of the peace and judges to ensure those that preside on domestic violence cases possess appropriate understanding of the dynamics of domestic violence cases.

27. Supports for Indigenous Accused

As in other parts of Canada, indigenous offenders are over represented in the justice system and in jails. This is particularly true in Brantford. The legacy of colonization and residential schools has left many indigenous people and their descendants poor and vulnerable. Gladue principles apply to bail yet many courts don’t apply those principles or pay lip service to them. The use of sureties puts many aboriginal offenders in positions of significant disadvantage and creates barriers to release and the overuse of conditions set many up for failure.

The Gladue Court in Toronto is an example of a remarkable success in dealing with aboriginal offenders in a different manner than most traditional courts. It is presided over by a judge and all the players are trained and educated in the issues facing aboriginal offenders and acutely aware of the need to find alternatives to incarceration for aboriginal people where appropriate. Gladue principles are applied to bail. People are released on bail from Gladue Court that would never be released from a traditional court and yet public safety has not been compromised by this different approach. Gladue courts work because they are staffed by experienced and knowledgeable judges, crowns, duty counsel and provide culturally relevant bail supervision.

In Brantford, there is an Indigenous People’s Court but it is limited to certain types of offences and only deals with an accused after a guilty plea is entered. Bail applications are not

conducted in IPC.

A Gladue court that deals with bail is desperately needed in Brantford. Whether this is established as a new court or the terms of IPC are modified is not important. What is important is that aboriginal accused are provided with culturally relevant and appropriately resourced community supervision, and support whether on Six Nations or in Brantford or in the court area Brantford serves and that the Court provide supports for bail that reflect the Gladue principles. In that regard, it is imperative that those who work in the court system, be they judges, justices of the peace, crowns or duty counsel are properly trained in the appropriate use and application of Gladue principles.

27.1 Recommendation:

That a court be established in Brantford to deal with indigenous offenders' applications for release on bail or that the terms and conditions of the indigenous people's court be amended to include bail for indigenous people.

28. The Use of Technology to Supervise Bail

Currently, ankle bracelets are used on some offenders as part of the sentencing process. This technology allows us to know where an accused is supposed to be but won't necessarily tell us where he/she is if they leave the designated location. This technology is especially useful where an accused is under house arrest or curfew. The technology allows the monitor to confirm the accused is in the required locale at the required time. Presently this technology is not used for bail but might be useful for some individuals who are on a bail curfew. There are issues and limitations with this technology. For one, it is expensive and needs resources to monitor. Secondly, offenders can remove the device and abscond and then all we know is that they aren't where they are supposed to be but we don't know where they are.

GPS technology can track where someone is and could be helpful in ensuring that those on conditions to stay away from a certain address in fact do so but this technology would also come with a cost to provide and a cost to monitor.

28.1 Recommendation:

That MAG and MCSCS review ankle bracelet and GPS technology to determine what, if any, use can be made of this technology for bail purposes, in addition to domestic violence cases as noted above.

29. Risk Assessments for Bail

Currently MAG is investigating the feasibility of developing a risk assessment tool for use in bail situations in Ontario. Saskatchewan is also independently studying this issue. A properly

tested and accepted risk assessment tool can objectively validate risk and suggest conditions or terms that might manage the identified risk in the accused. This is valuable work. It is suggested that, in order for a bail risk assessment tool to be effective and accepted, it should be developed in partnership with other government departments and allow for consistent data collection and sharing between those agencies with appropriate firewalls where necessary. This sharing of information and access to a consistent and inclusive risk assessment will make the tool much more effective, complete and useful in its applications. Further, it is important that such a tool be flexible and easily used so that applications for release by an accused are not further delayed as a result.

29.1 Recommendation:

That work continue on the development of a risk assessment tool that could be used in bail situations and other applications but that the development of such a tool be done in partnership with other justice partners including MCSCS.

30. Corrections

The Ottawa-Carleton Detention Centre report has already highlighted the significant issues related to that centre and has made recommendations for review. I am aware change has already occurred in some areas. For the purpose of this report, I will simply highlight those issues related to OCDC and the Brantford Jail which I believe are of most significance.

The OCDC report already recommended increasing the number of programs available to remand inmates, reducing the use of segregation, eliminating double bunking, increasing exercise opportunities and providing more health and mental health services amongst other suggestions. I entirely agree.

As indicated, remand can be very destructive and detrimental to people. Being kept in a locked area for up to 23 hours a day for months at a time in crowded conditions is just wrong. While I recognize there are significant physical limitations at both OCDC and Brantford, authorities must make every effort to ensure remand inmates are afforded services and activities that will assist them in their stay on remand.

This is particularly true in the area of mental health. Some have labeled our jails “the asylums of the 21st century” because they house so many people with mental health issues…….issues that I have already pointed out become worse in jail.

Particular emphasis must be placed on services for women. Again, while there are distinct physical limitations, appropriate resources must also be available for them. As well, it is vitally important to have culturally relevant programming, especially for indigenous individuals, available in institutions.

The OCDC report called for increased access for professional visits, particularly for legal counsel and expanded use of technology for this purpose. Again I agree. Presently, the issue of lawyer contact is problematic at OCDC. There are 6 interview rooms but 2 are used for immigration matters and internal counseling. That effectively leaves four rooms to be shared by a host of individuals and agencies. Booking those rooms is a difficult task. Presently, they can be booked Monday to Friday from 930 am to 11 am and 130 pm to 4 pm. However, many counsel have reported that there is a delay in getting time for an appointment because of the number of requests and the lack of rooms. Further, often appointments can be cancelled even at the last minute for a variety of lock-down reasons including lack of staff. The institution reported that they can accommodate professional visits on the weekend by request but it appears this is limited again because of staffing issues.

There is video capacity on the fourth floor of the Ottawa Courthouse for lawyers to access clients, by prior appointment, after 3:00 p.m. Monday to Friday. Again, these appointments may be cancelled. I am aware that the Criminal Modernization Unit is working on remote access for counsel. These initiatives should also assist in reducing transport of individuals to court simply for the purpose of meeting with counsel. It is imperative that steps be taken to enhance lawyer-client contact.

I concur with the recommendations to allow remand inmates to have at least one family call a week particularly when transferred away from their home area. Frankly though it doesn't seem like enough. As well, finding some way of providing remand inmates with greater phone access to their counsel is necessary. These presumed innocent people should be able to call a cell phone and make a professional call that is not collect at reasonable times and in reasonable numbers. I urge MCSCS to develop such a policy and practice. On a related note, I recommend that telephone access for remand inmates be provided in the Brantford Courthouse custody area. I also recommend that all efforts be made not to transfer remand inmates from their home institution unless it is for critical space issues. As much as possible, these people should be kept close to their court location appearance and home communities and family and support. Such a policy would also assist in reducing the practice of lawyers remanding clients for short periods of time in order to keep them from transfer. Reviewing the processing of how to handle intermittent sentences including expanding the use of temporary absence programs and cooperative work programs may assist in the space issues in jails and may also serve to reduce the security risks associated with intermittently sentenced prisoners.

30.1 Recommendation:

That MCSCS facilitate the increased availability of lawyer-client visits at OCDC by expanding the availability of interview times during the week and on weekends and, in cooperation with the criminal modernization division, expand the availability of technology for use in lawyer-client contact in order to provide appropriate means for counsel to access their clients in custody by means of secure video and in a way that maintains solicitor-client privilege.

30.2 Recommendation:

That MCSCS develop a policy to allow remanded inmates to make calls to cell phones and make non-collect calls to their legal counsel at reasonable times and in reasonable numbers and that such a policy include contact with family members.

30.3 Recommendation:

That the Ottawa-Carleton Task Force recommendations dealing with increased health and mental health services be implemented and that culturally appropriate programs be provided to remand inmates.

30.4 Recommendation:

That phone access for remand inmates be provided at the Brantford courthouse custody area.

31. Odds and Ends

1. SCOPE (Scheduled Crown Operations Prepared Electronically), the Crown information system, is rapidly expanding in Ontario. This is to be encouraged. Access to SCOPE, as Ottawa Crowns have, allows the Crown quicker access to relevant file material across the province, which makes their ability to assess positions on bail more effective.
2. E-JIROS (Electronic Judicial Interim Release Orders) are a court initiative which allows release documents to be printed right in the courtroom immediately after the pronouncement of release conditions. This is a good example of the use of technology to speed up court processes. Unfortunately, it also demonstrates that changes, where instituted, can have unexpected negative consequences. For example, while the judicial interim release document is printed right away, the system doesn't link or interface with other servers in the justice system. So the court has a record of the release but it isn't automatically sent elsewhere, to the police for example. Court staff are required to make a copy of the document and then scan it to the police. Further, only the court has access to the information contained in the document so research to obtain valuable information for study is much harder to obtain. Further, many report that printing and signing the release document in court actually delays a court proceeding while the clerk prints the document, has the justice of the peace sign and attends on the accused and possibly sureties to sign the documents. One suggestion made was to have two clerks in court, where that doesn't presently exist, so that while one does these documents, court can continue and not be unduly interrupted.
3. It was hard to get a handle on how often the crown pursued estreatment of bail proceedings against sureties who had been noted in default of their guarantee. The best information I received is that, in some jurisdictions, it is done a lot and in others not much at all. Given that this was a peripheral focus of the report, I did not investigate further. However, if it is the case that estreatments are pursued unevenly in the province, it would be beneficial for MAG to develop a consistent policy in this regard.

32. What a Streamlined Bail Court Process Might Look Like in Ontario

While it is entirely up to Ontario to decide how it wishes to conduct bail hearings, there is merit to considering a streamlined delivery of service, one that doesn't risk public safety but one that allows for a more efficient and effective decision on release without compromising fairness.

Ontario could consider a model whereby it is expected that the Crown would tender its submissions virtually always by oral argument. In some cases, it may be necessary to bring in other pieces of evidence in order to bolster the oral argument, but those cases should be limited and the additional evidence used sparingly. The defence, likewise, would present its argument in the same fashion. The accused would never testify. Sureties, where deemed necessary, could be approved in an administrative fashion without ever having to testify in court. Such a procedure would have the effect of reducing most show cause hearings to less than 30 minutes even factoring the judge's decision. In some cases, an hour or two might be needed. It would be unusual to go longer than a half-day or a full day even in the most complicated of cases. In this fashion, the court could and would create capacity to handle many more applications in a given day. Without the necessity of courtroom surety approval, applications could proceed more efficiently and quicker. In this way, the time spent on remand for many accused awaiting a hearing or getting a plan together along with surety attendance in court would be lessened. As well, much needed courtroom time could be freed up for other matters. Where possible and practicable, bail courts would be set up to handle only bail matters with administrative remands, whether they be by video or in person, done elsewhere by justices of the peace. Dedicated specialized bail courts such as domestic violence courts could be set up where practicable.

Bail applications would be handled by judges of the Ontario Court of Justice or justices of the peace with requisite legal training.

Bail applications could be done by video where such technology exists without the necessity of transporting the accused to a court setting. Such a scheme would save time and cost and reduce the risks, including security risks, inherent in transporting an accused to court. Such a policy of default video appearances for bail should be the rule of the Ontario Court of Justice and only in specified circumstances should an accused be transported. It should not be left to individual judicial officers to decide whether they personally will allow video bails. It should be a policy of the Bench made by the Chief Justice in consultation with members of the Bench.

The use of sureties in the majority of cases would not be required but only so in specified circumstances related to the primary ground where such a guarantee is needed to ensure attendance in court and, in some serious cases, to address public safety concerns including the safety of any particular individual. In those cases where sureties are ordered, the process for surety approval should be administrative as noted above. Sureties could file an affidavit or

complete a pre-set questionnaire and could present themselves to a justice of the peace for surety approval. Such approval could be done over the counter according to specified rules for surety approval. Such approval should be available during normal working hours seven days a week and during the evenings until a reasonable hour like 10:30 p.m. Surety approval should also be allowed, where available, by video appearance.

Defence counsel should be provided with the technology that allows for secure and confidential access to an accused in custody. Resources in detention centres should be sufficient that access to a client by a lawyer in such fashion or in person at reasonable hours with reasonable notice. Legal Aid should have the resources to take applications for certificate appointment at the first opportunity when an accused is taken into custody and should not wait until an accused is remanded into custody. Appropriate and properly funded bail support and community programs would be available to support an accused on bail. These types of programs would allow for more supervision programs, more bail beds, treatment facilities where appropriate and where the accused consents, more culturally relevant support programs and supports particularly for indigenous offenders, supports for those suffering from a mental health issue or severe addiction issues and the like.

33. Conclusion

This study focused on two jurisdictions in Ontario. As noted earlier, the need for further in-depth study of how bail and remand functions in Ontario is needed and recommended in order to ensure that a full picture is gathered and that all issues for action and further study are properly identified.

Fundamental, systemic and significant transformational change is needed in the bail system in Canada and in Ontario. Such change will not be easy nor will it be quick. It will require the dedication, collaboration, information-sharing, inter-agency cooperation and collective will of all stakeholders in the justice system.

34. References

1. Unlocking Change: Decriminalizing Mental Health Issues in Ontario, The John Howard Society of Ontario, August 2015.
2. “Broken Bail” in Canada: How We Might Go About Fixing It, Dr. Cheryl Marie Webster for the Research and Statistics Division, Department of Justice Canada, June 2015.
3. Bailing Out: Challenges in the Canadian Bail Process, Dr. Nicole Myers, University of Toronto, October 2013.
4. Reasonable Bail? The John Howard Society of Ontario, 2013
5. The Bail Process in Ontario: An Overview, Anthony Doob, June 2013.

6. Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention, The Canadian Civil Liberties Association, July 2014.
7. The Bail Reform Act Revisited, Martin Friedland, Canadian Criminal Law Review, 16 C.C.L.R.
8. Alberta Bail Review, Nancy L. Irving, February 2016.
9. Bail Experts Table Recommendations, Justice on Target Ontario.
10. R. v Gladue and Judicial Interim Release: A Proposed Framework, Jillian Rogin.
11. A Legal Aid Strategy for Bail, Legal Aid Ontario, December 2015.
12. Ottawa-Carleton Detention Centre Task Force Report, 2016.
13. National Prevalence of Mental Disorders among Incoming Canadian Male Offenders, Janelle Beaudette and Lynn Steward, The Canadian Journal of Psychiatry, April 2016.

List of Recommendations

1. Background

1.1 Recommendation: that MAG, the Ontario Court of Justice (OCJ) and MCSCS conduct an in-depth study of those on long-term remand to determine what measures can be put into place to lessen the length of their stay on remand.

1.2 Recommendation: that MAG and MCSCS undertake an indepth study into the demographics of and the reasons why many remand prisoners never make an application for release on bail.

4. Limitations of this Report

4.1 Recommendation: that a further in-depth study of issues of bail and remand be undertaken in all of Ontario.

5. Another Study?

5.1 Recommendation: that where possible and practicable, studies and investigations into issues of bail and remand, both qualitative and quantitative, be conducted cooperatively between stakeholders.

5.2 Recommendation: that to the extent possible, Ontario justice partners abandon the siloed approach to information collection and cooperate in data collection and sharing of information on a system-wide approach with appropriate firewalls to protect confidential information and privacy.

6. Damn Statistics

6.1 Recommendation: that the Ontario Court of Justice in consultation and cooperation with MAG, MCSCS, the Public Prosecution Service of Canada (PPSC), the police, private counsel, legal aid, court supports and service providers, conduct a process review of court use with a view to streamlining administrative processes in court and courtroom utilization with the goal to free up court time in order than meaningful acts, such as bail applications for release, can occur in a timely fashion.

7. A Note About Culture

7.1 Recommendation: that MAG review the procedures for bail with a view to ensuring that consistent structures, policies and practices are implemented thoroughout the province while taking into account and being cognizant of local and unique issues and the demographics present in each court locale.

11. Release by the Police

11.1 Recommendation: that the initiative of providing police access to crown attorneys for advice on release be expanded in order to support police decisions on bail

11.2 Recommendation: that mag continue and expand and refine continuing education programs for police officers and officers-in-charge on their powers of release

11.3 Recommendation: adopting the recommendation 13 from the Ottawa-Carleton Detention Centre Task Force report, that MCSCS should develop a policy for police services with a goal of diverting low-risk individuals away from pre-trial detention. Specifically, explicit guidance should be given to arresting officers and officers-in-charge regarding what classes of offences should be presumptively subject to release from police stations. In implementing these recommendations, links with social services and health services should be established to assist in diverting or releasing vulnerable low-risk individuals from custody.

11.4 Recommendation: that MAG and MCSCS consider the development of a pilot project of not laying charges in cases of minor breach of bail allegations.

11.5 Recommendation: that MAG continue to press for legislative changes that would widen police powers of release particularly providing the police the power to impose certain conditions that they currently do not have the power to do and pursue other legislative changes such as the repeal of the reverse onus provision for breaches of bail in section 515(6) of the Criminal Code.

11.6 Recommendation: that MCSCS and mag investigate the disparity in the percentage of individuals released by the police in different jurisdictions to determine what the reasons for

such a disparity might be and to take action to rectify such disparity if such is deemed necessary.

12. MCSCS and Policing Standards

12.1 Recommendation: that MCSCS conduct a full scale review of the policing standards manual with a view to bringing it up to date and implement a plan for continuous review of that manual and further that, in auditing compliance, that MCSCS also audit the implementation of the policies in various police agencies.

13. The Prosecution

13.1 Recommendation: that mag conduct a review of and revise its policy on bail to emphasize the right to reasonable bail, the ladder principle, and principles of restraint in the use of sureties and the imposition of conditions of release.

13.2 Recommendation: that the policy and procedures on bail emphasize the principles of Gladue in bail consideration.

13.3 Recommendation: that MAG conduct a review of staffing needs in crown offices and, where feasible, reduce its reliance on term and contract crowns.

13.4 Recommendation: that the bail vettor program be expanded to other bail court locations in Ontario.

14. Support for Legal Aid

14.1 Recommendation: that funding support for legal aid be reviewed and enhanced to ensure those in custody charged with offences have an application for legal aid taken at the earliest opportunity and that the access to duty counsel support for those in custody be made available at the earliest opportunity in order to facilitate early bail hearings.

14.2 Recommendation: that the funding amount for bail applications on legal aid certificates be reviewed and enhanced for private counsel

14.3 Recommendation: that legal aid provide for in-person applications for legal aid to be taken in Brantford and eliminate the 1-800 application process.

14.4 Recommendation: that legal aid hastens its certificate approval processing time.

15. Adjudicators on Bail

15.1 Recommendation: that the Chief Justice of the Ontario Court of Justice review the practice of having justices of the peace conducting all bail applications with a view to having

judges perform this function at least Monday to Friday during normally scheduled court hours

15.2 Recommendation: in addition or in the alternative, that the government of Ontario amend the requirements for appointment as a justice of the peace to mandate a law degree as a prerequisite for appointment such as exists in Alberta and that, where practicable, only legally trained justices of the peace be authorized to hear applications for bail.

15.3 Recommendation: that in any case, appropriate resources be provided to the Ontario Court of Justice to allow for judges and/or legally trained justices of the peace to conduct all release applications.

16. A Note About Independence, Particularly Judicial Independence

16.1 Recommendation: that the Chief Justice, in consultation with the bench, develop rules of court that will guide the consistent administrative practices regarding bail applications in Ontario.

17. Bail Application Practices, the Use of Sureties and Surety Verification Processes

17.1 Recommendation: that releases on bail in Ontario should follow the ladder principle in the criminal code and that an accused, when released, should be so released on the least restrictive bail possible that the particular circumstances call for.

17.2 Recommendation: that the province of Ontario end its widespread practice of requiring sureties and move to a system that requires sureties only in those cases of greatest need, most particularly where primary ground concerns exist.

17.3 Recommendation: that the practice and expectation that an accused testify in court on an application for release be ended.

17.4 Recommendation: that the province of Ontario develop an administrative model for surety verification that does not involve a surety testifying in court except in exceptional circumstances.

17.5 Recommendation: that the process for surety verification be flexible to allow sureties to be verified seven days a week from 8:30 a.m. to 10:30 p.m.

17.6 Recommendation: that in-court witness testimony should not be required where the crown is consenting to bail and should not be required in contested applications except in exceptional circumstances.

17.7 Recommendation: that section 11(i) of the Crown Attorneys Act be repealed.

17.8 Recommendation: that video capability be utilized for surety verification where appropriate in order to facilitate the release process.

17.9 Recommendation: that the practice of introducing information such as “calls for service” or similar information where the accused has not been convicted of an offence be halted.

18. The Culture of Remand

18.1 Recommendation: that judicial officers diligently inquire of counsel as to the reason for a remand adjournment where the accused is in custody to ensure the request has a legitimate basis and to ensure that those in custody have their cases proceed as expeditiously as possible.

19. The Use of Video and Bail Triage

19.1 recommendation: that Ontario develop a province-wide strategy on the use of video technology in court and, in partnership with the OCJ, plan for the reasonable use of video technology in court proceedings in most bail hearings with a view to reducing unnecessary prisoner transport to court without compromising the fundamental rights of the accused.

20. A Further Note on Prisoner Transport

20.1 Recommendation: that the province consider a province-wide program of prisoner transport under MCSCS that would shift responsibility from municipalities to the province through the use of a transportation unit for all inmate transfers.

20.2 Recommendation: that in any case, where a prisoner is transported to court that, absent exceptional circumstances, they be transported in their personal clothes and with their personal property.

21. Weekend and Statutory Holiday Courts (WASH Courts)

21.1 Recommendation: that the province review the operation of WASH courts to ensure that they are appropriately staffed and resourced and available to be used as full day courts, without restrictions on what matters can appear in those courts.

21.2 Recommendation: that the province amend the practices and procedures of WASH courts in order to facilitate the surety verification process, including the use of video technology.

21.3 Recommendation: that support services, particularly for indigenous accused, be provided in WASH courts.

22. The Use of Conditions on Release

22.1 Recommendation: that MAG, MCSCS, and the OCJ continue their research into the use of conditions on release orders with a view to making their use more restrained and relevant to the nature of the offence charged, the ability of the accused to comply and the risk the accused poses to commit a serious or violent offence, in order to reduce the number of administration of justice charges and admissions into custody.

22.2 Recommendation: that the use of the condition to keep the peace and be of good behaviour be eliminated in release orders.

22.3 Recommendation: that “red zone” conditions be limited in their use in order to ensure the rights of the accused are not unduly limited and should only be used in cases where the threat of a serious violent offence is present.

22.4 Recommendation: that the use of “reside” conditions be curtailed and that sensitivity and common sense be applied in directing people who are essentially homeless or transient to report changes of address to anyone.

22.5 Recommendation: that the use of other vague conditions of release such as “not to go to any place where the protected person may be” be eliminated.

22.6 Recommendation: that the use of the condition to abstain from alcohol or drugs be used sparingly in order to prevent setting up an addicted person for failure when such a condition cannot reasonably be met and where public safety or the safety of any individual would not be compromised.

23. The Use of Therapeutic or Behaviour Modification Conditions of Bail

23.1 Recommendation: that therapeutic or behaviour modification conditions be imposed with restraint and only after proper investigation and informed consent of the accused.

24. Bail Verification and Supervision Programs

24.1 Recommendation: that the province review the current practice of providing bail supervision programs in Ontario with a focus on determining if such programs could be run more universally, effectively and efficiently throughout the province by MCSCS.

24.2 Recommendation: that regardless of who delivers the service, the bail verification and supervision programs be expanded to all court locales in Ontario.

24.3 Recommendation: that MCSCS be responsible for the contracting of and oversight of non-profit BVSP in Ontario and that all programs be consistent in their rules and applications.

24.4 Recommendation: that BVSP be expanded to all WASH courts.

24.5 Recommendation: that the policies or rules of automatic disqualification such as two breaches in four years or other such rules for consideration into BVSP be eliminated and that

BVS programs be appropriately resourced to handle the increase in workload.

24.6 Recommendation: that BVSP concentrate on accepting higher risk individuals and that entrance into the program not be limited to those who are entitled to release in any event.

24.7 Recommendation: that a culturally appropriate bail supervision program be instituted for indigenous persons in Brantford.

25. Community Supports and “Bail Beds”

25.1 Recommendation: that the Government of Ontario, in cooperation with community agencies, move to provide more bail beds for the homeless, more shelters, additional support for those suffering from mental illness including residential support, mental health crisis beds and community mental health supervision programs for those released on bail, more support for addictions programs (including the consideration of “wet facilities”), more support for women, more support for indigenous offenders and others in need to ensure that, where appropriate, alternatives to custody can be utilized in the bail context.

26. Domestic Violence

26.1 Recommendation: that a province-wide study be undertaken aimed at identifying gaps in service for both victims and offenders in domestic violence cases, especially involving the bail stage and that additional resources be provided to government and non-profit community organizations to allow for better information gathering and sharing, risk assessment and counselling as appropriate for both victims and offenders.

26.2 Recommendation: that the province investigate the use of GPS technology particularly for accused in domestic violence cases to support no-contact and non-attendance conditions of release.

26.3 Recommendation: that, where possible, the Ontario Court of Justice consider establishing specialized domestic violence bail courts to deal with domestic violence bail issues staffed and supported by personnel trained in the dynamics of domestic violence and that the Ontario court of justice review its education and training of justices of the peace and judges to ensure those that preside on domestic violence cases possess appropriate understanding of the dynamics of domestic violence cases.

27. Supports for Indigenous Accused

27.1 Recommendation: that a court be established in Brantford to deal with indigenous offenders’ applications for release on bail or that the terms and conditions of the indigenous people’s court be amended to include bail for indigenous people.

28. The Use of Technology to Supervise Bail

28.1 Recommendation: That MAG and MCSCS review ankle bracelet and GPS technology to determine what, if any, use can be made of this technology for bail purposes, in addition to domestic violence cases as noted above.

29. Risk Assessments for Bail

29.1 Recommendation: that work continue on the development of a risk assessment tool that could be used in bail situations and other applications but that the development of such a tool be done in partnership with other justice partners including MCSCS

30. Corrections

30.1 Recommendation: that MCSCS facilitate the increased availability of lawyer-client visits at OCDC by expanding the availability of interview times during the week and on weekends and, in cooperation with the criminal modernization division, expand the availability of technology for use in lawyer-client contact in order to provide appropriate means for counsel to access their clients in custody by means of secure video and in a way that maintains solicitor-client privilege.

30.2 Recommendation: that MCSCS develop a policy to allow remanded inmates to make calls to cell phones and make non-collect calls to their legal counsel at reasonable times and in reasonable numbers and that such a policy include contact with family members.

30.3 Recommendation: that the Ottawa-Carleton task force recommendations dealing with increased health and mental health services be implemented and that culturally appropriate programs be provided to remand inmates.

30.4 Recommendation: that phone access for remand inmates be provided at the Brantford courthouse custody area