A Report on
The Bail Process in the Criminal Justice System

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Introduction

If one comes into conflict with the law, one may be charged with a criminal offence, and detained for a bail hearing. A bail hearing is "a court hearing, usually held soon after the initial arrest, at which it is determined whether the accused will be detained in a custody facility pending trial, or released, often with some conditions imposed" (Bala, 2003: 578). In Canada, the right to bail is constitutionally protected under the *Charter of Rights and Freedoms (Charter).* Section 9 of the *Charter* states that, "everyone has the right not to be arbitrarily detained or imprisoned" (Greenspan & Rosenberg, 2005: CH/34). In addition, "everyone has the right on arrest or detention…to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful" (Greenspan & Rosenberg, 2005: CH/36). In other words, the accused has the constitutional right to challenge the validity of his/her detention in a court of law. As well, pursuant to section 11(e) of the *Charter,* the Court can only deny a person bail if there is just cause to do so (Iacobucci, 2002).

The bail decision has often been recognized as the most crucial stage in the criminal process given the dangers of pre-trial detention (e.g., Hill et al. 2004: 32-1). Thus, it is imperative that accused who are detained for a bail hearing seek and obtain their release pending trial. However, many accused are denied bail, or do not seek their release on bail pending trial. The first section of this report focuses on past research on the bail process, and includes a discussion on both adult and youth offenders. Section I is divided into the following parts: Part I will describe the remand population in Canada, and Part II will focus on the different variables that the police may consider in their decision to arrest and/or detain a suspect. Part III will focus on the Crown Attorney's role in the bail process while Part IV will discuss the accused's legal representation in

the bail process. Part V will discuss the YOA (Young Offenders Act) and the Youth Criminal Justice Act (YCJA) in relation to the pre-trial detention of youth. Part VI will focus on legal and non-legal factors in the Court's bail decision. And finally, Part VII will discuss the dangers of pre-trial detention. Section II is divided into 10 parts and will describe and analyze research conducted on the bail process at the Provincial Courthouse in Kitchener, Ontario during the fall of 2005.

Part I: The Remand Population

The remand population includes not just people who have been denied bail, but any "person ordered by the court to be held in custody while awaiting a further court appearance" (Hill et al. 2004: 32-2). The remand population is diverse since it includes first time offenders, the mentally ill, the homeless, career criminals, and those charged with violent offences, such as murder or rape. This group is housed together in the same detention centre with sentenced offenders (e.g., National Council of Welfare, 2000, Pt. II).

The literature tends to describe only the characteristics of the people that have been convicted of a crime and are serving a sentence, and not specifically the remand population. However, the characteristics of the sentenced population are important since the remand and sentenced inmates are detained together, and because some sentenced inmates may have started out in the remand population. As such, the literature suggests that adult women serving sentences in Provincial Institutions tend to be young (median age 32), poor, single, and from racial minority groups. As well, these women are more likely be unemployed, uneducated and have drug and/or alcohol problems (Adelberg & Currie, 1993: 98; Zukewich et al. 2000: 177). Women are much less likely than men to be involved with the Criminal Justice System. For example, in 1997/98, 15% of the cases in adult court involved women, with the largest proportion of women being charged with property and drug related offences (Zukewich et al. 2000: 173-177).

Adult males serving sentences in Provincial detention centers tend to be single, young (20-39 years), unemployed and uneducated. Robinson et al. reported in a 1996 one-day snapshot of Canadian Provincial Institutions that 36% of the male inmates serving a sentence had a Grade 9 education or less, and 52% were unemployed at the time of admission. As well, 83% of the

sentenced inmates had at least one prior conviction, and 72% had been incarcerated in the past**.** In addition, 37% of the sentenced inmates had a property offence as their most serious charge, and 33% had a violent charge as their most serious offence (Robinson, et al.1998: 1-8).

Research suggests that, as a group, youth who are serving custodial dispositions tend to have high rates of psychiatric disorders, behavioural issues and personality problems (Hunzeker cited in Doob & Cesaroni, 2004: 233). As well, reports suggest that incarcerated youth are more likely to have been involved with The Children's Aid Society, and experienced family breakups and/or violence in the home (Bortner & Williams cited in Doob & Cesaroni, 2004: 233-234). In addition, Henteleff reported that as many as 75% of incarcerated youth may have learning disabilities (cited in Doob & Cesaroni, 2004: 233). Cesaroni & Peterson-Badali found that 75% of the youth serving a disposition in their sample reported having friends who were in conflict with the law, 78% had been suspended from school, and a high percentage reported using drugs and alcohol (2005: 262)**.** In 2002/03, Statistics Canada reported that the following offences accounted for over half of the total caseload in Canadian Youth Courts: property offences (31%), breach of a disposition (12%), and common assault (11%). Research also suggests that male youth, especially those aged 16 and 17, are more likely to be in conflict with the law than female youth (Robinson, 2003: 1-3). The Canadian profile of the young female offender includes high rates of physical and sexual abuse, drug addictions, low levels of academic and employment achievement and chronic family dysfunction. (Fleming, 2001: 427-439).

The above descriptions suggest that many of the people serving sentences in Provincial Institutions have faced adversity in their lives, and continue to experience a host of problems. As stated, many of these individuals may have been in remand at an earlier period, and thus some of

the characteristics of the sentenced offender may apply to a number of the people who are on remand.

One of the most disturbing Criminal Justice statistics is that more people are detained in remand facilities than are serving custodial sentences. For instance, in 2000/01, 59% of inmates were in remand custody, while 41% were serving a custodial sentence in Canada (Johnson, 2003: 1). While detaining certain individuals is a necessary evil, the sheer number of people in Canada's pre-trial detention centers is particularly disturbing given the fact that 53% of the 1996 remand population in Canada were in custody for non-violent offences (Robinson, et al. 1998: 8). It is equally disturbing that remand admissions have increased 75% between 1986/87 and 2000/01, even though the official crime rate, including violent crime, has decreased since 1991 (Johnson, 2003: 6; Linden, 2000: 76). These statistics would lead one to conclude that too many people are in Canadian remand facilities. In fact, it costs Canadian tax payers approximately $1,100 a week to incarcerate one adult offender, and $1,400 a week to incarcerate one youth (Statistics Canada, 2005; Doob et al.1995: 122). One would speculate that this money could be better spent helping people before they came into contact with the Criminal Justice System. In addition, it is troubling that there is so much disparity in the Provincial remand rates. For example, between 1991 and 2001, remand admissions increased in every Province except for Quebec and Alberta (Johnson, 2003: 7). Hence, depending on which province one resides in, one may have an increased or decreased chance of being detained in a remand facility.

In contrast to the adult remand population, the youth remand population has decreased. In 2000/01, there were 25,000 youth admitted to custody, 60% of which were held in remand. This was a 25% increase from 1992/93, but down 8% from a remand peak in 1997/98 (Johnson, 2003:

1). The youth remand rate should continue to decline since the new YCJA restricts the use of pre-trial detention.

There are a number of hypotheses on why the adult remand population is increasing. For example, Johnson reports that the people in remand are more likely to have been charged with violent offences than those serving a custodial sentence (43% vs. 31%). Secondly, many of the cases in the Criminal Justice System are now more complex and thus take longer to process (Johnson, 2003: 11; Kari, 2003). Thirdly, in 1997, a new ground of detention was added which enlarged the scope of detention (Johnson, 2003: 13). This new ground, the Tertiary Ground is related to the public interest, and it has been criticized by legal experts. For example, the minority Justices in *R. v. Hall,* Supreme Court of Canada (S.C.C.) expressed a concern that the Tertiary Ground may be "ripe for misuse, allowing for irrational public fears to be elevated above the *Charter* rights of the accused" (Iacobucci, 2002). A fourth factor that may be affecting the remand rate is the 1996 legislation that allow Judges the option of sentencing an accused to a conditional sentence if the sentence does not exceed the Provincial limit; two years less a day (Greenspan & Rosenberg, 2005: 1378; Johnson, 2003: 13). Instead of serving time in a custodial facility, a conditional sentence allows one to serve their sentence in the community under very strict conditions. Statistics Canada reports that in 2000/01, 11% of the conditional sentences in Ontario were terminated due to breaches. This, in turn, affects the remand rate because these people are re-arrested and detained (Johnson, 2003: 14).

A fifth factor that may be affecting the remand rate is that people are spending longer in remand than they have in the past (e.g., Johnson, 2003: 11). For example, in 1993/94 accused were spending, on average, 5 days in pre-trial custody, but by 1999/2000, people were spending,

on average, 8 days in pre-trial custody (John Howard Society of Ontario, 2002: 3). The increased time in detention may be because it is taking longer for accused to get a bail hearing. Pursuant to the Criminal Code of Canada, an accused should be taken in front of a Justice within 24 hours of arrest, or as soon as possible thereafter (Trotter, 1999: 109). In 2004, a study conducted by the Senior Justice of the Peace in Ontario concluded that generally an accused could have a bail hearing within 24 to 48 hours of arrest (Lennox, 2005). However, there is a significant amount of evidence that disputes this claim. For example, Trotter, a legal expert states that there are "unacceptably long delays for bail hearings" (Tyler, 2003: 2). As well, in 2003, The Ministry of Public Safety and Security reported that the average wait for a bail hearing was twelve days in Ontario (Tyler, 2003). In addition, if an accused has the great misfortune to be arrested after 10:00 a.m. on a Friday, he/she must often wait until Monday before being physically brought to a Bail Court. This means that all of these detainees are on an overcrowded Monday docket, and, in many cases, the docket is not completed (Locke et al. 1999: 13). Hence, some accused will have their cases adjourned to another day. A study by the Justice Summit conceded that while the average number of adjournments prior to a bail hearing have increased, defence counsel were responsible for most of these adjournments (Lennox, 2005). In contrast, some defence counsel have argued that bail hearing delays are due to Crown policies, the police not abiding by their statutory obligation to release, a shortage of courtrooms or judges, and/or because of the behaviour of some counsel and Judges (Steinberg, 2004: 5). In relation to youthful offenders, Bala reports that youth often wait a few days for a bail hearing if a parent must be located, or if they are arrested on the weekend (2003: 250).

A sixth factor that may be affecting the remand rate is deinstitutionalization (Johnson, 2003: 13)**.** This is because mental health budgets have not expanded to meet the needs of the mentally ill living in the community (Cockerham, 2002: 295). In fact, the literature suggests that the mentally ill are over-represented in the Criminal Justice System (Leiper & Morgan, 2005; Johnson, 2003: 13). The use of pre-trial time as 'dead time' may also be contributing to the increase in the remand population since there was a slight increase in the number of accused doing dead time between 1998 and 2001. 'Dead time' is the time in detention prior to conviction and sentence. Some accused may opt to serve dead time since Judges usually count one month in pre-trial custody as two months towards an accused's sentence (Johnson, 2003: 12).

Part II - Police

Adults and the Police:

The police have been referred to as the gatekeepers to the Criminal Justice System because they have enormous discretion over who gets stopped, charged and detained for a bail hearing (National Council of Welfare, 2000: Pt. I). The police have a number of options if they decide to charge and release a person. The police can release an individual on a summons, an appearance notice, a promise to appear, or on a recognizance/undertaking (e.g., Locke, et al. 1999: 11). If one is released on a recognizance or an undertaking, the police officer will attach terms to the release. If an accused breaches any of these terms (and is caught), he/she may be charged with a breach of an officer-in-charge undertaking and held for a bail hearing.

There seems to be general agreement that legal factors such as seriousness of the offence and criminal record are related to one's arrest and detention for a bail hearing (e.g., Hagan & Morden, 1981: 18). However, many writers also contend that the police tend to target the lower socio-economic class more than any other class (e.g., Hagan & Morden, 1981: 19; National Council of Welfare, 2000: Pt. I; Griffiths & Verdun Jones, 1994: 171). For example, there are reports that enforcement policies disproportionately impact the poor because police resources are heavily concentrated in lower-income neighborhoods (National Council of Welfare, 2000: Pt. I). As well, reports suggest that the police are more likely to stop and charge a suspect who fits the stereotypical image of a low socio-economic criminal such as a single young male, street person, and/or an Aboriginal or Black individual (National Council of Welfare, 2000: Pt. I). However, the police may charge more of the lower socio-economic class because they call the police more for

assistance and/or because they are easier to detect and control in comparison to the upper and middle classes (National Council of Welfare, 2000: Pt. 1).

Research contends that even when there is a mandatory arrest policy, the police may still exercise their discretion to arrest. For example, The Manitoba Spouse Abuse Tracking Project found that in three cities that had mandatory arrest policies for domestic assault cases, police charged the suspect in 79%, 56% or 68% of the cases, and that the police detained the accused for a bail hearing in 73%, 54% or 46% of the cases (Cunningham & Griffiths, 1997: 25).

In relation to ethnicity, some literature suggests that Aboriginal and Black suspects are discriminated against at the policing stage (e.g., Roberts & Doob, 1997: 515; The Royal Commission on Aboriginal Peoples cited in Chan & Mirchand, 2002: 70). In a Toronto study, Wortley found that over 43% of the Black males in his sample reported being stopped by the police in the previous two years, compared to 25% of the White males, and 19% of the Asians (1996). Roberts and Doob also found that Blacks were more likely to be detained by the police for a bail hearing than Whites (1997: 502-503). A Toronto Star study in 2002 also concluded that Blacks were more likely to be charged and held for a bail hearing than Whites, especially for drug offences, even when controlling for legal factors (cited in Wortley & Tanner: 2003). The Star's report generated a lot of controversy, and hence many researchers analyzed The Star's data. Some researchers supported The Star's conclusion that the police engaged in racial profiling, while others hotly disputed such a claim (Gold, 2003: 391-399; Harvey cited in Wortley & Tanner, 2003: 373-376; Melcher 2003: 363; Wortley & Tanner, 2003: 367-385).

In contrast, Ericson found that males, 16 to 24 years of age, and those from the lower socio-economic class were more likely to be stopped and subjected to a criminal records check

(cited in Griffiths & Verdun-Jones, 1994: 170). Hagan & Morden found that one's criminal record, employment status, seriousness of the offence, type of victim, the presence of a warrant, a statement and demeanor of the accused had a significant impact on a police officer's decision to release (1981: 18). Justice and the Poor also report that accused who are disrespectful to the police are more likely to be arrested (National Council of Welfare, 2000: Pt. I). Stribopoulos stated that some police officers admit to arresting a suspect because they "flunk the attitude test" (Stribopoulos, 2003: n.p.). The literature also suggests that the police are more likely to deal with the mentally ill by arrest (National Council of Welfare, 2000: Pt. 1; Stribopoulos, 2003). In contrast, Hucklesby found that the three most important factors that the police gave for refusing release were, in order, seriousness of offence, offence committed while on bail, and previous failure to appear convictions (2001: 458).

Youth and the Police:

Carrington & Moyer found that the present charge, criminal record and socio-legal factors such as failing to appear in Court and/or lack of community roots were related to detention at arrest. Carrington & Moyer also reported that gender, age, and race were related to detention at arrest (1988: 471-474). Carrington & Schulenberg report that police officers tended to detain if one was charged with a serious offence, was a repeat offender, if it was department policy to detain on a certain offence, and/or to obtain release conditions. In addition, Carrington & Schulenberg reported that 20% of the officers stated that they would detain a youth if they felt it was in their best interest (2003: 71-73). The previous studies are related to youth under the YOA. However, under the YCJA, the general rule is that the youth must be released, unless there is a reason pursuant to the Criminal Code that he/she should be detained (Justice Canada, 2002)

Part III: The Crown Attorney:

The Crown Attorney plays a crucial role in the bail process because he/she decides who will be released on consent, and who they will try to detain pending trial (e.g., Varma, 2002: 150). To assist the Crown Attorney in their bail decision, the police prepare a brief synopsis for the Crown that usually includes a summary of the offence, the criminal record, the accused's background, and the police's recommendation on release. The rules of criminal procedure state that the police must supply the Crown Attorney with a fair and balanced report on the accused (R. v. V.C.). However, reports suggest that the synopsis may contain negative personal information about the accused, such as he/she has a bad attitude, and that these comments may negatively influence the Crown Attorney's bail decision (Kellough & Wortley, 2002: 196).

If the Crown decides to show cause why an accused should be detained, the case will usually be adjourned to another day. But, if the Crown is consenting to release, the Court will, in most cases, release the accused on an undertaking, or on a recognizance with terms. However, the Crown Attorney may only consent to an accused's release if there is a surety. A surety is someone who agrees to be responsible for a person accused of a crime. The surety promises the Court that he/she will assure that the accused will obey all of the conditions of release, and appear for all future court appearances. A surety is often required if an accused is charged with a more serious offence, has a lengthy criminal record, or has a record for noncompliance with Court Orders. If released on terms with a surety, an accused and his/her surety is assigned a penal sum that may have to be paid to the Court if the accused breaches any condition of release (Trotter, 1999: 459). However, a surety condition may be problematic for many accused if they do not have a suitable surety to present to the Court.

The literature suggests that, in many cases, the Crown Attorney consents to release. For example, Koza & Doob found in a Toronto study that the Crown consented to release in 85.8% of adult cases (1974: 265). In contrast, Varma found in a Toronto study in 2000 that the Crown Attorney consented to release in 59% of the youth cases (cited in Doob & Cesaroni, 2004: 165). However, Varma found in a 2002 study in the Toronto area that the Crown Attorney consented to the release of youthful offenders in 70.3% of the cases. Varma reported that the most important variables in the Crown's decision to consent or contest a release were: prior record, school attendance, and whether the youth was living with parents (2002: 150-159). In addition, data from 2000/01 indicates that 96% of the accused in Windsor, 92% of the accused in St. Catherines, and 50% of the accused in Kitchener were granted bail (John Howard Society, 2002: 4). These statistics would include those who obtained their release after a contested bail hearing. One must query why there is such a huge disparity in bail releases between jurisdictions?

Part IV: Legal Representation:

The bail process is adversarial and thus it is crucial that a defendant have legal representation. If one cannot afford counsel, one can apply for Legal Aid. However, to qualify for Legal Aid, usually an adult offender must be at risk of a jail sentence, and qualify financially before Legal Aid is granted. A single person would financially qualify for free Legal Aid assistance if they make less then $1,089.00 net per month, and their liquid assets are under $2,000 (personal communication Legal Aid, December 20, 2005). These figures would eliminate Legal Aid assistance to a large number of low income earners. A Legal Aid application takes two to three days to process, thus many low income accused rely on duty counsel's assistance in Bail Court. Duty counsel is a lawyer that is paid by Ontario Legal Aid to assist unrepresented accused with the bail process, and other criminal proceedings. There have been many concerns raised about duty counsel. For example, in 1995, the Cole/Gitten Commission found that accused had little opportunity to consult with counsel before their appearance in Bail Court. As a result, many prisoners were forced to adjourn their cases because they were unprepared for their bail hearings (cited in Locke et al. 1999: 14). As well, some duty counsel have reported that due to a huge increase in their case load, they are over-worked, and often find it impossible to interview all their clients, potential sureties and witnesses in a timely manner (Locke et al. 1999: 14; National Council of Welfare, 2000: Pt. II).

The literature also suggests that many criminal lawyers will no longer accept Legal Aid cases due to cut backs in the Legal Aid tariff. Some argue that this has affected the quality of counsel available to the poor (National Council of Welfare, 2000: Pt. II**).** The Legal Aid base rate in Ontario is $67.00 an hour (Bentley, 2001: 10). The Lawyer's Weekly reports that without an

adequate increase, many lawyers may not be able to survive if they continue to represent accused that are on Legal Aid (Bentley, 2001: 10-11).

Bala states that many youth were not represented, or were inadequately represented by legal counsel under the YOA (2003: 319). For example, a Saskatoon Youth Court study in 1994 found that more than one-third of youth pleaded guilty without counsel, and that Aboriginal youths who appeared without counsel at their bail hearing were more likely to be detained than those with counsel (cited in Bala, 2003: 335). In theory, all youth should have access to legal representation under the YCJA. However, there is a concern that youth are less likely to have legal counsel under the YCJA since most of the provisions of the YCJA that deals with legal representation are similar to the rules under the YOA (Bala, 2003: 319). For example, similar to the YOA, if a youth is refused Legal Aid, an application can be made to a Judge to appoint legal counsel. Under the YCJA, the Judge must assign legal counsel for the youth. However, many parents may feel so humiliated by the process of attempting to obtain Legal Aid for their child, and/or obtaining an Order from the Court for counsel, that they may encourage their child to forego legal representation (Bala, 2003: 335-336). Further, the YCJA now allows provincial governments to establish a program that allows for the recovery of fees that were paid to the youth's lawyer under Legal Aid, or through a Judicial Order for counsel (Bala, 2003: 328-329). As a result, there is a fear that parents may pressure their children to resolve their case without the assistance of legal counsel so they do not have to pay these legal fees (Bala, 2003: 328-329). In addition, under both the YOA and YCJA, a youth can be assisted by an adult, such as a parent or relative, if the youth is not represented by counsel. Bala reports that Justices are reluctant to use this provision since "…it [would be] difficult to be satisfied that a parent, for instance, has the required expertise and

objectivity to properly advise the young person…" (Bala, 2003: 336). As well, in order to save costs, some provinces have established Legal Aid Clinics that have a staff of lawyers that assist youth in Court. Youth charged with serious offences can still choose from private counsel that will accept Legal Aid cases. However, the majority of youth will not be able to choose their counsel since they must be represented by a lawyer from the Legal Aid Clinic. The fear is that some youth may decide to appear unrepresented because they cannot have their counsel of choice (Bala, 2003: 324-326). Bala reports that Legal Aid Clinics are under funded, staff lawyers are overworked and as a result, they are often unable to provide adequate representation for youth (2003: 333-335). For all these reasons, there is a concern that youth may not be adequately represented under the YCJA.

Part V: The Young Offenders Act & The Youth Criminal Justice Act:

A number of researchers contend that under the YOA, which was in force from 1984 to March 31, 2003, there was an over-reliance on pre-trial detention (e.g., Federal-Provincial-Territorial Task Force cited in Barnhorst, 2004). For instance, one study found that over one-third of a youth sample was denied bail for breaching their bail conditions; a reverse onus situation. A youth who breaches his/her bail conditions has not complied with the terms of release. For example, a youth could be ordered to attend school, and then not attend, or he/she could be ordered to be in their residence by 8:00 p.m., and then break this curfew. It is notable that a breach of bail does not necessarily involve the use of violence (cited in Justice Canada, 2002). To address the concern that too many youth were being detained prior to trial, the YCJA restricts the use of pre-trial custody (Bala, 2003: 252-253). In fact, one of the main goals of the YCJA is to avoid, if at all possible, the use of pre-trial detention for Youth who come into conflict with the law (Doob & Cesaroni, 2004: 165). The YCJA restricts the use of pre-trial detention because the literature suggests that youth may suffer harmful consenquences from being detained. A detailed discussion of the harmful effects of pre-trial detention will be discussed in Part VII.

One of the concerns under the YOA was that too many youth were being detained for social welfare reasons, often because they had "no adequate place to stay" (Doob & Cesaroni, 2004: 164; Carrington & Schulenberg 2004: 71). To address this problem, the YCJA stipulates that a youth cannot be detained for child protection or other social measures. A second concern under the YOA was that the Court was not inquiring about a responsible person that may be available to take custody of the youth in a detention situation (Justice Canada, 2002). In fact, Varma found that not once in the 118 bail hearings that she observed did the Court inquire if a

responsible person was available to take charge of a youth (2002: 159). As a result, the YCJA mandates that the Justice of the Peace or Judge must inquire about a responsible person who might assist a youth who would otherwise be detained pending trial. The YCJA has also tried to restrict the use of pretrial detention by stipulating that a youth cannot be detained if that youth would not receive a custodial disposition upon a finding of guilt (Justice Canada, 2002).

Part VI: The Contested Hearing:

If the Crown Attorney decides to contest an accused release, a date is set for a bail hearing. At this hearing, the Judge or Justice of the Peace does not attempt to determine the guilt or innocence of an accused. Rather, it is the Court's job to make a predictive inquiry based on the evidence about what an accused may do if he/she is released on bail. To assist the Court in making this inquiry, the Criminal Code stipulates the following grounds of detention (Hill, 2004: 32-5 to 32-7):

(1) The Primary Ground - Is detention necessary to secure the accused's appearance for trial (Hill, 2004: 32:5)? In other words, is there evidence to suggest that the accused is a flight risk? In determining whether the accused is a flight risk, the Court will consider, among other factors, whether the accused has strong ties to the community. An accused who has strong ties to the community has family, friends, owns property and/or is employed within one's community. The Court's hypothesis is that if an accused has strong ties to the community, they are less likely to fail to appear for future Court appearances (Trotter, 1999: 126-131). The Primary Ground is of socio-legal concern because accused who are homeless and poor often lack community ties, and thus may be detained on this ground.

(2) The Secondary Ground - Is there a substantial likelihood that the accused will re-offend if released? Essentially, this ground is related to the protection or safety of the public. The Court will consider such factors as the nature of the offence, the criminal record of the accused, and whether the accused was already out on bail when he/she allegedly committed the instant offence (Trotter, 1999: 133-139).

(3) The Tertiary Ground - Is detention necessary to ensure that the public has confidence in the administration of justice? The Court, in this case, "permits the detention of an accused person based upon the anticipated reaction of the public to the decision, free of any concern about the accused person absconding or re-offending" (Trotter, 1999: 145-146).

In general, the onus is on the Crown Attorney to justify to the Court why an accused should be detained. However, in certain cases, the onus is on the accused to demonstrate to the Court why their detention is not justified on the Primary, Secondary or Tertiary Grounds; a much harder test for most accused. A reverse onus situation is triggered when the accused is charged with certain serious offences or is in breach of a bail condition (Hill et al. 2004: 32-6). If the Justice decides that the accused should be released, the accused will be released, usually with some conditions attached. However, if the Justice decides that the accused should be detained, the accused will be held in custody pending the determination of his/her case (subject to any bail appeal). Section 11(d) of the *Charter* states that even though an accused has been denied their liberty, he/she is presumed innocent until a finding of guilt is rendered (Greenspan & Rosenberg, 2005: CH/41).

In relation to contested bail hearings, Koza and Doob found in a Toronto study that 43% of adult accused were released (1974: 265). In a 1994 Ontario study, Doob also reported that 26% of his sample, which included people charged with drug offences, bail violations, serious assaults, robbery and sexual assaults, were detained after a contested bail hearing (cited in Trotter, 1999: 34).

Prediction

The Court's decision to release or detain an accused is based upon evidence given at a show cause hearing about the charges, the character of the accused, and the social circumstances of the accused (Trotter, 1999: 223). As mentioned, the Court makes a predictive inquiry based on the evidence about what an accused may do if he/she is released on bail (Hill et al. 2004: 32-6 to 32-7). The S.C.C. acknowledges that it is impossible to make exact predictions about recidivism, and thus bail cannot be denied unless there is a likelihood that the accused will re-offend, interfere with the administration of Justice and/or is a flight risk (R. v. Morales; Trotter, 1999: 126).

Trotter contends that the most serious problem in the Court's assessment of dangerousness is that much of the literature suggests that actuaries and mental health professionals are not very accurate in determining who is likely to be dangerous in the future (1999: 49). Most experts agree that predicting future behaviour is problematic. For instance, Gottfredson and Gottfredson argue that Judges tend to over-predict rather than under-predict who will re-offend or fail to appear for Court (cited in Williams, 2003: 305). The literature, in fact, suggests that prediction devices have more than a 50% false positive rate (Silver & Miller, 2002: 142). As mentioned, the Court will look at factors such as seriousness of offence, criminal record, and ties to the community in the decision making process. However, Hagen & Morden report that many studies have found that these variables do not predict dangerousness and/or are not related to whether one will fail to appear for future Court appearances (1981: 13). Other researchers disagree. For example, Goldkamp argues that nature of the offence, community ties, criminal record, and past bail record are predictors of an accused's likelihood of failing to appear for Court and re-offending while on bail (cited in Dhami, 2005: 383-384).

Legal Factors

The literature in Canada and the United States seems to agree that the seriousness of the offence and the prior record of the accused are the most important factors in the Court's Bail decision (e.g., Goldkamp & Gottfredson cited in Williams, 2003: 302; Roberts & Doob, 1997: 507; Demuth & Steffensmeier, 2004: 233). The Commission on Systemic Racism also found that accused in a reverse onus situation were more likely to be denied bail (Cole et al.1995: 36). As mentioned, a reverse onus situation is when the onus is on the accused to justify their release to the Court.

In relation to the pretrial detention of youth, researchers have found that prior record and current charge(s) were important factors in the Court's pre-trial detention decision (Carrington & Moyer, 1988: 474; Varma, 2002: 159). In another study, Carrington, Moyer & Kopelman found that the most important determinants for the Court were the Youth's criminal record and whether the youth was "under control" (cited in Doob et al. 1995: 122). Other research has indicated that factors related to one's ties to the community, such as living with parents or school attendance have some impact on the bail decision (Doob & Cesaroni, 2004: 167). On the other hand, Frazer & Bishop, researchers from the United States, found that detention decisions could not be predicted on legal or sociodemographic characteristics (1985: 1150). In a 1992 Ontario study, Gandy found that 79% of the youth were detained on property charges, or administration of justice charges (usually non-violent offences), and that 24% of the youth were detained on the Primary Ground of detention (cited in Doob et al. 1995: 122-123). In addition, Gandy found that older youth, aged 15 to 17, were more likely to be detained, and that the youth's criminal record was the most important determinant in detention (cited in Varma, 2002: 147). In a Toronto study, Varma found that 29.7% of the youth were detained predominantly on legal factors such as record and

charge(s); although the status of the youth, such as whether they were living at home, or attending school were also related to the bail decision (2002: 157-159).

Legal Consequences: Breach of a Bail Condition:

If released on bail terms, the Justice may order an accused, among other things, to obey a curfew, not to associate with certain individuals, or not to consume alcohol or drugs while on bail. A breach of one's bail condition has serious consequences since this type of conviction may draw one further into the Criminal Justice System. As well, this type of conviction can negatively affect one's chances of securing bail in the future since the Crown and the Court will consider prior breaches of bail in future bail decisions (Trotter, 1999: 438). Unfortunately, the literature suggests that many people breach their bail conditions. For example, research in England found that 10%-12% committed further offences while on bail and that 7-9% failed to appear for their court appearances. As well, Raine and Willson found that 45% of their sample had breached a condition of their bail, but that only 38.5% were caught and charged (cited in Trotter, 1999: 418). A number of researchers contend that terms of release set people up for failure (e.g., Gandy cited in Bell, 2005: 245). For example, if the Court orders an alcoholic not to drink, there is a very good chance that this individual will consume alcohol. Justice and The Poor argue that the lower socio-economic class is more susceptible to re-arrest because they are more visible to the police (National Council of Welfare, 2000: Pt. I).

In relation to youth, the literature seems to agree that bail conditions are especially problematic since some bail terms may set a youth up for failure (e.g., Justice Canada, 2002; Gandy cited in Bell, 2003: 244). In fact, the evidence indicates that many youth that are detained for a bail hearing are then released on bail terms. For example, in a Toronto study, Varma found

that 81 of the 118 youth that were held for a bail hearing and released were ordered to comply with certain conditions (2002: 157). The danger is that for many youth a minor encounter with the Criminal Justice System may escalate into many breaches until eventually the youth receives a custodial term (Bala, 2003: 260). For instance, a youth who is charged with a minor assault may be released on conditions to obey a curfew. Given time, the youth may breach their curfew, (a normal occurrence for most teens) be charged with a bail breach, held for another bail hearing, and released on stricter terms to obey a curfew and attend school. The youth may then breach both these conditions, and the cycle continues until the youth eventually is given a custodial sentence.

The Primary Ground of Detention: An overlap between Legal and Non-Legal Factors

As stated, the Primary Ground of detention is interpreted as being related to the accused's ties to the community, such as whether they are employed, own property, have a permanent home address, or have sureties who are willing to monitor their behaviour while on bail (e.g., Trotter, 1999: 129-131; Cole, et al. 1995: 32-33). The Court's assumption is that if an accused has strong ties to the community, they are less likely to fail to appear for future Court appearances (Trotter, 1999: 129-131). However, because of their economic and social circumstances, many of the lower class defendants face a challenge meeting the community ties criteria, and hence their chances of being detained may increase. Striboplulos concurs, and suggests that individuals who are homeless, have prior criminal records, and/or are mentally ill are the least likely to qualify for pre-trial release because they lack community ties, and rarely have suitable sureties to monitor their behaviour (2003). Furthermore, there are reports from the legal community that the poor are more likely to be denied bail because they lack sufficient community ties. For example, many Judges and defence counsel state that it is not uncommon for accused to be denied bail, on fairly

minor charges because they have criminal records, lack suitable sureties, and have no release plan (Kapoor, 2002: 30). Thus, the anecdotal evidence appears to indicate that the poor may be discriminated against in the bail process because they lack community ties.

In support of this anecdotal evidence are studies that have linked employment status to pre-trial detention (e.g., D'Alessio and Stolzenberg 2002: 178). A study in United States conducted by D'Alessio and Stolzenberg reported that unemployed robbery and burglary suspects were 2.5 times more likely to be detained than employed robbery and burglary accused (2002: 178-187). In addition, a 1995 study conducted by the Commission on Systemic Racism in Ontario found that the most important variables in relation to pre-trial detention were in rank order; (1) employment status (2) presently on bail, (3) no fixed address (4) high or low status of employment (5) Race (6) previous prison term and (7) marital status (National Council of Welfare, 2000: Pt. II). The Commission concluded that while employment was a significant variable, it did not fully explain why Blacks were held in pre-trial detention more often than Whites (Cole et al. 1995: 37). Several defence counsel interviewed for the Commission's study stated that the biases in the bail process were systemic, but that they believed the issue was more income than racial because "white accused were able to show more often than racial minorities ...wealth, employment…family support, community support…which impel crowns, police and judges to extend bail..." (Cole et al.1995: 15). The National Council of Welfare analyzed the Commission's data and concluded that most Canadians were denied bail, "…not because they are dangerous and poor, but mostly because they are poor" (2000: Pt. II). Roberts & Doob also analyzed the Commission's data, and concluded that the only characteristic of the offender that was significantly related to pre-trial detention was one's employment status (1997: 514).

Other studies have found that not having a fixed address seems to be a more important variable in pre-trial detention than employment status. In a Toronto study, Kellough and Wortley, found that criminal record, nature of charge, and the number of charges were positively related to pre-trial detention. However, these researchers also found that people without a permanent address were more likely to be denied bail than those who had a permanent home (2002: 187-196). This study highlights the importance of another one of the community ties criteria; a permanent address.

As noted, the literature suggests that Canada's mentally ill are overrepresented in the Criminal Justice System (e.g., Leiper, 2005). In relation to bail, Corrado et al. reports that of the 790 men held in a Vancouver pre-trial detention center that, "16% had a major mental disorder…86% had a substance abuse disorder [and] 88% had other mental disorders…" (cited in Johnson, 2004: 13). It was hypothesized that the high prevalence of accused suffering from mental disorders in pre-trial custody may be partly due to their inability to post bail (cited in Johnson, 2004: 13). Research in the United States has found that mental illness is related to homelessness (Perressini, 2004: 388). And, as previously stated, studies have found a relationship between homelessness and the denial of bail (e.g., Kellough & Wortley, 2002: 196).

In contrast to the above studies, a study completed by Dhami in the United Kingdom examined disagreements between Judges' pre-trial decisions. As the United Kingdom's legal system is similar to Canada, Dhami felt this study could be generalized to Canada. In Dhami's sample, 60% of the Judges stated that the accused's ties to the community was a significant factor in their bail decisions in relation to whether or not the accused was a flight risk. In fact, community ties was ranked the highest; higher than gender, race, age, offence, victim, criminal

record, and strength of prosecution case in relation to flight risk. Dhami discovered more disagreements between Judges' pre-trial decisions on accused with weak community ties, those charged with serious offences, and those who had prior bail breaches (2005: 368-383). As this study could be reasonably generalized to Canada, it raises a concern that some lower class defendants may be detained because of their lack of community ties, while others may be released in spite of their lack of ties to the community - clearly an unequal practice. Canadian legal experts also suggest that there may be inequality in Judges' pre-trial decisions. For example, it has been reported that one of the common weaknesses in bail hearings is that the socio-economic status of an accused may bias the Judge's pre-trial detention decision (Hill et al. 2004: 32-30).

One solution to the detention of an accused on the Primary Ground is to utilize bail programs which assist people who would otherwise be detained because of their financial situation or because they lack suitable sureties. Bail programs have staff that supervise accused in an effort to ensure they attend their court appearances and comply with their bail conditions. In fact, anecdotal evidence suggests that bail programs decrease the number of people held in pre-trial detention, reduce failure to appear and breach charges, and have an impact on recidivism (Locke et al. 1999: 17-18).

The Criminal Code of Canada prohibits fixing cash deposits for bail so high that it effectively creates a detention order (Greenspan & Rosenberg, 2005: CC/939). However, there have been reports that many poor people are detained because they lack sureties and/or cannot meet the Court's financial requirements. Studies in the United States, for instance, have found that unemployed defendants were much less likely to secure their release because they did not have the funds to post the required bail (e.g., Williams, 2003: 313; Sigler & Formby, n.d). Trotter contends

that this is not just an American problem since some Canadians are in pre-trial custody simply because they cannot meet the Court's bail conditions (1999: v). As well, a 1992 study by the Ontario Ministry of Correctional Services discovered that 35% of the defendants who had been granted bail were still in custody a week later because they were unable to post bail. In addition, a 1994 survey of prisoners revealed that two-thirds of those released on bail conditions were still in pre-trial custody because they could not meet the cash bail requirement and/or find suitable sureties (National Council of Welfare, 2000: Pt. II). In addition, a study in Toronto found that 45% of the accused were released on bail with a surety; however, 15% were still in jail because they could not meet the surety requirement (John Howard Society of Ontario, 2002: 3). Other scholars, however, have not found a relationship between pre-trial detention and social class, even after controlling for legal factors (Wilbanks cited in Kellough & Wortley, 2002: 187). Nevertheless, while questions remain as to the exact relationship between pre-trial detention and community ties, the research appears to be fairly consistent that a link may exist

Non-legal Factors:

Gender & Negative Police Assessment:

A number of researchers have found that legal factors explain the over-representation of males in the bail detention category (Demuth & Steffensmeirer, 2004: 233-238; Steury & Frank, 1990: 430). Kellough & Wortley found in a Toronto study that those who had received a negative police assessment were more likely to be denied bail. Kellough & Wortley's study was large; 1,800 criminal cases, 26% of whom had been detained, and thus it may be more valid than many of the other studies which had smaller sample sizes (2002: 190-197).

Ethnicity:

In relation to ethnicity, Blacks and Aboriginals are over-represented in the Criminal Justice System (e.g., Roach, 1996). Judges have acknowledged that racism, at least in relation to juries, exists within the Criminal Justice System (e.g., R v. Parks; R. v. Williams). In relation to bail, a number of studies have concluded that Blacks are more likely than Whites to be detained after a bail hearing (Demuth & Steffensmeier, 2004: 222; Cole et al. 1995: 37). The Commission on Systemic Racism for Ontario found that Blacks, even when controlling for criminal record and bail status, were less likely than Whites to be released following a bail hearing, especially in relation to drug charges (Cole et al. 1995: 37). Roberts & Doob analyzed the Commission's data and also found that Blacks charged with drug offences were more likely to be detained at a bail hearing than Whites, even after controlling for legal and social factors (1997: 505). The literature also suggests that Aboriginal status negatively affects the bail decision. The Manitoba Aboriginal Justice Inquiry found that natives were more likely to be detained pending trial than non natives (cited in Kellough & Wortley, 2002: 187). Legal scholars also report that Court biases may affect the bail process. For example, Hill et al. reports that one of the weaknesses in bail hearings is that race may bias the Court's judgement (2004: 32-30).

Part VII: The Dangers of Pre-trial Detention:

> "A bail hearing is arguably the single most important step in criminal proceedings, given the negative impact of pre-trial detention..." (Hill et al. 2004: 32-1).

A. Individual/Societal Cost:

The impact of pre-trial detention is extremely detrimental to all accused. For example, if bail is refused, an individual may suffer great psychological stress since one may lose their job and/or home. The detention of a family member, who is a bread winner, is especially problematic because it may have psychological and financial repercussion for the rest of the family. This is a particular hardship for those families that are already living on the margins of society (National Council of Welfare, 2000: Pt. II; Manns, 2005; Locke et al. 1999: 12). Further, an accused and their family may face stigmatization and be ostracized by their community because of an accused's alleged criminal behaviour. This, in turn, may lead to the breakdown of some families (Manns, 2005).

Pre-trial detention is probably even more stressful for youth. For instance, Liebing suggests that youth may be bullied while in remand, and that pre-trial detention is highly stressful because of the uncertainties surrounding the disposition of the youth's case (Liebing cited in Doob &Cesaroni, 2004: 168). Power & Beveridge also suggest that the stress of pre-trial detention may negatively affect a youth's self-esteem (cited in Doob & Cesaroni 2004: 168).

B. Pre-trial detention and defence

A second danger of pre-trial detention is that it may affect the ability of an accused to defend their charge. For example, a detained individual may have a more difficult time finding a lawyer, communicating with that lawyer, and finding evidence or witnesses to support their case while they are in custody (e.g., Hill, et al. 2004: 32-1; National Council of Welfare, 2000: Pt. II; Trotter, 1999: v**;** Hagen & Morden 1981: 14). Further, detained individuals are prevented from taking steps that would make a good impression on the Court, such as finding a job or demonstrating that they are attempting to mend their criminal ways (e.g., National Council of Welfare, 2000: Pt. II; Manns, 2005).

C. Harsh conditions of remand facilities

There is general agreement that pretrial detainees are often exposed to harsher conditions than sentenced inmates. Pretrial detention is quite onerous as remand prisoners are usually held in maximum security prisons that are often overcrowded, have frequent lock downs, and do not provide recreational, educational or rehabilitation programs. In contrast, many of the Federal Institutions are minimum security and provide programs for inmates. The Courts recognize that pre-trial custody is more arduous than serving a custodial sentence, and to reflect these harsh conditions, most Judges count one month in pre-trial custody as two months towards an accused's sentence (R. v. Wust; National Council of Welfare, 2000: Pt. II). However, the credit for time served does not reflect the horrendous conditions in some remand centers. For example, Christopher Crosier, a correctional officer at the Toronto (Don) Jail stated, "the cells…are six feet by nine feet…inmates sleep three persons to a cell with one inmate sleeping on a mattress on the floor…Due to staff cutbacks… there are increased security and health threats endangering the life of both staff and inmates…" (Gold, 2003: 1-2). Another senior official at the Don Jail testified that

"inmates who are bigger, stronger, more vocal, more menacing usually get one of the bunks in the cell, instead of having to sleep on a mattress on the floor next to the toilet" (Kari, 2003). To reflect these deplorable conditions, many Judges have given credit of three months for every one month spent in a remand facility rather than the normal two for one (e.g., R. v. Hancock; R. v. Jabbour; R. v. Robinson; R. v. Forde).

Youth - The pre-trial detention of youth has also drawn criticism. For example, one pregnant first time offender was forced to sleep on the floor with only one sheet and one blanket. The Justice presiding in this case stated that this treatment was a "shocking deprivation of human rights" (cited in Hill et al. 2004: 32-17). Bala also reports that many of the youth remand centers do not have adequate programs or resources, and that some youth report being abused by their jailers and other inmates (Bala, 2003: 258 & 465).

D. Pre-trial Detention Increases the likelihood of Conviction and length of sentence:

Adult: Two of the most consistent findings in Canada and the United States (even when controlling for type of charge and criminal record) is that pre-trial detention has an adverse effect on the likelihood of conviction and severity of sentence (e.g., Friedman, 1965: 110; Williams, 2003: 312; Hagen & Morden, 1981: 19; Kellough & Wortley, 2002: 198-199; Roberts & Doob, 1997: 510; Koza & Doob, 1974: 399-400). Researchers have suggested that one reason for this result is that a pre-trial defendant is surrounded by an aura of guilt (e.g., Koza & Doob, 1974: 392). Yet, other researchers partially disagree that there is a relationship between pre-trial detention and conviction. For example, Goldkamp argued that pretrial detention has no affect on the likelihood of conviction, but is related to a custodial sentence (cited in Williams, 2003: 302-303).

Youth: The literature also suggests that pre-trial detention has a negative affect on the likelihood of conviction and severity of sentence for youth. For example, Fagan & Guggenheim report that detained youth are more likely to be convicted and receive a custodial sentence (cited in Doob & Cesaroni, 2004: 169). However, Frazer and Bishop, researchers from the United States, disagree since they did not find a relationship between pre-trial detention and sentence (1985: 1148)**.**

However, another valid argument is that the the seriousness of the charge and the accused's criminal record are the strongest variables in determining one's sentence. In support, Doherty and deSouza found that there was a strong and consistent relationship between the likelihood of a custodial disposition and the number of prior convictions (cited in Fleming, 2001: 485).

E. Pressure to plead guilty:

The research in Canada and the United States generally agree that pre-trial detention may pressure people to plead guilty, even if they are innocent (e.g., Manns, 2005). The literature suggests that there are many reasons that a detainee may opt to plead guilty. For example, accused may not want to do dead time (time in detention prior to conviction and sentence) and/or they may plead guilty if they will be moved to a less crowded custodial facility. As well, since it may take months for an accused to come to trial, an accused may feel pressured to plead guilty if their sentence will not involve any more jail time (Kellough & Wortley, 2002: 190). In fact, Kellough &Wortley found that the odds of pleading guilty were 2.5 greater for those held in detention versus those released on bail (2002: 199). These authors felt that the data supported the hypothesis that the Crown Attorney is much more likely to coerce a guilty plea if an accused is in custody (2002: 198). Fagan & Guggenheim report that youth are also more likely to plead guilty if they are in pre-trial

detention (cited in Doob & Cesaroni, 2004: 169). In contrast, reports suggest that if one is released on bail, they are more likely to resist pleading guilty and have their charges withdrawn. Manns, for instance, reports that if one is released pending trial, they are more likely to work with a lawyer and try to mount a vigorous defence in order to avoid a prison term (2005). In addition, Kellough & Worltley found that accused on bail were 2.3 times more likely to have their charges withdrawn than those who had been detained (2002: 199).

F. Pre-trial detention and Recidivism:

The third danger of pre-trial detention is that it may contribute to recidivist behaviour. Most experts are in agreement that one of the most important predictors of continued criminal behaviour is related to one's peers (e.g., Linden, 2000: 349). Burgess and Akers Differential Association-Reinforcement theory contends that criminal behaviour is learned through interaction with other delinquents, and that criminality is reinforced and justified by peers to such an extent that it is viewed as a new normal (Bell, 2003: 170). The literature suggests that one is at a heightened risk of learning criminal behaviour in a custodial facility. One can understand this statement since these facilities have often been referred to as schools of crime. In relation to pre-trial detention and recidivism, an Australian study compared two groups; those detained and those released pending trial, and found that the recidivism rate was higher for those remanded (64%) versus those released (37%) (cited in National Council of Welfare, 2000: Pt. II). Agnew also concluded in his study of peer interaction "...that high levels of interaction, as opposed to moderate or low interaction with peers who are involved in serious forms of delinquency... contribute significantly to committing serious acts of delinquency on the individual level" (cited in Shoemaker, 2000: 147). If one is in pre-trial detention, he/she would be in a situation where there would be high levels of interaction

with deviant peers, which may lead to a heightened risk of recidivism.

Another theory that attempts to explain recidivist behaviour is Labeling theory. This theory argues that if one is labeled a deviant, this person may become committed to a deviant identity (Bell, 2003: 166; Linden, 2000: 355). The literature suggests that labeling may have the greatest effect if it is applied at a young age. For instance, Bishop et al. compared adult and youth cases, and concluded that there were higher recidivist rates among the youth (cited in Shoemaker, 2000: 206). As well, Smith and Gartin suggest that labeling has more impact when it includes incarceration (cited in Shoemaker 2000: 205). One could argue that simply being held in pre-trial detention, even though there has been no finding of guilt, may cause some accused, especially youth, to assume a criminal identity, which may then lead to recidivist behaviour.

A number of Strain Theories also attempt to explain deviance. For example, Merton argued that "deviance occurs when access to the approved means of reaching culturally approved goals [are] blocked" (Kendell, 2000: 212). Cloward and Ohlin state that a criminal subculture can result when there are social barriers to achieving conventional goals (Linden, 2000: 280). It is this subculture that provides role models that encourage criminal activity, creates the emotional bonding among members, and provides an alternative way to achieve conventional success (Quinn 2001: 386; Morrison, 1995: 286). One could argue that inmates in pre-trial detention are surrounded by a criminal subculture, and hence these prisoners may be more at risk of joining a criminal subculture because of the close proximity, and because they may believe they no longer have access to the culturally approved goals.

Thus, the literature suggests that pre-trial detention is harsh, and accused that do not attempt to obtain bail, or are denied bail, are at a distinct disadvantage in the Criminal Justice System. Thus,

it is important that accused attempt to seek their release on bail so they can avoid the many dangers of pre-trial detention.

The Present Study

Methodology

This research project was completed as part of a course requirement for an Honours Undergraduate degree at the University of Waterloo. The research focused on the bail process at the Kitchener Provincial Court from August 16th to September 15th, 2005. Four methods of data collection were used: Court observation, review of Court documentation, information from the local Bail Program, and interviews. Data was collected on all of the adults and youth who were detained for a bail hearing during this time period

In the first part of the study, I observed the bail process in one of the Bail Courts. In Kitchener, there are usually two courts each day that are scheduled to hear bail cases. All of the accused who are arrested and held for a bail hearing start out in the 1st Bail Court. If the Crown consents to an accused's release, that person will usually be released from the 1st Bail Court. However, many accused are adjourned out of this court to a Plea Court, the Video Court, or the contested Bail Court. Thus, for the most part, the 1st Bail Court deals with consent releases and adjournment of cases. The 2nd Bail Court is where the majority of the contested bail hearings are heard. A contested bail hearing is held if the accused wishes to obtain bail, and the Crown Attorney is opposing their release. Since the Bail Courts are running simultaneously, this author chose to observe the 2nd Bail Court where the contested hearings are heard.

Since 1985, I have been employed as a law clerk for a number of criminal lawyers. Thus, I am familiar with the bail process, and know many, if not all of the people who work at this Courthouse. As a result, I was able to collect an abundance of data. To assist me in my data collection, the Staff Sergeant of the Kitchener Court Bureau, and the senior Crown Attorney of the

Kitchener Provincial Court allowed me to review the crown briefs in the contested Bail Court. Each brief had a synopsis of the charge(s), the age, sex, ethnicity and criminal record of the accused. Since some accused set a bail hearing, and then decided to plead guilty, a number of the packages were not available for review since they had already been sent to another courtroom. However, the majority of the packages were reviewed.

In the second part of the study, I reviewed the police docket for the 1st Bail Court during the time period under study. This was crucial as it provided the age, sex and bail dispositions for all of the accused that went through Bail Court during this time frame. Of course, because I did not observe all of these individuals, data that would have been useful is missing. In addition, duty counsel provided me with copies of the court docket for the contested Bail Court. This documentation indicated how long people had waited for their bail hearings. Youth In Conflict with the Law (YICL), a bail supervision program that assists both youth and adults in the bail process, provided me with data on their organization, as well as data on the number of individuals they assisted during this time frame.

In the third part of the study, four Crown Attorneys, four defence lawyers and four duty counsel were interviewed to get their opinions on the bail process. Without the cooperation and assistance of the Court Bureau, the Crown Attorneys, the defence bar, and YICL, I would never have had access to the majority of the data collected.

The Results
Part I: Police:

Part I is primarily descriptive, although this section will include evidence of an association between certain variables. As well, this part includes a number of anecdotal comments from the interviewees. Tables 1 and 2 include data on all of the people who were arrested and detained for a bail hearing between August 16th and September 15, 2005. However, Tables 3-8 reflect data that was collected on people who appeared in the contested Bail Court. This section is divided into two sections; non-legal factors/arrest and legal factors/arrest. A small number of people were arrested and released on bail, and then re-arrested again during the time period under study. For this reason, the data will reflect the number of cases that were held for a bail hearing. In Part I, the following methods were used to collect data: court observation in the contested Bail Court, a review of the crown briefs from the contested Bail Court, and information from the police docket for the time period under study.

1. Non-Legal Factors and Arrest

As reported in the literature review, research has reported that the police are more likely to arrest male suspects (e.g., National Council of Welfare, 2000). Hence, data was collected on the gender of each accused (see Table 1).

Table 1: Adult and Youth - Gender of Accused - Arrest and Detention for Bail Hearing

	Adult	**Youth**	**Total**
Male	290 (87%)	52 (88%)	342 (87%)
Female	45 (13%)	7 (12%)	52 (13%)
	335 (100%)	59% (100%)	394 (100%)

Table 1 shows the distribution of gender in both the adult and youth categories. Males

were overwhelmingly held for a bail hearing in both the adult (87%) and youth (88%) categories.

Research has consistently reported that age may be related to a police officer's decision to arrest. For instance, the literature suggests that the police are more likely to stop and check people between the ages of 16 to 24 years to ascertain if they have a criminal record (Ericson cited in Griffiths & Verdun-Jones, 1994). As such, data was collected on the age of each accused at the time of their bail hearing. Pursuant to the Youth Criminal Justice Act, accused 18 years and older were classified as adults, while accused between the ages of 12 and 17 were classified as youth (Greenspan & Rosenberg, 2005: YC13) (see Table 2 and Table 3).

Table 2: Adult - Age at Arrest and Detention for Bail Hearing

Male				**Female**			
18-21 years **Mode	63 cases	(22%)		18-21 years **Mode	13	(29%)	
22-25 years	42	(14%)		22-25 years	7	(16%)	
26-29 years	32	(11%)	47%	26-29 years	10	(22%)	67%
30-33 years	27	(9%)		30-33 years	4	(9%)	
34-37 years	42	(14%)		34-37 years	7	(16%)	
38-41 years	35	(12%)		38-41 years	2	(4%)	
42-45 years	21	(7%)	53%	42-45 years	0	(0%)	33%
46-49 years	11	(4%)		46-49 years	2	(4%)	
50 plus years	17	(6%)		50 plus years	0	(0%)	
	290	(99%)			45	(100%) = 335	

Note: Percentages may not add to 100 due to rounding.

Adult:	Male:	32 years (mean)	18-21 years (mode)
	Female:	27 years (mean)	18-21 years (mode)

Table 2 shows the age distribution of the adults that were held for a Bail Hearing. The data indicates that there is a considerable age range in the male category. The most common category for male accused was in the 18 to 21 year category (22%). The data also indicates that 47% of the adult males were less than 30 years of age and that 53% of the males were over 30 years of age. The

data also shows that the most common category for female offenders was in the18 to 21 year age category (29%). Unlike the males, the majority of female offenders were under the age of 30 (67%).

Table 3: Youth - Age at Arrest and Detention for Bail Hearing

Male			**Female**		
12 years	4	(7%)	12 years	0	(0%)
13 years	2	(4%)	13 years	0	(0%)
14 years	7	(13%)	14 years	2	(29%)
15 years	12	(23%)	15 years **Mode	3	(43%)
16 years	9	(17%)	16 years	1	(14%)
17 years **Mode	18	(35%)	17 years	1	(14%)
	52	(99 %)		7	(100%)

Note: Percentages may not add to 100 due to rounding.

Youth:	Male:	15.5 years (mean)	17 years (mode)
	Female:	15.3 years (mean)	15 years (mode)

Table 3 shows that 17 year old male youth was the most common category (35%), and that 52% of the male youth were 16 and 17 years of age. Furthermore, 15 to 17 year old males were 75% of the male youth in Bail Court. On the other hand, the majority of the female youth sample were younger than the males. For example, 15 year old females were 43% of the female youth sample, and 14 and 15 year old girls were 72% of the female sample. There were no 12 and 13 year old girls. The female youth sample is very small, so this distribution might change with a larger sample.

The literature has also suggested that the police are more likely to arrest people from certain ethnic groups; specifically Blacks and Aboriginals (e.g., Roberts & Doob, 1997). Thus, data was collected on ethnicity. In this case, data was collected only on the accused in the contested Bail Court since one needed to review the police files, or view the Bail process to determine ethnicity.

The police report include a Canadian Police Information Centre Criminal Record Synopsis (CPIC) that classifies people into different ethnic groups. While the majority of accused were classified based on the CPIC report, a number of accused were also classified on skin colour and/or language spoken. This second method was only used when the police report was not available. Seven cases are missing because both the police report and the accused were sent to another courtroom (see Table 4).

Table 4: Adult & Youth - Ethnicity - Arrest and Detention for Bail Hearing

Adult & Youth Court Sample			**2003 Region of Waterloo**
White	107	(83%)	
Visible Minorities	22	(17%)	**Visible Minorities 9%**
Total	129	(100%)	

(*Missing data 7 cases**)**

The data in Table 4 indicates that 83% of the people in the contested Bail Court were White, while 17% were from a visible minority group. In 2003, the Region of Waterloo reported that visible minorities represented 9% of the region's population (Region of Waterloo, 2003). Thus, the data suggests that visible minorities are over-represented in the bail process since they were 17% of the sample; yet represent only 9% of the Region's population. However, this difference does not necessarily reflect ethnic bias, but rather may reflect legal factors of the case.

Another non-legal factor that may be related to arrest is socio-economic status (SES). For example, many researchers suggest that the police are more likely to arrest members of the lower socio-economic class (e.g., Hagan & Morden, 1981). As such, the following strategies were used in an effort to determine SES. People were coded into low or middle/upper categories.

(1) Employment status: If there was evidence that an individual worked full time, and made over

$40,000 a year, he/she was classified as middle/upper class. On the other hand, if one did not work, worked part-time, or full time at a low paying job, that person was classified as low SES. As well, if there was evidence that someone was on Social Assistance or a Disability Pension they were classified as low SES

(2) Residence: If one did not have a fixed address or lived at the House of Friendship (a hostel) one was classified as low SES. However, if one owned a home they were classified as middle/upper. As well, evidence of other assets was used in an effort to determine SES.

(3) Legal Retainer: If there was evidence that a lawyer was representing an accused on Legal Aid that individual was classified as low SES. This is because, generally speaking, only members of the lower socio-economic class qualify for Legal Aid. However, if there was evidence that a lawyer was privately retained then an accused was classified as middle/upper class.

(4) Severe alcohol and/or drug addiction/appearance: If there was evidence that an accused was a chronic drug addict or alcoholic, and appeared to be very malnourished and unhealthy, that individual was classified as low SES.

(5) Bail Supervision: If one was on bail supervision this individual was classified as low SES because the majority of people who are assisted by this program are from the lower socio-economic class.

(6) Criminal record: If one had an extensive criminal record, and had no opportunity for employment because they have been in and out of jail for a significant period of time, they were classified as low SES.

(7) Detention Order/Potential Custodial Sentence: If an accused was detained on a serious offence and adjourned to a guilty plea court that person was classified as low SES. For instance, an

accused who had been detained on armed robbery charges, and who an extensive record for armed robberies was classified as low SES because he/she was adjourned to guilty plea court, and was looking at a significant penitentiary sentence; especially since he/she received 10 years on the last armed robbery.

(8) Money seized at time of arrest: If an accused had a large sum of money seized at the time of arrest, they were classified as middle/upper.

(9) Personal knowledge: A number of accused are clients, or past clients of the law firm I work for, and thus their SES status is known to this researcher.

(10) Crown Ward Status: A Crown ward was classified as low SES.

If there was any indication that an individual was from the middle/upper class, that person was placed in this category. As some subjective measures were used in this category, an effort was made to reduce the chance of error by using as many SES indicators as possible. In this section, 8 cases are missing because it was not possible to make a determination on SES status (see Table 5).

Table 5: Adult & Youth - Socio-Economic Status Age at Time of Arrest and Detention for Bail Hearing

	Court Sample		**Region of Waterloo**
Low	102	(80%)	Low Income Families (1996) 12.1%
Middle/Upper	26	(20%)	
	128	100%	

(*Missing data - 8 cases)

Table 5 indicates that 102 cases or 80% were from the lower socio-economic class, and that 26 cases or 20% were from the middle/upper class. In 1996, The Region of Waterloo reported that 12.1% of the families in the area were low income (Region of Waterloo, 1996). Hence, it appears

that the lower socio-economic class are over-represented in the bail process since they are 80% of the sample, and only represent 12.1% of the Region's population. Even if the Region's statistics included data on singles, the lower socio-economic class would still be over-represented because it is unlikely that 67.9% of the singles would be from the lower socio-economic class.

The following question was asked in order to get the interviewees' opinions and perceptions about the relationship between the police and the lower socio-economic class, "Have you seen any evidence that the police unfairly target the lower socio-economic class"? Five respondents said no, two were unsure, and five said yes. Some of the interviewees who were unsure or said no felt the poor may be easier to catch, and were not specifically being targeted by the police. For example, one Crown Attorney stated, "They are more likely to come to the attention of the police because they are drinking and doing drugs in a public place rather than the privacy of their home". As well, a number of respondents mentioned that even though there are more members of the lower socio-economic class in Bail Court, there are also people from the middle class. In the yes category, four interviewees (all lawyers and duty counsel) felt, as reflected in some of the literature, that the police target the poor. For example, one lawyer stated, "The police operate in lower class neighbourhoods...if you go to Beachwood or Colonial Acres, you will not find a target team or downtown program. If you go to Cedar Street, Eby Street, or Charles Street, there are all kinds of cops there...they even have a project there, a target team..."

There have been reports that deinstitutionalization has increased the number of mentally ill that come into conflict with the law. In fact, the literature suggests that the police are more likely to deal with the mentally ill by arrest (e.g., National Council of Welfare, 2000). Hence, data was collected on evidence of a mental disorder in the contested Bail Court. An accused was classified

as having a mental disorder if there was evidence of schizophrenia, mood disorder, personality disorder and/or seeing a psychiatrist. It was only possible to collect evidence of a mental disorder (or lack of) in 101 of the cases since many accused were adjourned to a plea court, and in most cases, it was necessary to observe the bail process to collect data on this variable (see Table 6).

Table 6: **Adult & Youth - Evidence of a Mental Disorder at Time of Arrest and Detention for Bail Hearing**

Evidence of Mental Disorder	12	(12%)
No evidence of Mental Disorder	89	(88%)
	101	(100%)

(Missing data: 35 cases)

In Table 6, the data indicates that in 12% of the cases there was evidence that an accused was suffering from a mental disorder. To address the needs of the mentally ill that come into conflict with the Criminal Justice System, the Court Administrators in Kitchener have recently set up a Mental Health Court. In fact, a number of the mentally ill that I observed in this study were adjourned to this Court. This Court is in session every Tuesday, and is particularly well suited for these individuals since Mental Health workers and other support staff are there to offer bail support, diversion support or any other support he/she may need. The goal is to divert these offenders, if possible, out of the Criminal Justice System (personal communication, Crown Attorney, December 14, 2002).

Some of the research also contends that the police are more likely to arrest offenders who are disrespectful (e.g., Stribopoulos, 2003). It is hypothesized that if one is on drugs or intoxicated, one may be more disrespectful to the police, which in turn, may lead to arrest. Hence, data was collected in the contested Bail Court to ascertain how many cases had evidence of alcohol or drug problems (see Table 7).

Table 7: Adult & Youth - Evidence of Drug and Alcohol Problems at Bail Hearing

Evidence of Drug/Alcohol Problems	41 (41%)
No evidence of Drug/Alcohol	60 (59%)
	101 (100%)

(Missing data: 35 cases)

Note: Percentages may not add to 100 due to rounding.

Table 7 indicates that in 41 cases (41%) there was evidence of an alcohol and/or drug problem. What was particularly disturbing to the author is that the majority of people with drug problems were using crack cocaine. In fact, a number of accused were taking methadone in an attempt to stay off of crack. The crack problem is much worse than I thought, and future research should examine the extent of this problem. This is especially relevant because research suggests that a drug addiction may lead one to commit crime in order to support a habit.

2. Legal Factors and Arrest

A. Type of Charge:

The literature suggests that the nature of the charge(s) may be related to arrest. For example, it has been reported that those charged with a serious offence, or a bail breach are more likely to be arrested by the police (e.g., Hucklesby, 2001). A bail breach, or breach of recognizance charge is laid when an accused has not abided by the terms of his/her bail release. For example, if an accused is charged with assaulting their spouse, the Court will usually prohibit the offender from contacting the victim. If the accused then contacts the victim and the police are informed of this allegation, the police will usually charge the accused with a bail breach. In most cases, the accused will be re-arrested, and held for a bail hearing.

In this study, the majority of the accused were charged with numerous offences. Thus, the

most serious offence was counted. The charge categories included violence/violent related, property, narcotics, driving offences, breach of probation/breach of conditional sentence and other. If one was charged with a violence or violent related offence, this was always coded as the most serious offence. As well, the number of accused that were charged with a bail breach was coded. Table 8 and 9 reflects the data that was collected from the contested Bail Court.

Table 8: Adult - Type of Charge and Breaches of Bail Conditions

Charge	**With Bail Breaches**	**Without Bail Breaches**	**Total**
Violence/Violence Related	26 (51%)	37 (57%)	63 (54%)
Property	10 (20%)	15 (23%)	25 (22%)
Narcotic	4 (8%)	3 (5%)	7 (6%)
Driving Offences (CCC)	2 (4%)	3 (5%)	5 (4%)
Breach of Prob/Cond. Sent.	8 (16%)	7 (11%)	15 (13%)
Other	1 (2%)	0 (0%)	1 (1%)
	51(101%)	65 (101%)	116 (100%)
Percent of total	44%	56%	100%

Note: Percentages may not add to 100 due to rounding.

Table 8 shows that 44% of the adults had been charged with breaching a bail condition(s). As well, 51% of the people who had been charged with a bail breach also had a violence/violent related offence(s) as their most serious charge. Violence/violent related offences were the most serious charge(s) in 54% of the cases, and property offences were the most serious charge in 22% of the cases. In fact, violence/violent related offences and property offences made up the greatest portion of charges since they represented 76% of the cases.

Table 9: Youth - Type of Charge and Breaches of Bail Conditions

Charge	With Bail Breaches	Without Bail Breaches	Total
Violence/Violent Related	6 (50%)	1 (13%)	7 (35%)
Property	4 (34%)	4 (50%)	8 (40%)
Narcotics	0 (0%)	1 (13%)	1 (5%)
Driving Offences (CCC)	0 (0%)	0 (0%)	0 (0%)
Breach of Disposition	2 (17%)	2 (25%)	4 (20%)
Other	0 (0%)	0 (0%)	0 (0%)
	12 (101%)	8 (101%)	20 (100%)
Percent of total	60%	40%	100%

Note: Percentages may not add to 100 due to rounding.

Table 9 indicates that 60% of the youth had been charged with a breach of a bail condition. As well, youth were more likely than adults to have property offences as their most serious offence (40%) versus offences that were violence/violent related (35%). In total, property offences and violence/violent related offences represented 75% of the cases, which was very similar to the adult data.

B. Criminal Record

The literature suggests that one of the most important factors in a police officer's decision to arrest is the criminal record of the suspect (e.g., Hagan & Morden, 1981). In Table 10, criminal records are reported for both the adults and youth who were in the contested Bail Court. An adult criminal record was coded as follows: No Record = 0 convictions; Small Record = 1-5 convictions; Medium Record = 6-15 convictions and Large Record = 16 plus convictions. However, a youth's criminal record was coded differently because youth have not had as much time to accumulate a lengthy record. In the youth category, a criminal record was classified as follows: No Record = 0

convictions; Small Record = 1-3 convictions; Medium Record = 4-6 convictions and Large Record = 7-9 convictions. In the contested Bail Court, 96 adult and 16 youth criminal records were recorded. Please note that 24 cases are missing (see Table 10).

Table 10: Adult and Youth - Criminal Record at Time of Arrest and Detention for Bail Hearing

Adult:			**Youth:**		
(1) None	17	(18%)	(1) None	2	(13%)
(2) Small	33	(34%) 52%	(2) Small	6	(38%) 51%
(3) Medium	17	(18%) 48%	(3) Medium	4	(25%) 50%
(4) Large	29	(30%)	(4) Large	4	(25%)
Total	96	(100%)	Total	16	(100%)
(missing data: 20 cases)			(missing data: 4 cases)		

Table 10 illustrates that 48% of the adults and 50% of the youth that were held for a bail hearing had a medium or large record, and 52% of the adults and 51% of the youth had a small record or no record. It is interesting to note that 19 cases had no criminal record, yet these individuals were still held for a bail hearing. Thus, is the type of charge related to the arrest and detention for bail hearing of those accused with no record? (see Table 11)

Table 11: Adult & Youth - Type of Charge for Persons with no Criminal Record

	Adult:		**Youth:**	
Domestic occurrence	7	(41%)	0	(.00)
Other violence	7	(41%) 82%	2	(100.00)
Breach of bail term	2	(12%)	0	(.00)
Participation in Criminal Organ.	1	(6%)	0	(.00)
	17	(100%)	2	(100%)

Table 11 indicates that 82% of the adults, and 100% of the youth, without a record, had been charged with a violent offence. Table 11 also demonstrates that 41% of the adults were charged in

a domestic occurrence. This explains the detention of the people charged in a domestic with no record since the police, in this jurisdiction, must charge and detain an accused for a bail hearing if there are reasonable and probable grounds to believe that an accused has committed a domestic related offence. In fact, the police have no discretion on these types of offences (personal communication with Waterloo Regional Police officer, December 20, 2005). No firm conclusions can be drawn from the youth data or the remaining data on the adults since comparative information is missing on the accused that the police charged and released during this period, although it appears that this practice is rarely used for non-violent charges.

In an effort to see if the respondents' opinions on the police matched the data collected, they were asked, "What are some common characteristics of the people that the police hold for a bail hearing"? The most common characteristics that the participants reported were: drug addiction, alcoholism, emotional/psychological problems, long criminal records, low socio-economic status, and family conflict (e.g., domestic assaults). The data collected is consistent with many of these views.

Part II - Adult and Youth Bail Dispositions

Part II is purely descriptive and outlines the bail disposition for all of the adults and youth detained for a bail hearing during the time period under study (see Table 12 and 13). This data was collected by observation in the contested Bail Court, and by reviewing the police docket from the 1st Bail Court. The following are definitions and explanations of legal terms that are used in the bail process.

Released on consent: The Crown Attorney consents to an accused released on bail pending trial. Once the accused's case is called, the Justice of the Peace (JP) hears evidence on the case and, in most cases, agrees that the accused should be released on bail. In the majority of cases, the Court orders that an accused must comply with certain bail conditions if released. For example, the Court may order that an accused not consume alcohol or drugs while on bail.

Contested bail hearing/Detained: In a contested bail hearing, the Crown Attorney attempts to convince the JP that the accused should not be released on bail. On the other hand, the defence counsel tries to convince the JP that the accused should be released on bail terms. After hearing the evidence, if the JP finds that the Crown showed cause why the accused should not be released on bail, the JP will issue a detention order. This means that the accused will be held, in custody, until his/her charges are dealt with by the Court (subject to any bail appeal). **Contested bail hearing/Released:** However, if the JP, after hearing all of the evidence at a contested bail hearing, finds that the accused is a good candidate for bail, the JP orders the accused's release on bail, usually with certain conditions attached.

Adjournment for Plea: In this case, an accused is adjourned to the plea Court to plead guilty to some or all of the charge(s). In most cases, this is prior to a bail hearing. Hence, for

whatever reason, the accused has decided not to try to obtain bail on the charge(s) before the Court.

Consent Detention Order: An accused consents to his/her detention pending trial. This means that the accused remains in custody until the charges are dealt with by the Court.

Adjourn for Bail Hearing: A court date is set for a contested bail hearing.

Adjourn for Trial/Preliminary: An accused is in custody, either on a detention order, or prior to bail, and a trial date or a preliminary hearing court date is set.

Adjourn out of Bail Court: An accused is in custody, either on a detention order, or because they have not yet tried to obtain bail. In this instance, the accused is usually in the Video Court until they decide whether he/she will set a date for a contested bail hearing, a plea of guilty, a trial date or a preliminary hearing date. In Video Court, one appears via a televised screen from a detention centre.

Withdrawal: The Crown Attorney withdraws all of the charge(s) against an accused. This means that an accused has no criminal record arising out of the charge(s) before the Court.

Table 12: Adult Bail Dispositions

Adult Male	**1st Bail Ct.**		**Contested Bail Ct.**		**Total**	
Released on Consent	93	(50%)	47	(46%)	140	(48%)
Contested Hearing - Detained	0	(0%)	9	(9%)	9	(3%)
Contested Hearing Released	3	(2%)	19	(18%)	22	(8%)
Adjourned for Plea	58	(31%)	22	(21%)	80	(28%)
Consent Detention Order	3	(2%)	3	(3%)	6	(2%)
Adjourn for Bail Hearing	2	(1%)	1	(1%)	3	(1%)
Adjourn for Trial/Prelim	7	(4%)	0	(0%)	7	(2%)
Adjourned out of Bail Ct.	21	(11%)	2	(2%)	23	(8%)
Withdrawal	0	(0%)	0	(0%)	0	(0%)
Total	**187**	**(101%)**	**103**	**(100%)**	**290**	**(100%)**

Adult Female	**1st Bail Ct**		**Contested Bail Ct**		**Total**	
Released on Consent	21	(66%)	8	(62%)	29	(64%)
Contested Hearing-Detained	0	(0%)	0	(0%)	0	(0%)
Contested Hearing Released	0	(0%)	1	(8%)	1	(2%)
Adjourned for Plea	8	(25%)	1	(8%)	9	(20%)
Consent Detention Order	0	(0%)	2	(15%)	2	(4%)
Adjourn for BH	0	(0%)	0	(0%)	0	(0%)
Adjourn for Trial/Prelim.	0	(0%)	0	(0%)	0	(0%)
Adjourned out of Bail Ct	3	(9%)	0	(0%)	3	(7%)
Withdrawal	0	(0%)	1	(8%)	1	(2%)
	32	**100%**	**13**	**(101%)**	**45**	**(100%)**

Total: Adult Male and Female		
Released on Consent	169	(50%)
Contested Hearing - Detained	9	(3%)
Contested Hearing Released	23	(7%)
Adjourned for Plea	89	(27%)
Consent Detention Order	8	(2%)
Adjourn for BH	3	(1%)
Adjourn for Trial/Prelim.	7	(2%)
Adjourned out of Bail Ct	26	(8%)
Withdrawal	1	(.3%)
	335	**(100.3%)**

Note: Percentages may not add to 100 due to rounding.

Adult: Table 12 indicates that:

1. 140 cases or 48% of the males, and 29 cases or 64% of the female cases were released on consent. In total, 169 cases or 50% of the adult sample were released on consent.

2. 9 cases or 3% of the males, and 0 females were denied bail after a contested bail hearing. In total, 3% of the adult sample were denied bail after a contested bail hearing.

3. 22 cases or 8% of the males were released after a contested bail. On the other hand, only one female, or 2% had a contested bail hearing, and were released. In total 7% of the sample had a contested bail hearing and were released on bail.

4. 80 cases or 28% of the male cases, and 9 cases or 20% of the female cases were adjourned to plead guilty. In total, 89 cases or 27% were adjourned to the plea court.

5. 6 cases or 2% of the males, and 2 cases or 4% of the female cases consented to detention. In total, 2% of the adult sample consented to detention.

6. 1% of the males and 0 females had their cases adjourned for a contested bail hearing.

7. 2% of the males and 0 females had their cases adjourned for a trial or for a preliminary hearing.

8. 23 cases or 8% of the male cases, and 3 cases or 7% of the female cases had their charges adjourned out of Bail Court . In total, 26 cases or 8% of the adult sample had their cases adjourned out of Bail Court.

9. 0 males, and 1 female (2%) had their charges withdrawn.

Therefore, 284 cases or 85% of the sample were released on consent (50%), adjourned to a plea court (27%) or adjourned out of the Bail Court (8%).

Table 13: Youth Bail Disposition

Youth Male	**#5 - 1st Bail Ct.**		**#6 - contested Bail Ct.**		**Total**	
Released on Consent	22	(65%)	9	(50%)	31	(60%)
Contested Hearing - Detained	1	(3%)	0	(0%)	1	(2%)
Contested Hearing - Released	0	(0%)	2	(11%)	2	(4%)
Adjourned for Plea	6	(18%)	4	(22%)	10	(19%)
Consent Detention Order	2	(6%)	2	(11%)	4	(8%)
Adjourn for Bail Hearing	1	(3%)	0	(0%)	1	(2%)
Adjourn for Trial	1	(3%)	0	(0%)	1	(2%)
Adjourned out of Bail Ct.	1	(3%)	1	(6%)	2	(4%)
	34	**(101%)**	**18**	**(100%)**	**52**	**(101%)**

Youth Female	**#5 - 1st Bail Ct**		**#6 - contested Bail Ct.**		**Total**	
Released on Consent	2	(40%)	0	(0%)	2	(29%)
Contested Hearing - Detained	0	(0%)	1	(50%)	1	(14%)
Contested Hearing - Rel'd	0	(0%)	0	(0%)	0	(0%)
Adjourned for Plea	2	(40%)	0	(0%)	2	(29%)
Consent Detention Order	0	(0%)	1	(50%)	1	(14%)
Adjourn for Bail Hearing	0	(0%)	0	(0%)	0	(0%)
Adjourn for Trial	0	(0%)	0	(0%)	0	(0%)
Adjourned out of Bail Ct.	1	(20%)	0	(0%)	1	(14%)
	5	**(100%)**	**2**	**(100%)**	7	**(100%)**

Total Youth: Male and Female

Released on Consent	33	(56%)
Contested Hearing - Detained	2	(3%)
Contested Hearing - Rel'd	2	(3%)
Adjourned for Plea	12	(20%)
Consent Detention Order	5	(8%)
Adjourn for Bail Hearing	1	(2%)
Adjourn for Trial	1	(2%)
Adjourned out of Bail Ct.	3	(5%)
Total	**59**	**(99%)**

Note: Percentages may not add to 100 due to rounding.

The following description of the youth data includes males and females since the female

sample was small (n=7). Table 13 indicates that:

1. 33 cases or 56% of the youth were released on consent.
2. 2 cases or 3% of the youth were detained after a contested bail hearing.
3. 2 cases or 3% of the youth were released after a contested bail hearing.
4. 12 cases or 20% of the youth were adjourned to guilty plea court.
5. 5 cases or 8% of the youth consented to their detention.
6. 1 case or 2% of the youth were adjourned for a contested bail hearing.
7. 1 case or 2% of the youth were adjourned for trial.
8. 3 cases or 5% of the youth were adjourned out of Bail Court.

Therefore, 50 cases or 84% of the youth sample were: released on consent (56%), were adjourned to guilty plea court (20%) or consented to detention (8%).

PART III

The New Act: The Youth Criminal Justice Act

Part III includes the respondents' comments on the new Youth Criminal Justice Act. As well, there is some descriptive information in this section. As mentioned, research has suggested that too many youth were being held in pre-trial detention under the YOA. In an effort to curb the use of detention, the YCJA restricts the use of pre-trial detention by stipulating that: (1) detention cannot be substituted for child protection measures; (2) a youth cannot be denied bail if, upon a finding of guilt, the youth would not receive a custodial term, and (3) the Court must inquire whether there is a responsible person that could take custody of the youth before detaining that youth (Justice Canada, 2002). Thus, data was collected, and interviews were conducted to try to ascertain if the YCJA has reduced the number of youth in pre-trial detention.

Under the YOA, some of the research contends that incarcerated youth are more likely to have been involved with The Children's Aid Society (Bortner & Williams cited in Doob & Cesaroni, 2004). Thus, data was collected to ascertain how many youth in the contested Bail Court were Crown wards or past Crown wards of The Children's Aid Society (also known as Family and Children's Services). A Crown Ward is a youth who is under the age of 18, and whose legal guardian is Family and Children's Services (see Table 14).

Table 14: Evidence that youth is or has been a ward of Family and Children Services

Ward of FCS	4	(20%)	
Past ward of FCS	5	(25%)	45%
No evidence of Ward ship	11	(55%)	
	20	(100%)	

Table 14 indicates that 45% of the sample were either present or past Crown Wards. (Note:

In some cases, evidence of past wardship may not have been mentioned in Court). This is a very high percentage, however, a definite link cannot be made between past and present Crown Wards and arrest since data is missing on the youth that the police arrested and released during this study.

As well, interviewees were asked the following question in relation to Crown Wards, "Is a Crown Ward of Family and Children's Services (FCS) more likely to be arrested and then detained by the Court"? Four interviewees said yes, seven said no, and one was unsure. Many of the respondents that indicated yes felt because the youth did not have a parent to come to their defence, they were more likely to be detained. For instance, one lawyer stated, "A lot of the difference between a youth getting out, and not getting out is a parent who is obviously dedicated towards the future of the young person, and is prepared to go the extra step; whereas a ward is simply another kid". Another participant stated, "…by virtue of being a ward, they automatically don't have a surety...often times they are arrested and come to the attention of the authorities because of difficulties they are having in the group home...wards are under more of a microscope...many of these kids have been abused and shunted around. These kids have more on their plate, in my opinion, than other kids". In contrast, a number of respondents felt that Crown Wards were much less likely to be denied bail since a FCS worker is in Bail Court every day to assist these youth, and could, if necessary, find the youth a new place to live. One Crown Attorney, for example, stated, "In this jurisdiction, we are very fortunate that the local FCS has a liaison person who attends Court regularly…defence counsel and the Crown rely heavily on this input…it helps us to identify the youths who should be given a chance to get out on consent (as is usually the case), and gives input regarding appropriate terms...I believe Waterloo region is unique in this respect. I do not believe that any other jurisdiction in Ontario has a FCS person who regularly attends Court". As such, data

was collected to ascertain how many Crown Wards were released on consent into the care of FCS (see Table 15). Court observation was employed in the contested Bail Court to collect this data.

Table 15: Youth - Consent Release of a ward into the care of FCS

Ward of FCS	3 (33%)
Not Ward of FCS	6 (67%)
	9 (100%)

Table 15 indicates that three youth, or 33% of the sample were released on consent into the care of FCS. This highlights the importance of the FCS Court liaison person in this jurisdiction.

As mentioned, the YCJA restricts the use of detention. As a result, in the interview portion of the data collection process, respondents were asked certain questions regarding the new Act. For example, interviewees were asked, "Since the YCJA came into effect, can you tell me about any cases where you have seen youth detained because of social welfare reasons"? This question was specifically asked because research has indicated that too many youths were being detained for this reason under the YOA. Six respondents answered yes to this question, and six said no. Four of the interviewees in the affirmative category stated that they had only seen one youth detained for social welfare reasons. The other two respondents said that this happens quite a bit. The yes interviewees stated that the youth they have seen detained for social welfare reasons were detained because the youth had no place to live. As a result, these youth were adjourned, in custody, for a day or two, until a residence could be found for them, and then they were released. In the observation process, one 16 year old youth was charged with serious sexual offences, but had no record. This youth was detained for a significant period of time because he/she had no place to live. The Crown Attorney would not consent to the youth's release unless there was a surety. As such, the Court ordered a parent to attend Court. The parent failed to appear in Bail Court, but another

relative eventually attended, and the youth was released into the care of this family member. This process took 31 work days. Since the youth was charged with a serious offence, one could argue that the youth was not simply being detained for social welfare reasons. As well, in this study, only one youth was detained, and that individual was detained on the secondary ground, or for the protection of the public; not for social welfare reasons. (Note: One other youth was detained during this study, but detailed data was not collected since the contested bail hearing took place after September 16th).

Secondly, interviewees were asked, "Do you think that more youth are being released under the YCJA then they were under the YOA". Ten participants said yes, and two were unsure. However, it is notable that only one youth was detained in the month that this study took place.

Thirdly, all the people interviewed were asked, "Since the YCJA came into effect, have you seen any cases where the Justice of the Peace has not inquired about a responsible person to take responsibility for a youth before detaining that youth"? This question was relevant because under the YCJA, the Justice is required to inquire about a responsible person. Five participants said no, four said yes, and three were unsure. Many of the participants in the yes category stated that, in a lot of cases, evidence had already been presented to the Court that there was not a responsible person to take control of the youth. In the one case of detention that I observed, I do not recall the Justice specifically asking about the availability of a responsible person before detaining that youth However, the evidence at the Bail Hearing made it very clear to all parties that there was no such person available, and there was a lot of discussion around this issue.

And finally, participants were asked, "Do you think that the YCJA is better than the YOA for youth that are from a lower socio-economic class"? Two interviewees were unsure, two

believed there was no difference, and eight said yes. A number of the respondents in the yes category felt it was better for all youths because "it promotes a more even playing field for everyone...the general rules apply to all kids". As well, another interviewee commented that, "the new Act diverts youth out of the system and allows for restitution and retribution, and only kids who are really bad end up here". What struck this writer in the observation process is that all parties in the bail process were well aware of the rules that restrict the use of pre-trial detention for youth. In fact, the Court made an effort to have the Youth's contested Bail Hearings heard as soon as possible since many times youth were adjourned to the next day even though the contested court docket was full. As well, some of the JP's sat well after 5 p.m. to ensure that the youth's bail hearing was heard as soon as possible. Further, it was my opinion, that the economic status of the youth was completely irrelevant in the Court's decision making process.

Part IV -Waiting Time for a Bail Hearing

Part IV is descriptive and includes subjective comments from the respondents on the length of time accused are waiting for a bail hearing. As reported, the number of people in remand has been increasing, and one potential explanation for this fact is that it is taking longer for an accused to obtain a bail hearing (e.g., Tyler, 2003). As such, data was collected in the contested Bail Court to ascertain the number of actual days that one was in custody pending a detention order or release and; the number of work days that one was in custody before being released or detained in custody. In this case, n = 96 as this was the number of accused that were actually released on bail or denied bail in the contested Bail Court. Court documentation and court observation were used to collect this data (see Table 16).

Table 16: Adult & Youth - Waiting Time for a Bail Hearing

# of actual days in custody before release and/or detention			# of work days in custody before release and/or detention.		
(1)	One Day	11 (11%)	(1)	One day	39 (41%)
(2)	Two days	18 (19%)	(2)	Two days	26 (27%)
(3)	Three days	13 (14%)	(3)	Three days	4 (4%)
(4)	Four days	13 (14%)	(4)	Four days	6 (6%)
(5)	Five days	10 (10%)	(5)	Five days	2 (2%)
(6)	Six days	3 (3%)	(6)	Six days	4 (4%)
(7)	Seven days	7 (7%)	(7)	Seven days	4 (4%)
(8)	Eight days	1 (1%)	(8)	Eight days	3 (3%)
(9)	Nine days	4 (4%)	(9)	Nine days	0 (0%)
(10)	Ten days or more	16 (17%)	(10)	Ten days or more	8 (8%)
		96 (100%)			96 (99%)

Note: Percentages may not add to 100 due to rounding.

Table 16 indicates that 41% of the accused had to wait one work day for a bail hearing. The data also indicates that, on average, most people were in custody one or two working days before

they were either released or denied bail. However, the most common experience was to wait one work day. While the waiting time was minimal during this study, a week later accused were waiting a week for a bail hearing, and then a few weeks later, accused were back to waiting a day or two for a hearing.

In order to get the interviewees' opinion on how long accused were waiting for bail hearings, they were asked, "Are accused waiting too long for a Bail Hearing?" All eight of the defence counsel interviewed said yes, two of the Crown Attorneys said no and two Crown Attorneys said it is highly variable. Defence counsel, and some of the Crown Attorneys complained that, in many cases, an accused who is arrested on the weekend often has his/her hearing delayed because some JP's on the weekend adjourn cases to a Monday Video Court. Video Court is the process whereby an accused appears at Bail Court via a video screen. The majority of people in Video Court have their cases adjourned until they can be physically brought to the Court which often means a delay in their hearing. One defence counsel said, "It happens all the time that people are not brought in after a weekend arrest. We have deviated significantly from the Code's spirit. Accused are supposed to be, within 24 hours, brought in front of a JP to determine if they will be released...They appear before a camera for a minute or two (on the weekends) to comply with the Code's requirement, at which time they are adjourned to Monday, and not in person, but to appear on another TV screen. No one gives a thought to what it is like sitting in a crappy cell ...where they have virtually no contact with officials or guards. It is an experience of terror for those who are not suited or experienced to it...They are housed within the same range as those accused with committing murder or other serious crimes." One senior counsel said that the defence bar had spoken to Court Administrators about this problem, and they had been promised that all accused

would be brought, in person, on the first judicial day, and never remanded to Video Court. Some of the Crown Attorneys interviewed also expressed a concern about this issue. However, as of the last report, some accused were still not being brought, in person, on the first judicial day.

On the other hand, the Crown Attorneys stated that defence counsel and the accused may be responsible for some of the Bail Hearing delay. For instance, one Crown Attorney stated that sometimes accused set a date for a contested bail hearing before they consult with counsel. Hence, at their hearing, the accused's counsel may not have had enough time to prepare for the hearing, or they may not be available. Another Crown stated, "Counsel come in and set a hearing date, and they are not necessarily asking for the earliest date. Or, they may need time to secure a plan. They will often get a date the next day, but there is no plan. So, then at the hearing, it is just adjourned to Video Court when the time could have been used for someone else... It is not black and white. There are a whole lot of factors to be taken into consideration". In addition, data collected in the contested Bail Court indicates that there is a lot of Court time spent waiting for defence counsel. For example, in the 19 days that I observed the contested Bail Court, the Court waited for defence counsel approximately 52 minutes a day (total waiting time was 1,003 minutes). A lot of this waiting time was because prisoners are not brought until about 9:30 a.m., and duty counsel needs time to speak to clients and prepare for their hearing before Court starts at 10:00 a.m. As well, a number of times, private counsel who had scheduled hearings, were late.

In addition, duty counsel reported that, in many cases, accused come to Court unprepared for their bail hearings, which in turn may affect the length of time an accused is in custody. For example, duty counsel reported that because of periodic lock downs at the detention centre, prisoners are often not allowed to make phone calls. As a result, inmates are not able to contact

lawyers, arrange for sureties or make other arrangements in order to secure their release at their first available court date. Duty counsel complained that by the time they interviewed the accused, many of their potential sureties had gone to work, and thus, in many instances, cases had to be adjourned until another day.

In the past, there was a shortage of JP's in this jurisdiction; which may have contributed to a delay in the bail process. Thus all of the participants were asked, "Is the number of Justices of the Peace in this jurisdiction sufficient?" Five participants thought we needed more JP's, four participants felt there was enough JP's, and three were unsure.

Part V - Consent Releases & The Crown Attorney

Part V is descriptive and contains remarks from the respondents on the Crown Attorney's bail decision. Further, legal factors such as the presence of a surety or bail support will be discussed. As well, a small portion of this section will report on variables that may be linked.

The literature suggests that the Crown Attorney plays a pivotal role in the bail process because he/she either consents or contests an accused's release on bail (e.g., Varma, 2002). The bail position of the Crown has huge implications for the accused. If the Crown Attorney consents to release, the Court, in most cases, agrees that the person should be released on bail term, and releases the accused; usually on the same day. On the other hand, the Crown Attorney may contest a person's release if they believe an accused should not be released on bail. In this case, a contested hearing date will be set.

In relation to the bail decision, the Crown Attorney relies on a brief synopsis that is prepared by the police for each accused in Bail Court. A number of researchers have suggested that some police officers put their personal opinions about an accused in these reports; opinions that are not relevant to the case, and comments that may influence the Crown Attorney's bail decision (e.g., Kellough & Wortley, 2002). As such, the Crown Attorneys were asked, "Are you influenced by any negative personal comments that the police make about the accused in the police synopsis"? The Crown Attorneys indicated that they placed great weight on the synopsis because "that was their case". While some Crown Attorneys thought a small minority of police officers may be making moral judgements; they all stated that they made their own bail decisions on the evidence, not on personal comments that the police may have made in the synopsis.

As mentioned, the bail decision of the Crown Attorney has repercussions for each accused.

Hence, is the Crown Attorney more likely to consent to the release of a female or male defendant? The data was collected through court observation and by reviewing court documentation (see Table 17).

Table 17: Adult & Youth - Consent Release by Gender

	ADULT		YOUTH	
	Male	**Female**	**Male**	**Female**
Consent Release	139 (48%)	29 (64%)	31 (60%)	2 (29%)
Other dispositions	151 (52%)	16 (36%)	21 (40%)	5 (71%)
	290 (100%)	45 (100%)	52 (100%)	7 (100%)

Table 17 indicates that the Crown Attorney consented to the release of adult females in 64% of the cases, and adult males in 48% of the cases. In contrast, the Crown Attorney consented to the release of male youth in 60% of the cases, and female youth in 29% of the cases. These differences do not necessarily reflect gender bias as they may reflect other aspects of the case.

What is the percentage of adult accused that are released on bail? A 2000/2001 report indicated that 96% of the accused in Windsor, 92% of the accused in St. Catherines, and 50% of the accused in Kitchener were granted bail (John Howard Society, 2002). Hence, data was collected on the total number of cases that were released either on consent or after a contested bail hearing. Data was also collected on the number of cases that were adjourned to a guilty plea court? This data was collected through Court observation and a review of the court documentation (see Table 18).

Table 18: Adult - Consent Releases and Adjournments for a plea of guilty

Male and Female

Consent Release	168	(50%)	
Contested Bail Hearing - Released	23	(7%)	57%
Adjourned for guilty plea (prior to bail)	89	(27%)	
Other disposition	78	(24%)	
Total	335	(101%)	

Note: Percentages may not add to 100 due to rounding.

Table 18 indicates that in the adult category, 168 cases or 50% were released on consent, and 7% were released after a contested bail hearing. Thus, in total, 57% of the accused were released on bail. (Part VII will provide a more detailed analysis on the individuals who had a contested bail hearing, and were released on bail). The data also indicates that 89 cases or 27% were adjourned to plead guilty. In order to understand this data, defence counsel were asked why they thought so many people forego bail and plead guilty? Defence counsel gave the following reasons:

(1) they recognize they won't qualify for bail;

(2) they may not have a sufficient plan of release;

(3) they may want to take advantage of the increased credit for pre-trial custody (2 for 1);[1]

(4) they may want to plead guilty if they believe they may be released from custody, and placed on probation, or;

(5) they do not want to wait for a bail hearing. One duty counsel stated, "If they have to wait a week for a bail hearing, it is a knee jerk reaction, they may want to plead guilty. This happens often; just get it over with." This statement highlights the need for timely bail hearings.

1. To reflect the harsh conditions of remand, Judges often give two months credit for each month spent in pre-sentencing detention (R. v. Wust).

Under, the YOA, Varma found in a Toronto study that the Crown Attorney consented to

release in 70.3% of the cases (Varma, 2002). Hence, does the Crown Attorney consent to release the majority of youth detained for a bail hearing under the YCJA? (see Table 19).

Table 19: Youth - Consent Releases and Adjournments for a guilty plea

	Male and Female	
Released on Consent	33	(56%)
Contested Hearing - Released	2	(3%) (59%)
Adjourned for Plea	12	(20%)
Other disposition	12	(20%)
Total	**59**	**(99%)**

Note: Percentages may not add to 100 due to rounding.

Table 19 indicates that 56% of the youth were released on consent by the Crown Attorney, and that 3% of the youth were released after a contested bail hearing (Part VII will provide a more detailed analysis on the youth who had a contested bail hearing and were released on bail). Hence, 59% of the youth sample was eventually released on bail. In addition, similar to the adults, the data suggests that 20% of the youth cases were adjourned to a guilty plea court. Defence counsel's comments on why accused may decide to forego bail and plead guilty also apply to youth.

As mentioned, in most cases, the 1st Bail Court is used for adjournments and consent releases, and the 2nd Bail Court is used almost exclusively for contested bail hearings. A separate date is set for contested hearings because they take longer to complete. Hence, only a certain number of contested hearings can be scheduled for each day. However, the data indicates that many accused are released on consent in the contested bail Court (see Table 20). This data was collected through Court observation and court documentation.

Table 20: Adult & Youth - Consent Releases in the Contested Bail Court

	Adult: Consent Releases	Youth: Consent Releases
1st Bail Court	114 (68%)	24 (73%)
Contested Bail Court	54 (32%) *	9 (27%) *
	168 (100%)	33 (100%)

Table 20 indicates that 114 cases or 68% of the adults and 24 cases or 73% of the youth were released on consent in the 1st Bail Court, and 32% of the adults and 27% of the youth were released on consent in the contested Bail Court. This means that 54 cases or 32% of the adult cases, and 9 cases or 27% of the youth cases, the Crown Attorney in the 1st Bail Court would not consent to release. Thus, these accused were forced to set a contested hearing date so their counsel could try to convince the Court to release them on bail. However, when these accused got to their hearing date, the Crown Attorney in the contested Bail Court than consented to their release (often a different Crown). In an effort to understand why so many accused were being released on consent in the contested Bail Court, respondents were asked, "Is the quality or personality of Crown counsel related to whether an accused is released or detained at a bail hearing?" All participants responded in the affirmative (at least minimally). For instance, one Crown Attorney stated, "Some Crowns have very strong beliefs about how certain types of charges should be dealt with. It is not necessarily the wrong belief, but, others will have a different belief". Thus, it appears that the Crown's bail position may depend on who the Crown Attorney is in Bail Court on a particular day.

In addition, interviewees were asked, "Can you tell me about any cases where the Crown Attorney has insisted on an accused being held for a bail hearing, only to have another Crown Attorney consent to that accused's release at their actual hearing"? All of the defence and duty counsel interviewed responded yes to this question. The defence lawyers all agreed that, in some cases, they felt their clients should have been released in the 1st Bail Court, and not forced to wait

until a hearing date. One defence lawyer stated, "Crown consent is the most important factor because under the current system, it is equivalent to a four or five day jail sentence because that is how long you will have to sit in custody to get a bail hearing." The respondents suggested the following reasons as to why so many consent releases happen in the contested Bail Court:

(1) The majority of the defence lawyers interviewed felt that some of the Crown Attorneys in the 1st Bail Court were inexperienced and lacked the confidence to exercise their discretion to release. For example, one defence lawyer said that some Crowns would "rather be safe than sorry". The lawyers felt that senior Crown Attorneys, who had years of experience, were much better at exercising their discretion. The Crown Attorneys agreed that experience was an advantage. For example, one Crown Attorneys stated, "A really important part of the job is to exercise judgement...you need to exercise judgement quickly. You need to know when you need more information, when the alarms are going off, and experience helps. There is a lot of pressure on the Crown to move forward quickly, and in some cases making a mistake is costly".

(2) The majority of the defence counsel interviewed conceded that the Crown Attorney in the 1st Bail Court has a high volume of files to screen, and that often he/she does not have the time to review each case thoroughly. For instance, one Crown Attorney stated, "The list is so heavy that sometimes you have less than five minutes to make a decision and so sometimes you are rushing, and tend to err on the side of caution". As such, some cases may be set for a contested hearing, and when reviewed more thoroughly by the Crown in the contested Bail Court, he/she may decide to release the accused on consent.

(3) The majority of the respondents stated that the accused's circumstances may change. For example, people may come up with a better plan of release that includes a surety, and/or a

residence by the date of their contested bail hearing. As well, one Crown Attorney said that often you get information from the accused and other agencies that you may not have had when the accused was in the 1st Bail Court. As a result, the Crown may then change their bail position, and consent to release.

(4) The majority of the Crown Attorneys stated that they may start a contested bail hearing, and then change their mind, and release an accused. One Crown counsel stated, "Sometimes, the purpose of a bail hearing is to get a sense of what are the risks...you are testing the plan...after a bail hearing, the answer may be clearer". It is this writer's opinion that an extra Crown Attorney should be placed in the 1st Bail Court so files can be reviewed thoroughly. As well, if a second Crown Attorney was present, there would be a peer available to assist in the decision making process.

Legal Factors that Influence the Crown's Bail Decision

A. Bail Supervision

When considering whether to release an accused, the Crown Attorney considers one's ties to the community. The community ties criteria is related to the Primary Ground of detention. In this ground, the Crown considers whether the accused is a flight risk. As mentioned, the rationale is that if the accused has ties to the community, he/she is less likely to fail to appear for future Court appearances. The literature suggests that accused that do not have strong ties to the community are more likely to be denied bail (e.g., D'Alessio & Stolzenberg, 2000). However, anecdotal evidence suggests that Bail programs may reduce the number of people that are denied bail on the Primary Ground (Locke et al. 1999). As such, data was collected on the local bail program, Youth In Conflict with the Law, through information provided by this agency and through Court observation.

The jurisdiction under study has an excellent bail program that assists offenders, over the [2]

age of 12, who lack community ties and have no surety to present to the Court. Provincial statistics indicate that, on average, 1,200 to 1,500 people a month are on bail supervision in Ontario. YICL supervises between 150-200 clients a month while most bail programs supervise less than 100 clients a month. Thus, the bail program in Kitchener is well utilized. Perhaps this is because Kitchener pioneered the first bail program in Canada thirty years ago. Bail programs are essential for the following reasons:

(1) Bail programs ensure more equality in the bail process. For example, one accused may be released on bail because he/she has a surety and strong community ties, while another accused with the same charge(s) and criminal record, may be denied bail because he/she lacks a surety or community ties.

(2) Bail programs make economic sense since it costs $6.00 a day to supervise an individual on bail versus $152.00 to $285.00 a day to detain that same individual.

(3) Bail supervision may reduce recidivism. For instance, provincial statistics indicate that 79% of those released on bail supervision appear for future Court appearances. This is higher than the general population. In Kitchener, the percentage is even higher, as 97% of the YICL files

2: Personal communication with Youth In Conflict With the Law September 30, 2005.

closed in August 2005, appeared for all of their court appearances. As well, YICL may prevent recidivism because they make community referrals and personally counsel their clients in an effort to prevent a recurrence of criminal behaviour. In fact, on average, only 15% of YICL's caseload are repeat offenders. In addition, custodial facilities have been known as schools of crime so, if possible, one should not be subjected to pre-trial custody if supervision by a bail program is a viable alternative.

In the Kitchener Bail Court, a number of bail supervisors are present to assist people in need. The first responsibility of a bail worker is to help an accused find a surety. The accused must be willing to have YICL contact a potential surety because, as a general rule, if the person refuses, YICL cannot assist them. However, there is some discretion in this rule. For example, if a potential surety is suffering from heart problems, the surety contact rule may be waived to avoid harm to that person. Once an interview is completed with an accused, the worker provides a neutral and unbiased report to the Crown Attorney and defence counsel. This report assists the Crown and the Court in their bail decisions.

A number of people that are initially interviewed by YICL may not go on to become clients. For example, a defence lawyer may advise an accused to plead guilty, the accused may be let out on their own undertaking, or the accused may be released with a surety. However, YICL tracks these people in the event they make their way back into a Bail Court and need their assistance. If the Court releases an accused on terms to report to YICL, the bail supervision process includes meeting regularly with that individual, and verifying that they are complying with all of their bail conditions. If YICL ascertains that an accused is not complying with their conditions of release, they will lay a charge of breach of recognizance (or bail). Data was collected in an effort to determine how many accused were released on consent with a term to be supervised by YICL. Court observation in the contested Bail Court and statistics from YICL were used in this data collection method. Both Bail Courts are included in this analysis (see Table 21 and 22)

Table 21: Adult - Consent Release with Bail Supervision

Adults	**Bail Supervision**
YICL Consent Release	29 (17%)

Other support Consent Release	140 (83%)
	169 (100%)

Total of YICL support including consent releases: 63 cases or 16% of n = 394

Table 22: Youth - Consent Release with Bail Supervision

Youth:	
Consent Release	3 (9%)
Other support Consent Release	30 (91%)
	33 (100%)

Total of YICL support including consent releases: 6 cases or 10% of n= 59

Table 21 and 22 highlight how important YICL is in this jurisdiction. For example, 17% of the adults released on consent, and 9% of the youth released on consent were ordered to be under the supervision of YICL. As well, YICL assisted or monitored, in total, 16% of the adult sample, and 10% of the youth sample.

In certain cases, the Crown Attorney and the Court may feel that an accused needs more supervision than what a bail program can provide. For instance, one Crown stated, "I see our bail program (YICL) as being particularly useful for people that do not have a fixed address, or maybe need a little support. But, they are not particularly useful in public safety cases because they are not in a position to monitor the accused". The importance that is placed on having a surety is also highlighted in this Crown Attorney's statement, "I don't see finances as being the obstacle...it is more of an obstacle in the appropriateness of the surety...I am concerned about the relationship that the surety has with the accused...the best protection is a surety who takes their job seriously".

B. Surety:

The previous statements indicate that a surety is very important in the jurisdiction under

study. A study in Toronto also indicates that the presence of a surety is important since 45% of the accused were released on bail with a surety (John Howard Society, 2002). As mentioned, a surety is an individual who pledges to the Court that he/she will ensure that an accused complies with their conditions of release, and that in the event that he/she does not comply with all of the conditions, the surety promises to report a breach to the police. In most cases, the Court places a monetary amount that the accused and the surety are liable for if the accused breaches a bail condition. Court observation was used to obtain data on the number of accused that were released, on consent, with a surety or sureties as part of their release (see Table 23).

Table 23: Adult and Youth - Consent Release with a Surety

	Adult: Consent Releases	**Youth: Consent Releases**
Surety	41 (75%)	6 (67%)
No Surety	14 (25%)	3 (33%)
	55 (100%)	9 (100%)

Table 23 demonstrates that 75% of the adults who were released on consent were released with a surety. In comparison, 67% of the youth who were released on consent were released with a surety. This is significantly higher than the 45% reported in the Toronto study.

In the interview portion of this study, the Crown Attorneys were also asked, "What factors do you take into consideration when you are deciding whether to release or detain an accused"? Two Crown Attorneys said that he/she considered the strength of the Crown's case. One of these Crowns stated that an accused should not be detained for months if there was a good chance that the charges would eventually be withdrawn. Most of the Crown Attorneys mentioned the Primary Ground (flight risk) and the Tertiary Ground (public interest) of detention. However, the Crown Attorneys seemed to be most concerned with the Secondary Ground of detention which is related to

the safety of the public. The Crowns reported that they placed great weight on the criminal record, especially if it included violence and/or breaches of Court Orders. In addition, the type of offence was important, particularly if it was a breach of a bail condition or involved the use of violence. One Crown stated, “Even if it is a weapons charge, and no history of violence, you carefully consider release because it is a violent offence”. As well, in most cases, the Crown Attorney's reported that the domestic violence cases caused them the most angst. For instance, one Crown stated, “These are the cases that are of most concern to me because if you have an accused with no record, but has assaulted his wife and/or threatened to kill her, you better not be wrong when you consent to release”. Another Crown Attorney said, “You always want to err on the side of caution. We have had several murders and murder/suicides”. In relation to release, one Crown Attorney stated, “If there is there a good plan of release, if there is no violence, and no breaches of Court Orders, then they will be released”.

Part VI - Legal Representation

Part VI is descriptive and includes comments from the interviewees about defence counsel. Defence lawyers are either privately retained by their clients, or paid by the Ontario Legal Aid Plan. Every accused in Bail Court has the right to be represented by duty counsel who is paid by Legal Aid. As well, if an accused does not have the funds to pay for a lawyer, he/she can apply for Legal Aid, and if they qualify, they can hire the defence lawyer of their choice, as long as that lawyer accepts Legal Aid cases. It takes a couple of days for Legal Aid to process an application. However, in many cases, defence counsel can judge whether a person will be eligible for Legal Aid. If counsel believes an accused will qualify for Legal Aid, then some counsel will attend at a bail hearing hoping that a Legal Aid Certificate will be issued in the future. The Legal Aid rate is quite low in comparison to what lawyers tend to charge private clients. As such, there have been reports that many defence counsel will not take Legal Aid cases (National Council of Welfare, 2000). Data was collected in the contested Bail Court (see Table 24) in order to ascertain how many accused were appearing with private counsel or duty counsel. Private counsel includes those lawyers who are retained privately or through a Legal Aid Certificate. In the jurisdiction under study, the majority of the criminal lawyers have Legal Aid and privately paying clients. Thus, in many cases, it was impossible to distinguish between these two types of clients.

Table 24: Adult and Youth - Type of Counsel

Appeared with Duty Counsel	49	(36%)	
Appeared with Duty Counsel who had instructions from private counsel	7	(5%)	41%
Appeared Without Counsel:	1	(1%)	
Appeared with private counsel:	79	(58%)	
	136	(100%)	

Table 24 indicates that the majority of accused had private counsel (58%). As stated, private counsel includes lawyers that are privately retained or paid by Legal Aid. Since the majority of the sample appears to be from the lower economic class, one suspects that most of the private lawyers would be paid by Legal Aid. The data also indicates that duty counsel's assistance was vital in Bail Court since they represented 41% of the accused. Only one person did not have counsel, and this individual did not need the assistance of a lawyer because the charges were withdrawn. In fact, the Crown Attorney allowed this individual to sit in open court, rather then the holding cells, until the case was formally withdrawn.

There have been reports that duty counsel are overworked, and as a result, are often not prepared for bail hearings (Locke et al. 1999). Hence, duty counsel was asked, "Do you feel that you have enough time to adequately prepare for Bail Court"? Two of the respondents felt that they generally had enough time to prepare, however, that it depended on how many people were in Bail Court. One duty counsel noted that, "We know it is the triage type of experience. We know we can't possibly get all the background information on the person. We must ascertain quickly what can be done to help that person get bail, and do it, and get it done". On the other hand, two duty counsel stated they felt that they did not have enough time to prepare. For example, one duty counsel stated, "It's a given; in many cases, you fly by the seat of your pants". There were many glowing statements from the interviewees about the duty counsel in Bail Court. For example, one

respondent stated that, “The most experienced duty counsel are in Bail Court, they are the cream of the crop. These duty counsel have learned from experience to stand up to adversity, and they will not just accept the Crown’s position”.

Respondents were also asked, “Is the quality of the defence counsel related to an accused being released on bail, or being detained prior to trial”? All of the participants stated that they believed the quality of counsel made a difference, at least in some cases. For example, one Crown Attorney stated, “The good lawyers will have a ‘plan/surety’ in place prior to the hearing, and the not so good lawyers will not have any plan to propose for release.” As well, one defence lawyer said, “As defence counsel become more experienced, you become better at assessing files, and better at determining what type of plan will meet the JP’s requirement”. It appears that both the Crown Attorney and defence bar are more effective if they are experienced litigators.

Part VII: The Contested Bail Hearing Sample

Part VII includes descriptive information and, in certain cases, evidence of an association between variables in relation to detention or release. In addition, there are comments from the respondents. This section is divided into two parts; non-legal factors and legal factors. Data in this section was collected by observing the contested Bail Court.

As noted, a contested bail hearing takes place when the Crown Attorney is opposing an accused's release on bail. At the bail hearing evidence is heard and the JP, pursuant to the Criminal Code of Canada, must base their bail decision on the following grounds of detention.

The Primary Ground: Is detention necessary to secure the accused's appearance for trial? In other words, is there evidence to suggest that the accused is a flight risk (Hill et al. 2004: 32:20)? As mentioned, in determining whether the accused is a flight risk, the Court will consider, among other factors, whether the accused has strong ties to the community. The Court's expectation is that if an accused has strong ties to the community, they are less likely to fail to appear for future Court appearances (Trotter, 1999: 129-131).

The Secondary Ground: Is there a substantial likelihood that the accused would re-offend or interfere with witnesses if released? (Hill et al. 2004: 32-20). Essentially, this ground is related to the protection or safety of the public. The Court will consider such factors as the nature of the offence, the criminal record of the accused, and whether the accused is already out on bail.

The Tertiary Ground: Is detention necessary to ensure that the public has confidence in the administration of justice (Hill et al. 2004: 32:20)?

Doob found that between 36% and 43% of the people charged were released on conditions

after a contested bail hearing (cited in Trotter, 1999: 254). Hence, data was collected to ascertain how many accused were released after a contested bail hearing.

Table 25: Adult & Youth - Outcomes of Contested Bail Hearings

	Adult	Youth
Detention Order	9 (31%)	1 (25%)
Released	20 (69%)	2 (75%)
	29 (100.%)	3 (100%)

Table 25 indicates that 20 adults or 69% of the adult sample were released after a contested bail hearing. This is much higher than the 36-43% reported above. As well, 2 youth or 75% of the youth sample were released on bail after a contested bail hearing. The small number of youth that had their bail contested is probably a reflection of the new YCJA which restricts the use of pre-trial detention.

a) Non-legal Factors

The literature suggests that males are over-represented in the Criminal Justice System. Thus, are males more likely than females to have a contested bail hearing and to be detained after a contested bail hearing? (see Table 26)

Table 26: Adult & Youth - Outcomes of Contested Bail Hearings by Gender

	Adult		Youth		
	Detention Order	**Released**	**Detention Order**	**Released**	**Total**
Male	9 (100%)	19 (95%)	0	2 (100%)	30 (94%)
Female	0	1 (5%)	1 (100%)	0	2 (6%)
	9	20 100%	1	2	100%

Table 26 indicates that males were much more likely to have a contested bail hearing since they represented 30 cases, or 94% of the entire sample versus 2 female cases or 6% of the sample.

The data also indicates that adult males were 100% of the detained adult sample, while 1 female youth was 100% of the detained youth sample. Hence, in the adult category there appears to be an association between males and a contested bail hearing; and males and a detention order. However, only three youth had a contested bail hearing, and only one youth was detained, so no firm inferences can be drawn from this data.

Since it has been reported that the majority of sentenced offenders are young, what was the average age of the adults and youth who had a contested bail hearing? (see Table 27)

Table 27: Adults & Youth - Age of Defendants at time of Contested Bail Hearing

Adult:				**Youth**			
18-21 years	3	(10%)		12 years	0	(0%)	
22-25 years	4	(14%)	27%	13 years	1	(33%)	33%
26-29 years	1	(3%)		14 years	0	(0%)	
30-33 years	3	(10%)		15 years	0	(0%)	
34-37 years	5	(17%)		16 years	1	(33%)	66%
38-41 years	5	(17%)		17 years	1	(33%)	
42-45 years	5	(17%)	71%		3	(99%)	
46-49 years	0	(0%)					
50 plus years	3	(10%)					
	29	98%					

Note: Percentages may not add to 100 due to rounding.

Table 27 indicates that adults between the ages of 34 and 45 were over-represented in the contested bail category. It is interesting that 71% of the accused that had a contested hearing were over the age of 30. Therefore, the data suggests that older males are more likely to have a contested bail hearing. The data also shows that 16 and 17 year old youth were more likely to have a contested bail hearing (66%). However, the youth sample is too small to draw any inferences.

Since Table 27 indicates that 71% of the sample were over 30 years of age, Table 28 examines whether older adults are more likely to be detained, and younger adults are more likely to

be released (see Table 28).

Table 28: Age of Adults at time of Detention Order or Release Pending Trial at Contested Bail Hearing

	Detention Order			Released		
Adult						
18-21 years	0	(0%)		3	(15%)	
22-25 years	1	(11%)	11%	3	(15%)	35%
26-29 years	0	(0%)		1	(5%)	
30-33 years	1	(11%)		2	(10%)	
34-37 years	1	(11%)		4	(20%)	
38-41 years(over 30 yrs. - 9 cases)	2	(22%)		3	(15%)	
42-45 years	3	(33%)	88%	2	(10%)	65%
46-49 years	0	(0%)		0	(0%)	
50 plus years	1	(11%)		2	(10%)	
	9	99%		20	(100%)	

Note: Percentages may not add to 100 due to rounding.

Table 28 indicates that one is more likely to be detained after a contested bail hearing if one is over 30 years since 8 cases or 88% of the detained adult sample was over 30. On the other hand, it appears that the over 30 category (65%) are slightly more likely to be released than the under 30 category (35%) after a contested bail hearing. However, one must keep in mind that 72% of the sample was over 30 years. Older adults may be detained in greater numbers because they have had more time to accumulate a criminal record; which would reduce their chances of obtaining bail.

The literature suggests that certain minority groups are more likely to be denied bail. Thus, how many visible minorities were denied bail in this study? (see Table 29).

Table 29: Adult and Youth - Ethnicity at Contested Bail Hearing

	Detention Order	Release
White	7 (70%)	20 (91%)
Visible Minority	3 (30%)	2 (9%)
	10 (100%)	22 (100%)

Table 29 illustrates that 70% of the accused that were detained were White, and 30% were from a racial minority group. Visible minorities are over-represented in the detention category since they represent only 9% of the population in Waterloo Region, but 30% of those detained. However, legal factors could be responsible for this over-representation; an analysis of legal factors and ethnicity will follow in Table 43. The data also indicates that 91% of the White accused, and 9% of the visible minority accused were released after a contested bail hearing.

Since the literature suggests that the lower class are more likely to be charged, are they also more likely to be detained after a contested bail hearing? (e.g., Griffiths & Verdun Jones, 1994) (see Table 30).

Table 30: Adult and Youth - Socio-economic Status at Contested Bail Hearing

	Detention Order	**Released**
Low	10 (100%)	11 (50%)
Middle/upper	0	11 (50%)
	10 (100%)	22 (100%)

Table 30 indicates that there may be a relationship between one's socio-economic status and detention since all of the individuals in the detention category were low SES. However, 50% of the released category were also low SES. On the other hand, 100% of the middle and upper classes were released. This seems to suggest that there is a relationship between socio-economic status and detention. Legal factors, however, may explain this apparent relationship; an analysis of legal factors and socio-economic status follows in Table 44.

As stated, a number of researchers have concluded that the lower economic class may be detained in greater numbers because of their economic situation. For example, Trotter contends

that some Canadians are in pre-trial custody simply because they cannot meet the Court's bail conditions due to financial constraints or because an accused does not have a surety (Trotter, 1999: v). As such, respondents were asked the following question, "Have you seen any evidence that poor accused are being detained simply because they cannot meet the release criteria"? Nine of the interviewees did not believe that accused were being held for this reason. For instance, one defence lawyer stated, "The case law clearly states that you cannot detain anyone because of money. The Court has to set the penalty sum at a level that brings the gravity of the offence home to the accused. So, on a poorer person, a smaller penalty sum can send the same message". One Crown Attorney also stated, "The amount that we ask for is very low in this jurisdiction; money is never a factor. In other jurisdictions it is a factor..." Another Crown Attorney stated that the lower socio-economic accused is not detained in this jurisdiction because of the presence of the bail program and a local hostel. Other lawyers felt that people were in jail not because they were financially poor but because they co-exist with facts related to poverty, such as having no family, friends or a residence. As well, some participants felt it was not so much economically poor, as being poor in community resources because accused need a good plan of release which often includes a surety. On the other hand, three participants believed that accused are more likely to be detained because they are poor. These lawyers felt that the poor were detained for the same reasons as the no category. For example, "The poor find it hard finding a place to stay, finding sureties" and "the poor tend to have less to offer by way of residence and potential jobs whereas those with resources may be able to arrange employment or provide a sufficient residence". Thus, it appears that there is general agreement among the participants that it is the lack of support, resident and/or job that is the crucial factor; all factors that may relate to being from the lower socio-economic class. I saw no evidence that anyone

was being detained because they were poor in monetary terms. However, some people were detained because they lacked sureties, which, in some cases, may be related to being from the lower socio-economic class.

Since the literature suggests that the mentally ill are more likely to be arrested, are the mentally ill more likely to be denied bail after a contested bail hearing? (e.g., Stribopoulos, 2003) (see Table 31A and 31B).

Table 31A: Adult and Youth - Evidence of Mental Illness at Contested Bail Hearing

	Detention Order	**Released**
Evidence of Mental Illness	4 (40%)	1 (5%)
No evidence of Mental Illness	6 (60%)	21 (95%)
	10 (100%)	22 (100%)

Table 31B

	Evidence of Mental Illness
Detention Order	4 (80%)
Bail Hearing Released	1 (20%)
	5 (100%)

Table 31A indicates that there was evidence of a mental illness in 4 cases or 40% of the people who were detained. In contrast, there was evidence of a mental illness in only 1 case or 5% of the people that were released on bail. As well, table 31B shows that there were only five people in the sample where there was evidence of a mental illness, and four of these people were detained (80%). Thus, there does appear to be a relationship between mental illness and detention. Legal factors, however, may explain this apparent relationship; an analysis will follow in Tables 45.

Are the people that have drugs and alcohol problems more likely to be released on bail or detained after a contested bail hearing? (see Table 32)

Table 32: Adult and Youth - Evidence of Alcohol/Drug Problems at Contested Bail Hearing

	Detention Order	Released
Alcohol/Drugs	5 (50%)	8 (36%)
No Alcohol Drugs	5 (50%)	14 (64%)
	10 (100%)	22 (100%)

Table 32 illustrates that there was evidence of alcohol or drug problems in 50% of the detention cases. However, this means that in 50% of the detention category there was no evidence of these problems. In relation to those released, there was evidence that 8 accused or 36% had substance abuse problems, and 14 accused or 64% did not have such problems. Thus, the data indicates that one is in a superior position if there is no evidence of alcohol or drug problems since more accused were released in this category.

b) Legal Factors

As mentioned, the Justice considers the Primary Ground (flight risk), Secondary Ground (safety of public) and Tertiary Ground (public interest) in his/her bail decision. Legal experts have argued that the Tertiary Ground is "ripe for misuse" (Iacobucci, 2002). Hence, data was collected on this ground of detention (see Table 33).

Table 33: Adult & Youth - Grounds for Detention at Contested Bail Hearing

(1) Primary Ground	1 (10%)
(2) Secondary Ground	9 (90%)
(3) Tertiary Ground	0 (0%)
	10 (100%)

Table 33 does not support the contention that the Tertiary Ground is "ripe for misuse" since no one was detained on this ground (Iacobucci, 2002). The data indicates that one accused or

10% of the sample was denied bail on the Primary Ground, and nine accused or 90% were detained on the Secondary Ground, or the public safety ground. Hence, there seems to be a relationship between the denial of bail and the Secondary Ground of detention (public safety).

A. Type of Offence

Since 90% of the sample were detained on the Secondary Ground, one must query if there is a relationship between violent offences and a detention order? (see Table 34)

Table 34: Adult & Youth - Violent Offence(s) and Contested Bail Hearing

	Detention	Released
Violence	7 (70%)	15 (68%)
No violence	3 (30%)	7 (32%)
	10 (100%)	22 (100%)

Table 34 indicates that 70% of the accused who were charged with a violent offence were detained. In contrast, 68% of the accused charged with a violent offence were released. Thus, one was about equally likely to be released or detained if charged with a violent offence. If this is the case, is there a relationship between domestic violence and a contested bail hearing; and/or domestic violence and a detention order? (see Table 35). The youth are taken out of this analysis since the youth were not charged with this type of offence.

Table 35: Adults - Domestic Violence and Contested Bail Hearing

	Detention	Released	Total
Domestic	4 (44%)	6 (30%)	10 (34%)
Non-domestic	5 (56%)	14 (70%)	19 (66%)
	9 (100%)	20 (100%)	29 (100%)

Table 35 indicates that 44% of the people that were denied bail and 30% of the people who

were released had charges arising out of a domestic occurrence. Hence, there appears to be a stronger relationship between domestic related charges and detention. As well, 34% of the people who had a contested bail hearing had been charged in a domestic violence case. As stated, the Crown may be more inclined not to consent to a person's release if they are charged in a domestic situation. Defence counsel seems to agree. For instance, one of the defence lawyers stated, "The biggest determining factor is whether it is a domestic...there is a disinclination to let [these] people out. The Crown generally won't consent on domestic cases unless it is a minor accusation, and the person has a surety, and has a limited or no prior record." Hence, there is probably a stronger relationship between being charged with a domestic related offence and a contested bail hearing, as well as detention.

The literature also suggests that accused in a reverse onus situation are more likely to be detained (e.g., Cole, et al, 1995). A case triggers a reverse onus situation when the accused is charged with certain serious offences or is in breach of a bail condition. If one is in a reverse onus situation, the onus is on the accused to justify to the Court that they should be released on bail terms. This sets the bar higher for the accused seeking their release. In contrast, if one is in a crown onus situation, the onus is on the Crown Attorney to justify to the Court that an accused should be detained pending trial; a much easier test for most accused (see Table 36).

Table 36: Adult & Youth - Type of onus at Contested Bail Hearing

	Detention Order	**Released**
Reverse Onus	5 (50%)	8 (36%)
Crown Onus	5 (50%)	14 (64%)
	10 (100%)	22 (100%)

Table 36 illustrates that half of the people detained were in a reverse onus situation, and half were in a crown onus situation. As well, the data indicates that the accused in a reverse onus situation were released in 36% of the cases. On the other hand, the data indicated that if one was in a Crown onus situation, they were released in 64% of the cases. Thus, the accused appears to be in a more favourable position in a crown onus situation.

B. Bail Supervision/Surety

If an accused is in a contested hearing situation, it is very important that they have a surety, or the support of a bail program. An accused is in a superior position if they have a surety as this person, in theory, will continuously monitor the accused if he/she is released on bail. If an accused only has the support of the bail program, the Court may find, in certain cases, that YICL is not enough supervision since workers cannot monitor a person 24 hours a day.

As mentioned, a number of researchers suggest that accused who lack community ties may be at risk of being detained on the Primary Ground of detention (flight risk) (e.g., Cole, et al. 1995). The rationale is that accused that lack community ties may be more likely to fail to appear for future court appearances. Thus, data was collected to ascertain how many accused were detained on the Primary Ground of detention (see Table 37).

Table 37: Adult & Youth - Detention on the Primary Grounds - Contested Bail Hearing

(1) Primary Ground (flight risk)	1 (10%)
(2) Secondary Ground	9 (90%)
(3) Tertiary Ground	0 (0%)
	10 100%

Table 37 indicates that only one individual (10%) was detained on the Primary Ground. This individual was a recent immigrant to Canada, had no criminal record, but had been charged

with a domestic related offence. Defence counsel informed me that if the accused had the support of a suitable surety, the Crown Attorney would have consented to release. In this case, the Court found that YICL, who supported the accused, was not sufficient supervision. Since, only one accused was detained on the Primary Ground, there does not seem to be a relationship between lack of community ties and detention.

In relation to youth, research has also suggested that youth are more likely to be detained if they lack community ties. For instance, youth may be more likely to be detained if they are not under control (Carrington, Moyer & Kopelman cited in Doob et al. 1995). As such, evidence was collected in the contested Bail Court on the youth who were not attending school, abiding by parental rules and/or running away from home; indications of one's community ties (see Table 38).

Table 38: Youth not attending school, abiding by parental rules and/or running away from home (Community Ties): Contested Bail Hearing

	Detained	**Released**
Lack of Community Ties	1 (100%)	2 (100%)
Community Ties	0	0
	1	2

Table 38 indicates that there was evidence that all of the youth that had a contested bail hearing were not attending school, were not abiding by parental rules, and/or were running away from home. However, no youth were detained on the Primary Ground; the one youth that was detained was detained on the Secondary Ground. No firm inferences can be made since the sample

size is small.

Since only once accused (an adult) was detained on the Primary Ground of detention (flight risk), one must query if the presence of YICL, the bail program, reduced the number of accused detained on this ground (see Table 39).

Table 39: Adult & Youth - Bail Supervision at Contested Bail Hearing

	Released	**Detention**
YICL Support	6 (27%)	4 (40%)
Other/no support	16 (73%)	6 (60%)
	22 (100%)	10(100%)

Table 39 shows that 6 accused or 27% were released on terms to be under the supervision of YICL. If this bail program had not been available, it is probable that many of these individuals would have been detained. Thus, the presence of a bail program seems to reduce the number of accused held on the Primary Ground of detention. In addition, anecdotal comments also support the belief that bail programs reduce the number of people detained on the Primary Ground.

Some of the literature also suggests that the views of Justices may vary in their bail decisions for individuals with weak community ties (Dhami, 2005). As a result, participants were asked, "Are certain Justices of the Peace more likely to release an accused on bail than other Justices of the Peace?" All participants stated yes. This suggests that one accused may be released by one Justice of the Peace, while another Justice of the Peace might have detained the same person. One participant stated, "Bail is a matter of discretion, and anytime you give discretion to a human being, they will exercise it according to their own view points. In our jurisdictions, the JP's tend to be extremely fair and oriented towards release, and in other jurisdictions it is different. But, no question that on a similar fact situation, one Justice will release and another will not. But, I think

we are very lucky to have the Justices we do."

As mentioned, research has found that the presence of a surety is important (e.g., John Howard Society, 2002). Therefore, data was collected to ascertain how many accused were released, after a contested bail hearing, with a surety (see Table 40).

Table 40: Adult & Youth - The presence of a surety at a Contested Bail Hearing

	Released	**Detention**
Surety	15 (68%) (*two youth)	3 (30%) - (*sureties not accepted)
Other	7 (32%)	7 (70%)
	22 (100%)	10 (100%)

Table 40 indicates that the majority of the accused (68%) who were released after a contested bail hearing had the support of a suitable surety. In contrast, 32% had another or no type of support; 27% of which was YICL. On the other hand, in the detention category, three accused had sureties, but were still detained. This is because these sureties were not accepted by the Court. As well, 70% of the accused who were detained had other or no support. Thus, it appears that having an acceptable surety is related to release. However, a more thorough analysis follows in Table 41.

In this section, the following variables will be analyzed to arrive at an overall legal score for each accused that had a contested bail hearing: criminal record, outstanding charge(s), and level of support (see Table 41A and 41B).

Criminal record is categorized as follows: In each subcategory an accused can score from 1 to 6; for a maximum of 18. The higher the score, the more serious the criminal record.

No. 1 - The total number of criminal convictions:

0: no convictions;

1: 1-5 convictions;

2: 6-10 convictions;

3: 11-15 convictions;

4: 16-20 convictions;

5: 21-25 convictions and;

6: 26 or more convictions and/or 10 or more years served in a Federal Penitentiary.

No. 2 - The number of criminal convictions for breaches of a Court Order:

0: no convictions for breach of a Court Order;

1: one conviction for breach of a Court Order;

2: two convictions for breach of a Court Order;

3: three convictions for breach of a Court Order;

4: four convictions for breach of a Court Order;

5: five convictions for breach of a Court Order, and

6: six or more convictions for breach of a Court Order.

No. 3 - The number of violent criminal convictions:

0: no violent convictions;

1: one violent conviction;

2: two violent convictions;

3: three violent convictions;

4: four violent convictions;

5: five violent convictions and

6: six or more violent convictions.

The accused's present criminal charge is categorized as follows: In each subcategory an accused can score from 1 to 6; for a maximum score of 18. The higher the score, the more serious the charges (Maximum 6 + 6 + 6 = 18)

No. 1 - Pursuant to the Criminal Code of Canada, the punishment that an accused may face if convicted on his/her most serious charge.

1: an offence punishable on summary conviction;

2: an offence punishable on summary conviction, or an indictable offence and is liable to imprisonment not exceeding two years;

3: an offence punishable on summary conviction, or an indictable offence and is liable to imprisonment not exceeding five years;

4: an offence punishable on summary conviction, or an indictable offence and is liable to imprisonment for a term not exceeding ten years;

5: an indictable offence and liable to imprisonment for a term not exceeding fourteen years and

6: an indictable offence and liable to imprisonment for life.

No. 2 - The number of breaches of a Court Order that an accused is alleged to have committed.

0: No breach of a Court Order

1: One breach of a Court Order;

2: Two breaches of a Court Order;

3: Three breaches of a Court Order;

4: Four breaches of a Court Order;

5: Five breaches of a Court Order and;

6: Six or more breach of Court Orders.

No. 3 - The level of violence that an accused is alleged to have committed.

0: No violence or violent related charge;

1: common assault;

2: threaten bodily harm and assault police;

3: Assault Causing Bodily Harm, Assault with a weapon, Assault (domestic violence related), threaten death (domestic violence related), and criminal harassment (domestic violence related);

4: Assault Causing Bodily Harm (domestic violence related);

5: Sexual Assault (rape) and mischief endangering life (discharge of weapons), and;

6: Armed Robbery.

Level of support is categorized as follows: In each subcategory an accused can score 3, 6 or 9. The higher the score, the less support the accused has at their bail hearing.

If an accused has a surety he/she is given 3 points;

If an accused has bail support he/she is given 6 points, and;

If an accused has no support he/she is given 9 points

Table 41A: Adult - Legal scores of accused who had contested Bail Hearing and were released

Accused #2			Accused #13	
Charge score:	11		Charge score:	1
Conviction score:	2		Conviction score:	18
Support score:	3		Support score:	9
	16			**28** ***
Accused #15			Accused #19	
Charge score:	10		Charge score:	7
Conviction score:	5		Conviction score:	13
Support score:	6		Support score:	3
	21			**23**
Accused #21			Accused #33	
Charge score:	8		Charge score:	2
Conviction score	3		Conviction score:	1
Support score	3		Support score:	3
	14			**6**
Accused #39			Accused #40	
Charge score:	6		Charge score:	10
Conviction score	12		Conviction score:	3
Support score	6		Support score:	3
	24			**16**
Accused #49			Accused #52	
Charge score:	7		Charge score:	7
Conviction score	16		Conviction score:	0
Support score	3		Support score:	3
	26			**10**
Accused #66			Accused #71	
Charge score:	4		Charge score:	10
Conviction score	12		Conviction score:	0
Support score	9		Support score	3
	25			**13**
Accused #80			Accused #88	

Charge score:	3	Charge score:	11
Conviction score	16	Conviction score:	13
Support score	6	Support score:	3
	25		**27 *****

Accused #109		Accused #110	
Charge score:	7	Charge score	8
Conviction score	4	Conviction score	0
Support score	6	Support score	3
	17		**11**

Accused #123		Level #127	
Charge score:	11	Charge score:	6
Conviction score	2	Conviction score:	3
Support score	3	Support score:	6
	16		**15**

Accused #128		Accused #130	
Charge score:	7	Charge score:	10
Conviction score	15	Conviction score:	3
Support score	3	Support score	3
	25		**16**

Table 41B: Adult - Legal scores of accused who after a Contested Bail Hearing, a Detention Order was issued

Accused #5		Accused #11		
Charge score:	6	Charge score:	5	
Conviction score	17	Conviction score:	18	
Support score	6	Support score:	9	
	29		**32**	
Accused #12		Accused #23		
Charge score:	6	Charge score	7	
Conviction score	0	Conviction score	17	
Support score	6	Support score	9	(surety denied)
	12 ***		**33**	
Accused #54		Accused #63		
Charge score:	11	Charge score:	10	
Conviction score	17	Conviction score:	18	
Support score	9	Support score:	9	(surety denied)
	37		**37**	
Accused #97		Accused #102		
Charge score:	6	Charge score:	12	
Conviction score	18	Conviction score:	18	
Support score	9	Support score:	6	
	33		**36**	
Accused #114				
Charge score:	4			
Conviction score	14			
Support score	9 (surety denied)			
	27 ***			

Table 41A indicates that the majority of the accused that were released had legal scores under 27. Two accused, however, had scores of 27 and 28, and were released. Number 33 had a legal score of 28, had no support, had a large record, but was only charged with a minor offence; theft under. Number 88 was charged with assault causing bodily harm (domestic), had a large record, but also had the support of a suitable surety. On the other hand, Table 41B indicates that 7

of the 9 adults detained had legal scores well over 27; (29, 32, 33, 37, 37, 33, and 36). Number 14 had a score of 27 (the overlap score) but was detained. However, this person had a large criminal record, had their surety rejected by the Court, and was charged, for the second time, within 60 days, with breaching a conditional sentence. Accused #12 was also detained despite having a legal score of 12. This person was a recent immigrant to Canada, had YICL support, and was charged in a domestic violence case.

The data indicates that not one of the accused who were detained had a suitable surety, while thirteen of the twenty who were released (65%) had the support of a surety. As well, 8 of the 9 detained had extensive criminal records (score of 14 plus). In fact, 4 of these accused had reached the maximum record count. In contrast, 4 out of 20 (20%) of the accused released had extensive records (score of 14 plus). However, two of these individuals had fairly minor charges (theft under and obstruct police officer), and two had more serious charges (domestic assault and assault weapon) but had sureties. In relation to the most serious charge; those released had scores ranging from 1 to 11, and those detained had scores ranging from 4 to 12. The 16 accused that were released, and had scores of 5 or over had the following support: 12 had a surety and 4 had the support of YICL. In contrast, the accused that were detained all had scores of 4 or more, and had the following support: three accused had YICL support and six had no support.

Table: 42: Youth - Legal scores of youth released and detained after a contested Bail Hearing

Accused #55	
Charge score:	8
Conviction score	6
Support score	6
	20

Bail Hearing/Released

Accused #91		Accused #113	
Charge score:	4	Charge score:	10
Conviction score	7	Conviction score:	1
Support score	3	Support score:	3
	14		**14**

Table 42 indicates that the most important legal factor is the presence of a surety since the 2 accused that were released had sureties, and the one accused that was detained had YICL support. In fact, the JP stated at the hearing that if this youth would have had a surety, the JP probably would have released the youth on bail. As well, the criminal record may be related to detention, especially when one does not have the support of a surety, since the one youth that was detained had a conviction score of 6, while another youth with a conviction score of 7 was released with a surety. However, since there are only 3 youths that had a contested bail hearing, no firm conclusions can be drawn.

As stated the literature suggests that ethnicity may be related to detention even when one considers legal factors (e.g., Cole et al. 1995). Hence, the legal scores from Table 41 are used to analyze for the presence of ethnic discrimination at a contested bail hearing (see Table 43)

Non-Legal Factors:

Table 43 Adults and Youth: Ethnicity - Contested Bail Hearing and Legal Factors

	Bail Hearing/Released		Bail Hearing/Detained	
White	20	(91%)	7	(70%)
Visible Minority	2	(9%)	3	(30%)
	22	100%	9	(100%)

Table 43 indicates that three accused were detained from a visible minority group (#12, 97 and #114). In relation to legal scores, #114 scored 27 (the overlap score) and was detained since he/she had breached a conditional sentence twice in the last 60 days, and his/her sureties were rejected by the Court. In addition, #97 had a fairly high legal score of 33. However, #12 had a low legal score of 12, yet was detained. This was because this individual was charged with a domestic related offence, and did not have the support of a surety. Thus, there does not appear to be a relationship between ethnicity and detention at a bail hearing since legal factors explain the detention of these three accused.

Is socio-economic status related to detention at a contested bail hearing, even when controlling for legal variables? (see Table 44)

Table 44 Adults: Socio-economic status: Contested Bail Hearing and Legal Factors

	Bail Hearing/Released	Bail Hearing/Detained
Low	11 (55%)	9 (100%)
Middle/upper	9 (45%)	0 (0%)
	20 (100%)	9 (100%)

Table 44 indicates that socio-economic status does not seem to be related to detention when one considers that 8 of the 9 adults detained had the highest legal scores (29, 32, 33, 37, 37, 33, 36 and 27). The one accused that did not have a high legal score (#12) was detained on a domestic

violence charge, and did not have the support of a surety.

Are the mentally ill more likely to be detained following a contested bail hearing even when one considers legal factors? (see Table 45)

Table 45: Adults & Youth - Evidence of Mental Illness: Contested Bail Hearing and Legal Factors

	Detention Order	Released
Evidence of Mental Illness	4 (40%)	1 (5%)
No evidence of Mental Illness	6 (60%)	21 (95%)
	10 (100%)	22 (100%)

Table 45 indicates that there was evidence of a mental disorder in five cases. However, the accused who were detained (#5, 11, 54 & 97) had legal scores of 29, 32, 37 and 33. In contrast, #66 who was released had a lower legal score of 25. Hence, there does not appear to be a relationship between mental illness and detention when one considers legal factors.

In an effort to ascertain if the Court's tended to detain on the same factors that the data revealed, the interviewees were asked, "What are some common characteristics of the people that the Justices of the Peace detain"? The most cited reasons for detention were:

1. A long criminal record, violence offences (especially domestic) and/or numerous Court breaches in their records. This was confirmed in the data collected.

2. Inadequate supervision or community support. The data revealed that all of the accused that were denied bail did not have a suitable surety.

In general, the participants seemed to agree that the accused that are released after a contested bail hearing tend to have good sureties, have no record (or a short record), are stable, have a residence, have support in the community, are employed, and are charged with non-violent

offences. The data seemed to suggest that those with good sureties are more likely to be released, and those who have no record or a shorter record tend to be released.

Part VIII - Dangers of Pre-Trial Detention

As noted, the literature contends that accused may be subjected to special dangers if they are detained pending trial. For example, accused may suffer psychologically and/or financially as a result of pre-trial incarceration. Secondly, an accused may not be able to properly defend their case while they are incarcerated. Thirdly, accused in remand are usually subjected too much harsher prison conditions than most offenders serving time in a Federal Penitentiary. Fourthly, pre-trial detention may increase the risk of conviction and length of sentence. Fifthly, pre-trial detention may be related to recidivist behavour. And finally, accused may feel pressured to plead guilty if they are in pre-trial detention. In the present study, it was only possible to collect data on one of the alleged dangers of pre-trial detention; pressure to plead guilty (See Table 46).

Table 46: Adult and Youth - Adjournment to a Guilty Plea Court after a Detention Order is issued.

Adjourned for plea	5	(50%)
Adjourned to trial date	2	(20%)
Adjourned to video remand	3	(30%)
Total	10	100%

Table 46 indicated that 50% of those detained were adjourned to plea court. In contrast, trial dates were set for two accused; (each trial date was set for approximately two months in the future). Three other accused were still undecided on their plea. Defence lawyers were asked, "If someone is detained, is that person more likely to plead guilty". All participants said yes because if an accused pleads guilty they will often be out before their trial date. This highlights the need for early trial dates so people who are denied bail do not feel pressured to plead guilty.

Part IX - Bail Process Recommendations

At the end of each interview, the respondents were asked, "What could be done to improve the bail process for all the accused people coming before the Court"? The suggestions were:

1. The accused must be brought on the first judicial day and never remanded to a Video Court.

2. The Court should devise a more efficient manner for consent releases. At the present time, consent releases take valuable Court time since the facts of the case are read in and, in most cases, the JP hears evidence from a proposed surety. One Crown Attorney stated that just a brief summary of the facts should be read in and the JP's should, "trust the Crown's judgement that the surety is okay".

3. The Crown Attorney in the 1st Bail Court should be experienced.

4. Duty Counsel should start earlier, the prisoners should be brought earlier, and Crown counsel should be ready to proceed an hour before duty counsel arrives. This would allow more time to discuss bail files.

5. There should be a ready list so that anyone who comes into the 1st Bail Court and wants to have a bail hearing can go on that list, and when the contested Bail Court is waiting for cases, they can proceed with that person from the 1st Bail Court.

6. The police should have more powers of release.

7. Accused should be given legal advice at the time of detention about the bail process, and that one may need a surety to secure their release. This means that detention centres must allow accused access to a phone.

8. Paralegals should be hired to assist duty counsel. These individuals could assist duty counsel by making telephone calls to sureties and other agencies so that these lawyers would have

more time to be in Bail Court.

9. One of the Crown Attorneys suggested that, in the future, a bail team may be set up in the to assist in the bail process. For instance, four Crown Attorneys would be assigned to a team that would strictly deal with bail. As a result, there would be more continuity in the bail system.

Part X - Conclusion

While this study provides anecdotal comments, descriptions and evidence of links between certain variables in the bail process, it cannot be generalized to other communities since the study did not gather data on the accused who were released by the police; it was a non random study that was drawn from a particular geographic area; and the study is co-relational which precludes causality.

However, a number of important statements can be made. For instance, the data seems to confirm that many accused breach their bail conditions since 44% of the adults and 60% of the youth had at least one charge of this nature. Further, the data reveals that too many accused are not attempting to obtain bail since 20% of the youth sample, and 27% of the adult sample were adjourned out of Bail Court to a guilty plea court. The anecdotal evidence indicates that some accused may feel pressured to plead guilty. This is particularly disturbing if an accused may be innocent or have a defence to the charge(s).

In addition, this study highlighted the power that the Crown Attorney has in the bail process. It is disturbing that so many accused were forced to set a contested bail hearing, and then released at their hearing. However, this problem is not a black and white issue since many reasons were given as to why so many accused are released on consent in the contested Bail Court. Since the 1st Bail Court is often very busy, it is this author's belief that an extra Crown Attorney should be assigned to this Court to help review files, speak to counsel, and act as a peer review for the other Crown Attorney in that Court. As well, accused should always be brought to Court on the first judicial day and never remanded to a Video Court. The interviewees and data also indicate that duty counsel are experienced and very effective litigators who are crucial advocates for

unrepresented accused in the bail process. However, the comments from duty counsel indicate that they may need more assistance in the Bail Courts.

In relation to youthful offenders, the data indicates that the Crown and the Court abide by the YCJA's rules that restrict the use of pre-trial detention since only three youth had a contested bail hearing, and only one youth was detained during the time period under study. The data also indicates that the presence of a Family and Children Service worker and the assistance of Youth In Conflict with the Law is vital since they assist youth who might otherwise be detained by the Court.

The data in this study suggests that more accused are released after a contested bail hearing in the jurisdiction under study than what previous literature has reported. For example, the literature suggests that between 26-43% of the accused are released after a contested bail hearing. However, in this study, 69% of the adults, and 75% of the youth were released after a contested bail hearing.

The results indicate that the most important variable in relation to securing one's release from custody pending trial is the support of a suitable surety. In fact, the presence of a suitable surety was more important than what the literature suggested since one Toronto study had found that 45% of the releases were with a surety condition. However, in the contested Bail Court, 75% of the Adults, and 67% of the youth were released on consent with a surety condition. In addition, 68% of the accused that had a contested bail hearing (Adult & Youth) were released with a surety term.

The data did not support the contention that ethnicity, socio-economic class, or mental illness were related to detention at a contested bail hearing once legal factors were taken into consideration. In addition, the data did not support the theory that the lower socio-economic class

were more likely to be detained on the Primary Ground of detention. This is probably directly related to the presence of the bail program in Kitchener. In fact, without YICL, it is likely that many of the accused that were released to be under the supervision of YICL, would have been detained. Thus, bail programs are essential to ensure equality in the bail process. In addition, the data did not support the theory that the Tertiary Ground may be misused since no one was detained on this ground.

However, the data did support a link between the Secondary Ground of detention and the denial of bail. An extensive record and/or a breach of a bail condition seem to be related to detention. The data also suggested that an accused was more likely to be held for a contested bail hearing and than detained at this hearing if he/she was charged in a domestic violence situation. Furthermore, the data indicates that an accused, with no record, is more likely to be held for a bail hearing if he/she is charged with a violent offence, especially a domestic related charge.

Most of the literature on the bail process in Ontario seems to be coming out of the Toronto area. It is likely that each jurisdiction is very different in how they approach the bail process. Thus, more research should be conducted in smaller cities and communities throughout Ontario and the rest of Canada. Secondly, future research should investigate Mental Health Courts to ascertain if these Courts are successful at diverting the mentally ill out of the Criminal Justice System. Thirdly, research should focus on the number of accused who come into contact with the Criminal Justice System who have severe alcohol or drug problems. This study hints that this region may need more drug and alcohol programs to assist people with these types of addictions. This, in turn, may help reduce recidivism. Fourthly, research should follow the domestic abuse cases to try to ascertain the number of people being charged with these types of offences, and the number of repeat offenders.

And lastly, future research should investigate the conditions of the remand facilities for both youth and adults.

In conclusion, most of the Crown Attorneys and JP's that I observed in this study respected the *Charter* rights of the accused in relation to bail. This is perhaps why only 32 accused had a contested bail hearing, and only 10 defendants were denied bail.

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