Beyond Cash Bail: Evaluating the Relationship Between Racial Disparities and Pre-Trial Detention Rates in the Province of Alberta

By
Sarah Mackenzie

Honors Thesis
Department of Public Policy
University of North Carolina at Chapel Hill

April 30th 2020.

Abstract

This thesis evaluates the underlying reasons behind rising pre-trial detention rates in the Canadian province of Alberta, with a specific focus on the over-representation of Indigenous people. Using a mixed-methods approach, this paper explores the connection between breaches of conditions of release and detention at the bail stage. The findings presented in this paper demonstrate how the imposition of certain, seemingly race-neutral, conditions of release generate a disparity between the detention rates of Indigenous and non-Indigenous accused, despite the existing legal protections specifically for Indigenous people in Canadian criminal proceedings. While this thesis not only highlights existing problems within the Canadian bail system, it may also serve as a warning for American policy makers, as pressure builds within the country to move away from its cash-reliant system, to one that more closely resembles the Canadian system. Ultimately, this research makes the case that abolishing cash bail may not ameliorate the over-representation of certain groups in the justice system, nor reduce the number of people in custody at the pre-trial stage.

Keywords: bail, Canada, Indigenous, bias, disparate impact, criminal justice

Approved:

Dr. Douglas MacKay

Dr. Frank Baumgartner
Acknowledgements

To all of the judges and employees of the Alberta Court System who made the time to speak with me, introduced me to colleagues, referred me to case law, or kept me informed on key developments in this area – Thank you for your time and generosity. You have helped me better understand my home.

To Dr. MacKay and Dr. Baumgartner – Thank you for serving as my advisors throughout this project, and for the constant encouragement and feedback.

To my family and friends – Thank you for your endless love and support. This project would not have been possible without you.
Table of Contents

1. Introduction, Key Questions and Significance
   A. Introduction
   B. Principle Question and Hypotheses
   C. Significance & Contribution to Public Policy Making
   D. Research Structure

2. Background & Conceptual Framework
   A. Criminal Justice, Marginalization, and Disparate Outcomes in Detention
   B. Legal & Cultural Background
      a. Rights of the Accused
      b. Indigenous People in Canada
   C. Legislative Response & Guiding an Alternative Course of Action
   D. The Challenge of Studying Racial Bias in Criminal Proceedings
      a. Academic Studies of Bail & Pretrial Detention
      b. Contribution of the Present Research

3. Methods
   A. Quantitative Approach
   B. Qualitative Approach
   C. Understanding the Bail Process

4. Qualitative Results
   A. Underlying Reasons Behind Pretrial Detention
      I. Administrative Justice Offenses
      II. Cases of Reverse Onus
   B. Evaluating Risk & Grounds for Detention
   C. Conditions of Release
      I. Cash
      II. Addiction
      III. Homelessness & Transportation
      IV. Mental Health, Mental Illness, and Disability
      V. Ability to Comply
   D. Racial Bias & Bail
I. Role of *Gladue* in Bail Hearings

E. Other Factors Influencing Bail Hearings
   I. Role of Crown & Duty Counsel: Rising Frequency of Joint Submissions

F. Policy Solutions
   I. New Guidelines in Bill C-75
   II. Reducing Administrative Justice Offenses: Referral Hearings & Conditional Sentences
   III. Introduction of Indigenous Court

G. Consequences of Pre-Trial Detention for an Accused
   I. Pre-Trial Detention, Innocence, and False Guilty Pleas

5. **Conclusion**
   A. Alternative Explanation for High Pre-Trial Detention Rates: A Continued Reliance on Cash
   B. Limitations and Generalizability
   C. Areas for Further Research
   D. Policy Implications & Conclusion
1. Introduction, Key Question, and Significance

A. Introduction

In recent years, the question of how best to institute an effective and fair bail system has risen to prominence in public discussion regarding both American and Canadian criminal justice policies. Bail refers to the conditional release of an accused person\(^1\) charged with a criminal offense, based on the promise that they will appear in court when required. In order to ensure the accused complies with the judicial process, a judge may impose a set of pre-trial restrictions on them, ranging from paying a sum of money to the court, or complying with certain conditions of release.

In both the American and Canadian contexts, an accused may be denied bail if a judge suspects that they pose a violent threat to society, or that they are likely to not appear for their court date. If the judge denies them bail, they are held in a jail or prison while they await their appearance in court. In the case that the judge grants them release, the two systems diverge in their treatment of the accused. The Canadian system in general, is reluctant to rely on any monetary conditions of release, for reasons that I explore in Chapter 2. In most American states, however, judges will request to hold a certain sum of money from the accused until they appear in court. If the accused cannot immediately pay the amount requested, they are detained until their court date. Alternatively, an accused who cannot pay the full amount to the court can pay a non-refundable portion of their bail amount (usually around 10%) to a bail bondsman, who will post the full bail to the court. While this may grant them temporary release, the accused will

\(^1\) The “defendant” in the American context, referred to mostly throughout this paper using the Canadian “accused”
never be refunded for the 10% payment, even if they are not convicted. This process has become known colloquially within the United States as the “cash bail” or “money bail” system.

The American bail system is characterized by its reliance on cash bail. Critics of the cash bail system emphasize its increased use, and the extent to which it disproportionately impacts low-income people and people of color, detaining them because they are unable to post their bail amount. In their report on cash bail, the ACLU (2017) found that the share of people arrested who were required to post money bail grew from 37 percent to 61 percent from 1990 to 2009. As of 2018, the median bail for a felony arrest was $10,000, equivalent to eight months of income for an average accused person (Prison Policy Initiative, 2019). According to the Prison Policy Initiative, a nonprofit, black men and women ages 23 to 39 who were being held in local jails had median earnings of between $568 and $900 the month prior to their arrest (2019). While that makes an average bail amount of $10,000 immediately unaffordable, black people between the ages of 18 and 29 years old were asked to pay, on average, higher sums for bail (Prison Policy Initiative, 2019).

While most American states rely on cash bail, the Canadian bail system has an alternative mechanism to ensure that an accused appears at court. As a matter of the law, the Canadian pre-trial system has a presumption towards release, meaning that the government must prove that the defendant is either a violent danger to society or a serious flight risk in order to be detained pre-trial, in a process referred to as “remand.” Canadian judges rarely demand money as a condition of release; if they do, there is an opportunity to rely on a surety, in which a friend or relative can agree to forfeit a small sum on behalf of the accused in the event that they fail to appear at their court hearing (Macleans, 2013). Bail bondsmen are, moreover, illegal in Canada. Largely, Canadian judges rely on setting conditions of bail in order to ensure the defendant appears in
court. These conditions often range from refraining from using alcohol or drugs, obeying a curfew, staying away from certain locations or people, or attending high school full-time. In many ways, the Canadian bail system seems to foreshadow what a new American bail system could look like: one in which a person’s ability to pay is not the determining factor of their release.

And yet, Canada has some of the highest pre-trial detention rates in the world. In the province of Alberta, 70% of inmates are pre-trial detainees, meaning they have not yet been convicted of a crime (Malakieh, 2019). For every year since 2005, the average number of adults awaiting trial or sentencing (remand population) in Canada, has been greater than the population of adults in custody in the province (Malakieh, 2019). In 2017/2018, on average per day there were about 50% more adults (14,812) in remand than were in provincial sentenced custody (9,543) (Malakieh, 2019). To contextualize these numbers, California has a pre-trial detention rate of 59%, meaning 59% of inmates in the state correctional system are awaiting trial or sentencing, even with the cash bail system in place (Prison Policy Initiative, 2019). This statistic puts Alberta ahead of California, and on par with the top eleven countries with the highest pre-trial detention rates in the world, alongside countries such as Yemen, the Central African Republic, and the Democratic Republic of the Congo (World Prison Brief n.d.). Canadian experts posit that high levels of remand stem from either (a) the judge determining the defendant to be a violent threat to society, or a flight risk or (b) the defendant breaking some condition of their bail, and so being charged with an “administrative justice offense.”

It is well documented, moreover, that Indigenous people are overrepresented in the Canadian criminal justice system in general. In 2018, Indigenous adults represented 30% of admissions to provincial and territorial jails and 29% of admissions to federal facilities last year.
(Malakieh, 2019), despite the fact that Indigenous peoples comprise only about 4% of Canada’s population. This trend is increasing over time, moreover, as the percentage of Indigenous people admitted to provincial and federal jails has grown nine points in the past decade (Malakieh, 2019). On a provincial level, 41% of the people admitted into custody in 2018 identified as Indigenous, up from 36% in 2008 (Malakieh, 2019), despite the fact that the Indigenous population of Alberta is only slightly above the national average (around 6%). As pre-trial detention rates have been rising in tandem with the increasing proportion of Indigenous representation, there is a serious need for an investigation not only into increasing rates of detention, but disproportionate impact on this community.

While the Canadian system is generally thought to be a model for the United States, it too faces problems with the disproportionate impact that it has on marginalized groups. And yet, there has been relatively little scholarship on this phenomenon.

**B. Key Question and Hypotheses**

No study has examined the role of racial bias in the Canadian bail system until this point. Thus, this research will fill a gap in the literature, ultimately addressing the following question:

Are there racial disparities in Alberta bail proceedings?

- Specifically, are there racial disparities in terms of:
  
  (a) determining the relative risk of an accused if granted release and

  (b) assigning conditions of bail

- If so, how do racial disparities in these two processes contribute to high rates of pre-trial detention in Alberta, Canada?
Studies have demonstrated that racial bias plays a significant role in American judges’ assigning of bail amounts, as well as completing risk assessments. Arnold et al., found in their 2018 study that bail judges rely on inaccurate stereotypes that exaggerate the relative danger of releasing a black defendant. In Canada, the Indigenous population is vastly over represented in the criminal justice system. As such, this thesis will test the following hypotheses:

H1: While deciding to grant or deny bail, judges are more likely to detain Indigenous people than non-Indigenous people for the same crime.

H2: When assigning conditions of bail, judges are more likely to assign conditions related to abstaining from alcohol or drug consumption and permanent housing to Indigenous people, regardless of the relevance of these conditions to the original charge, or whether they believe the defendant can reasonably meet those conditions.

I test for direct discrimination in the form of a decision to detain an Indigenous person over a non-Indigenous person charged with the same crime (Hypothesis 1), as well as any decision to impose conditions of release that are not relevant to the original charge (Hypothesis 2). It is well established, however, that other indirect forms of discrimination can have a disproportionate effect on minority groups, resulting in a disparity in outcomes similar to instances of direct discrimination. This is often referred to has disparate impact, which is a concept I explore in Chapter 2. In this case, Hypothesis 2 tests for the possibility that this disparity in the racial breakdown of pre-trial detainees may be attributed to assigning conditions of release that one group is less likely to be able to meet. While these conditions may appear
racially neutral, they generate a disparity among detention outcomes because one group, in this case the Indigenous population, is unable to meet those conditions due to structural and systemic conditions, which I explore in Chapter 2. This problem is encapsulated in the section of Hypothesis 2, which questions the extent to which judges assign certain conditions of release knowing that the accused will be unable to meet those conditions, perhaps suggesting that there is some level of discrimination involved in this process. While I am able to evaluate the presence of direct discrimination through statistical tests, whether a judge believes that an accused will be able to comply with a given condition when they assign it is more challenging to evaluate statistically. As such, I rely on a series of interviews with Provincial Court Judges and Justices of the Peace, which can fill in gaps within the statistical analysis.

C. Significance & Contribution to Public Policy

This research is significant in two ways: First, the literature supports that pre-trial detention has potentially severe and long lasting consequences for the accused. Not only does being detained pre-trial mean that the defendant may risk losing their home, their job, or even their children, studies have shown that it may affect their trial outcome. Dobbie et al. found in their 2018 study that being detained pre-trial makes it more likely that the defendant will be convicted of the offence with which they were charged. Additionally, Dobbie et al. found that being held in jail while awaiting trial increases the likelihood that the defendant will engage in criminal behavior or find themselves unemployed two to four years after their arrest.

Secondly, the problem of bail is relevant and of current debate beyond the Canadian context. In the 2020 US election, Californians will vote on whether to abolish the state’s money bail system. This comes as former California Governor Jerry Brown recently referred to bail as
“a tax on poor people. (LA Times, 2019.)” A few other states have recently moved away from the cash bail system, and D.C. did away with their cash bail program in 1992 (NPR, 2018). The anti-cash bail sentiment has spread quickly across the United States, as criminal justice reform advocates maintain that the cash bail system unfairly disadvantages low-income people, detaining them while they are legally innocent simply because they could not afford their release. As states abandon cash bail, the question then becomes: what will take its place? While this thesis will not directly compare the Canadian and American Bail systems, its findings may have implications for American bail reform advocates and policy makers.

Ultimately, this research on the Canadian bail system may serve as a warning to American policy makers: Ending cash bail does not mean ending racial disparities in pre-trial detention. If states are not cautious, they may only have transitioned from a cash bail system characterized by wealth discrimination, to a new bail system characterized by racial bias.

### D. Research Structure

In Chapter 2, I further examine the existing literature surrounding racial bias in sentencing and bail decisions, drawing from both the American and Canadian contexts. From here, I identify relevant conceptual frameworks and empirical models to evaluate and draw from when developing models to test my hypotheses.

Chapter 3 lays out methods and data collection. For the purpose of this research, I will employ a mixed-methods approach. First, I quantitatively analyze the effect of racial bias on risk assessment and bail conditions using data from the Alberta Provincial Court Database. This quantitative approach includes a combination of descriptive statistics to illustrate the rates of pre-trial detention in Alberta, its growth over the past ten years, and its disproportionate impact on
certain groups. Additionally, I use a multivariate regression to assess the causes behind this growth in detention and overrepresentation of certain groups. The qualitative analysis involves evaluating bail decisions through conducting a series of interviews with Alberta provincial court judges.

In Chapter 4, I discuss my results and findings, presenting the results of a series of interviews with twelve Alberta judges. The qualitative component of these results comprise of responses to series of questions surrounding: the underlying reason behind high pre-trial detention rates in the province; the impact of administrative justice offenses on the pre-trial detention rate; the role of racial bias in bail proceedings; and the consequences of pre-trial detention for an accused in their personal life and for the outcome of their case. At this stage, I am unable to present the quantitative findings, due to constrains on the part of the Provincial court system.

In Chapter 5, I evaluate the implications these findings have for the Alberta bail system, demonstrating how the imposition of certain, seemingly race-neutral, conditions of release generate a disparity between the detention rates of Indigenous and non-Indigenous accused, despite the existing legal protections specifically for Indigenous people in Canadian criminal proceedings. While these results not only highlights existing problems within the Canadian bail system, I argue it may also serve as a warning for American policy makers. I conclude by suggesting that abolishing cash bail may not be able to ameliorate the over-representation of certain groups in the justice system, nor reduce the number of people in custody at the pre-trial stage.
2. Background and Conceptual Framework: Discrimination & Criminal Justice

This chapter offers necessary legal and cultural background surrounding the debate over the Canadian bail system, and places this research within the broader literature on racial bias in criminal procedures. First, I identify the rights and protections of those who find themselves accused and detained in Canada, with a specific focus on those protections for accused Indigenous individuals. Second, I outline recent legislative efforts surrounding bail reform in Canada, and the extent to which this research can contribute to policymaking in this arena. Last, I identify relevant literature, both quantitative and qualitative in approach, regarding racial bias in the criminal justice system across a variety of countries. Specifically, I identify a few major studies from which I draw much of my quantitative methodology surrounding judicial bias in bail hearings. From here, I explain how this thesis builds on these studies, and outline contributions of this thesis to the broader literature on racial bias in judicial processes, as well as to Canadian criminal justice policy.

A. Criminal Justice, Marginalization, and Disparate Outcomes in Detention

It is well-established that members of the most disadvantaged or under-resourced minority group are over-represented in the criminal justice system (Tonry, 1997). For this reason, some may dismiss the problem of over-representation of marginalized groups as a cultural problem, not one that is relevant for policy-makers to address. In the context of criminal justice policy, crime can be seen as a group issue, wherein Indigenous communities face unique social conditions, as a result of historical and sustained marginalization, that lead them to inevitable fall into the criminal justice system. This process is illustrated through the movement between steps
one and two in Figure 1. While it is certainly worthwhile to study the role that education, healthcare, housing, or economic concerns may play in the extent to which Indigenous people come into contact with the criminal justice system, it is beyond the scope of the present study.

**Figure 1. Social Marginalization & Disparate Outcomes in the Criminal Justice System**

This study focuses on the forces within the criminal justice system – the judges, police, prosecutors, and defense attorneys – that determine detention outcomes, ultimately asking whether they ameliorate or exacerbate pre-existing social inequalities. The relation between the forces in the criminal justice system and disparate outcomes in detention, and therefore the primary focus of this study, is illustrated through the movement between steps two and three in the above chart.

Certainly, there are some people who will say that step three is a direct product of step one, and that the forces within the criminal justice system are passive bystanders to an inevitable cycle of marginalization and detention. This approach to criminal justice policy is problematic in two ways. First, it dismisses the possibility that this over-representation is partially due to racially discriminatory practices, thus ignoring the broad literature which demonstrates the salience of race as a determinant of a variety of outcomes in criminal proceedings. In their 2010 study, Gazal-Ayal and Sulitzeanu-Kenan analyzed the effect of racial bias among Arab and
Jewish judges in Israel on bail outcomes. Ultimately, they found systematic evidence of racial bias as demonstrated by judges while deciding to detain either Arab or Jewish defendants at their bail hearings. Dobbie et al. found in their 2018 study that that American bail judges are racially biased against black defendants. Second, it dismisses the idea that the criminal justice system can be a mechanism through which people are diverted from incarceration, and directed to the necessary social services.

The association of crime as an Indigenous problem promotes a racially charged understanding of criminal justice: poor people commit crimes out of desperation, and marginalized people are poor, therefore marginalized people commit crimes. The salience of this narrative across societies allows for motivated reasoning on the part of judges and juries: it is expected that members of the most disadvantaged will appear in court, and be incarcerated, and that is an inevitable truth of every society. This understanding works to create a presumption of guilt, which is particularly concerning in the bail proceedings, given that the accused person is still legally innocent at the time they appear before the judge.

The present research challenges the reader to view incarceration partly as a problem of judicial bias, with room for policy intervention, rather than one of individual or group criminal behavior. Evaluating the potential role of racial bias in judicial decisions may reveal how these practices further exacerbate social inequalities (Abrams, 2008), and thus highlight appropriate policy interventions to address this issue. The possibility that racial bias may be a contributing factor to the over-incarceration of marginalized groups is deeply concerning, moreover, because it undermines the legitimacy of the justice system as a bastion of fairness and equality under the law. The Canadian Charter of Rights and Freedoms holds that Canadians should not be discriminated against because of their race or ethnicity. Disproportionate representation of
Indigenous peoples in prisons, and particularly in pre-trial detention, seems to violate that principle. Given the additional protections offered to Indigenous people under *Gladue*, a case I explore in the following section, this disproportionate impact indicates that there are other forces at play within the justice system involving the treatment of Indigenous peoples.

**B. Legal & Cultural Background**

I. **Rights of the Accused & The Three Grounds for Detention**

There are constitutional and legislative protections for those charged with criminal offenses in Canada. The Canadian Charter of Rights and Freedoms protects those basic rights and freedoms of all Canadians that are considered essential to preserving Canada as a free and democratic country, including the rights of all Canadians in criminal and penal matters. Specifically, the Charter outlines in Section 11(a) that any person charged with an offense has the right to “not be denied reasonable bail without a just cause.” This clause sets the constitutional framework for an analysis of pre-trial detention. Additionally, subsection 515(10) of the Canadian Criminal Code contains the three grounds that justify the pre-trial detention of an accused. These include where the detention is necessary to “ensure his or her attendance in court;” where the detention is necessary for the “protection or safety of the public;” or where the detention is necessary to “maintain confidence in the administration of justice, having regard to all the circumstances.”

The former two grounds for detention relate to my first hypothesis, in which judges assess the relative risk of an accused to assess if they are likely to miss their appearance, or to cause harm to the wider community. This is common among high profile cases in which the accused is known to resist cooperation with the justice system, or for those charged with violent
offenses, such as homicide. The latter ground relates to my second hypothesis, specifying that judges have the authority to detain an accused, after initially granting them bail, if they break some condition of their release. These are called “administrative justice offenses” and can result in detention on the grounds that in breaching the conditions of their release, the accused has compromised public confidence in the Canadian justice system. Canadian Judges and Justices of the Peace must interpret this statute when making a decision to grant or deny the accused release.

II. Marginalization of Indigenous Peoples & Legal Reforms Through Gladue

Canada is currently engaged in a collective reckoning regarding the nation’s historical mistreatment and marginalization of Indigenous peoples. In 2007, the Canadian Government formed an independent Truth and Reconciliation Commission to investigate the devastating legacy of its forced assimilation and abuse of Indigenous peoples through the residential school system. The first residential schools opened in Canada in the 1870s, and the last school did not close until 1996 (Truth and Reconciliation Commission of Canada, 2015). These schools were the product of churches and the government, and were a collective, calculated effort to eradicate Indigenous language and culture in what the Commission refers to as a cultural genocide.

In June 2015, the Commission released a report based on years of public hearings. This report not only outlines the history and legacy of the residential school program’s impact on Indigenous communities across a variety of sectors, including criminal justice, but offers 94 calls to action. These calls to action involve individual instructions to guide governments, communities, and other groups throughout the process of reconciliation (Beyond 94, 2018). Of these 94 calls to action, there are 17 related to criminal justice. Of relevance to this research, the report compels the Department of Justice to “eliminate the overrepresentation of Aboriginal
people in custody over the next decade” and “implement and evaluate community sanctions that will provide realistic alternatives to imprisonment” (Beyond 94, 2018).

There has been marginal progress on these recommendations. In the 2017 federal budget, for example, the Canadian government committed $120.7 million over five years, “to address the over-representation of Indigenous Peoples in the criminal justice and corrections system,” (Beyond 94, 2018). Part of that funding was to be allocated towards community-based programming that can take the place of incarceration. A 2016 study by Corrections Canada Services entitled “the Evaluation of Aboriginal Justice Strategy,” however, determined that the allotted funding was not sufficient to cover the demand for the community-based justice projects (Canada, Department of Justice, and Evaluation Division 2017). This is despite the fact that the report outlined the success of these programs in terms of improving quality of life and reducing recidivism, when adequately funded.

Lastly, there have been relevant legal amendments to deal with the marginalization and barriers that Indigenous peoples have faced in Canada historically and until the present. Section 718.2 of the Canadian Criminal Code, in addition to the Canadian Supreme Court in R v. Gladue (1999) instructs judges to consider all available sanctions other than incarceration when sentencing Indigenous offenders. The Gladue sentencing principle is also applicable to bail hearings, and an accused aboriginal person may ask for more time in order to prepare for their bail hearing, in addition to raising Gladue as an issue at the hearing to ask for special consideration (Legal Services Society publications explain Aboriginal legal rights | Provincial Court of British Columbia, 2018). The fact that these legal and governmental protections currently exist for Indigenous accused peoples, and yet the province of Alberta has continued to
see rising rates of Indigenous peoples in detention calls for a further investigation into the effectiveness of such protections.

C. Canadian Legislative Response: Antic & Bill C-75

The Canadian Legislature has recognized the bail system as inequitable and inefficient, and has recently introduced Bill C-75, entitled “An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts.” This act proposes a variety of amendments to the Criminal Code regarding different aspects of criminal law. Of relevance to this thesis is the proposed amendments to bail procedure. Specifically, the legislation “modernizes and clarifies bail provisions; and provides an enhanced approach to administration of justice offences, including for youth.” (Government of Canada 2019) Prior to submitting this legislation to Parliament, the Department of Justice released a report outlining the major challenges facing the Canadian criminal justice system. An issue they identify of foremost concern is the overbearing nature of the Canadian bail system, namely the burdensome conditions of release it places on the accused, and the extent to which it places constraints on the courts and the accused. Many bail rules, the report says, were “unnecessarily complex and/or redundant, which added to criminal justice system delays, without necessarily contributing to public safety…unnecessary bail conditions were being imposed too frequently resulting in increased breaches and overburdening sureties.” (Government of Canada, 2019)

The findings and legislation proposed in Bill C-75 codify the holdings from a 2017 Supreme Court Decision on bail, R v. Antic. In writing the decision for Antic, Justice Wagner wrote that an accused is presumed innocent at the bail stage, and that the judiciary should intervene in their life as little as possible, given their guaranteed innocence. Any intrusion beyond the minimum, release on recognizance, must be justified. Additionally, Antic outlined a
Ladder Principle, wherein a justice must refrain from imposing cash unless absolutely necessary, and not until all less onerous forms of release have been considered and rejected as inappropriate.

Of specific concern to the Department of Justice in Bill C-75 is the issue of administrative justice offenses (AJOs), or offenses pertaining to breaching conditions of release on bail, such as failing to appear in court or consuming drugs or alcohol when instructed not to. The report finds that criminal courts process a high number of AJOs, and suggests that the current approach to these breaches of bail conditions “perpetuates individual cycles of incarceration and takes resources away from other cases, including those involving serious offences.” (Government of Canada 2019, pg. 14) The report further recognizes Indigenous overrepresentation within the criminal justice system, as well as the over representation of Black Canadians and those with mental illnesses.

Thus, there is a recognition in Canada that remand is a significant cost on the criminal justice system, citing that in Ontario, for example, it costs $183 per day to detain a person as opposed to the $5 a day it costs to supervise an accused in the community. The introduction of Bill C-75 affirms the need for the present research, stating “the challenges facing the criminal justice system, specifically regarding remand and the overrepresentation of Indigenous persons and accused from vulnerable groups who are traditionally disadvantaged in obtaining bail, call for a careful look at Canadian bail law.” (Government of Canada 2019, pg. 16)

The legislation presented in Bill C-75 proposes to amend the Canadian bail system in a variety of ways. First, they suggest providing guidance to judges on imposing reasonable, relevant and necessary conditions that are related to the offence and consistent with the principles of bail. Secondly, the legislation includes a “principle of restraint” for courts to ensure
that release at the earliest opportunity is favored over detention, that bail conditions are reasonable, relevant to the offence and necessary to ensure public safety, and that sureties are imposed only when less onerous forms of release are inadequate. Lastly, the legislation suggests that “circumstances of Indigenous accused and of accused from vulnerable populations are considered at bail, in order to address the disproportionate impacts that the bail system has on these populations.” (Government of Canada 2019, pg. 17) While the report represents a willingness in the political landscape to change, each of these recommendations are vague and unable to be operationalized without an empirical understanding of the forces driving this disproportionate impact on Indigenous peoples and other marginalized groups.

Bill C-75 was passed by the Senate and officially implemented at the Federal level on December 18th, 2019. While Bill C-75 makes major changes to bail procedures in Canada, it is not the first time that the federal government has engaged with the issue of bail in the last decade. In 2006, The Senate Steering Committee on Justice Efficiencies and Access to the Justice System Committee recommended that a judge presiding in bail court should no longer be required to order that an accused charged with an administrative justice offense be detained in custody unless the accused shows cause why detention in custody is not justified.

While the conversation surrounding bail reform is happening at the federal level, it is also ongoing at the provincial level in Alberta provincial level. The Irving Report (2019) examined the province’s bail procedures, recommending that defense duty counsel be made available at the bail hearings in conjunction with greater government involvement. Additionally, the provincial government passed legislation in 2018 stipulating that all people arrested in Alberta making first-appearance bail applications have access to defense counsel by late September 2019 through Legal Aid Alberta (Edmonton Journal, 2018). This decision was implemented to counter the
increasing prosecutorial role with the province’s first-appearance bail system. Prior to 2017, police officers served as prosecutors at first appearances, and this system was overhauled following the fatal shooting of St. Albert RCMP Const. David Wynn by a man who was released on bail despite having a number of outstanding criminal charges (Edmonton Journal, 2017). Since this incident, prosecutors have been present for arguments at all first appearance bail hearings, regardless of whether the defendant has access to legal representation.

Ultimately, this research seeks to address the underlying issues behind high rates of pretrial detention in order to illuminate salient issues within the bail system as well as inform any legislative efforts to amend bail policy. While concern over pretrial detention is an ongoing national conversation, this research will focus on the case of Alberta as the province with the highest level of pretrial detention (Malakieh, 2019) in order to evaluate the forces at play in the current bail system.

D. Studying Discrimination in Criminal Proceedings

The challenge of studying racial bias in criminal procedures is that researchers may be unable to adequately control for major explanatory factors in the legal process. In his analysis of research on racial bias in American sentencing, Kleck (1981) demonstrated that studies which seemed to find racial discrimination usually failed to control for factors such as a defendant’s criminal record. Part of the problem in studying racial bias is that race and ethnicity are often highly correlated with other predictors of harsh sentencing outcomes in addition to criminal record, such as pretrial detention (Demuth & Steffensmeier, 2004), unemployment (Chiricos & Bales, 1991), crime type (Tonry, 1995), and aggravated circumstances (Kleck, 1981). When all of these factors are controlled for, the effect of race may lose much of its explanatory power,
given the constraints of the available data. Ultimately, these lurking variables present a problem for quantitative analyses of race in sentencing, in that they make it seem as though race is a key explanatory factor only when all other racially-correlated variables are not accounted for.

An additional concern for studying racial bias in criminal proceedings is that the bias may not be directly attributable to the sentencing judge, given that there are multiple actors that work together within the span of one trial. Notably, the literature supports that prosecutors play a significant role in determining sentencing outcomes. Focusing on the initial bail hearing, the impact of prosecutors and other predictors of sentencing outcomes such as aggravating circumstances or pretrial detention, allows for mitigation of some of the concerns surrounding omitted variable bias.

Despite the potential for bail to serve as a strong setting through which to test the presence of racial bias in the criminal justice system, it has been relatively understudied. The following section identifies two studies from which I draw the framework for my methodology and model, and upon which this research builds in order to fill gaps identified within the two articles.
3. Methods

This research involves a mixed-methods approach. First, I qualitatively investigate the existence and nature of bias in bail decisions through conducting a series of interviews with Alberta provincial court judges. Second, I quantitatively analyze the effect of racial bias on risk assessment and bail conditions using data from the Alberta Provincial Court Database.

A. Qualitative Approach:

The qualitative portion of this research involves a series of twelve interviews with Alberta court judges. These interviews took place over the phone, in January and February of 2020, and were not recorded. The textual data were manually coded based on themes, and synthesized into tables where common topics emerged. The interviews were originally intended to be focused and guided, based on the conceptual framework for this thesis and guided by a series of questions. Broadly, these questions covered the following topics:

- Underlying reasons for rising pre-trial detention rates in Alberta
- Administrative justice offenses and what role, if any, they play in rising pre-trial detention rates
- A basic overview of what a bail hearing looks like: legal guidelines surrounding detention/release of an accused, guidelines surrounding imposition of conditions of release, etc.
- Legislative responses on the provincial or federal level surrounding bail reform
- Racial bias in the criminal justice system in Alberta, and in pre-trial proceedings
- Consequences of pre-trial detention for an accused (on their personal life, the outcome of their trial, etc.)
Despite the guided approach to these interviews, many of the interviews revealed new information and areas for exploration. Throughout the data collection process and subsequent analysis, certain topics such as: the significant role of counsel in bail decisions; the continued reliance on cash bail; the role of mental health and mental illness in bail; the relationship between pre-trial detention and false guilty pleas; and new developments in the court system to combat these problems, such as the introduction of the Calgary Indigenous Court.

Each judge’s name and identity remains confidential throughout this research, and the recorded responses come from judges of varying gender and racial identities, though only a small number of those interviewed were themselves Indigenous.

**B. Quantitative Approach**

The quantitative approach includes a combination of descriptive and inferential statistics. First, I compile some descriptive statistics to illustrate the rates of pre-trial detention in Alberta, its growth over the past ten years, and its disproportionate impact on certain groups. Second, I run an OLS difference-in-differences regression to assess the causes behind this growth in detention and overrepresentation of certain groups.

For the multivariate regression, the unit of analysis is the initial bail hearing (within first 24 hours of the charge) for each individual case. I have set this unit of analysis to the first court appearance because it minimizes potential threats to internal validity such as the influence of the prosecutors, witnesses, and other factors that may emerge throughout the trial, while taking advantage of the semi-random assignment of judges to each case. At this state in the court proceedings, the judge knows relatively little about the defendant themselves, other than their charge, their appearance, and the general recommendation of the prosecutor.
One potential threat to internal validity while studying judicial bias throughout the hearing process is that prosecutors and defense attorneys will influence the extent to which the judge makes decisions about the defendant’s bail hearing outcome. By isolating the unit of analysis to the first appearance, I will then be able to focus specifically on the relationship between the judge and defendant.

The dependent variables in this regression can be broken into two categories:

1) whether the defendant was granted or denied bail (dichotomous variable)
2) if granted bail, what conditions of bail are assigned to the defendant’s release, running three separate tests with dichotomous variables for different conditions of release.

The independent variables include: demographics of the judge, demographics of the defendant, level of the charge, and whether the charge pertains to drug or alcohol use. In this case, the null hypothesis is that there will be equal detention outcomes across groups with the same level of charge. In this study, my sample frame is the information sheets in which judge’s record their bail decisions. My sample is, moreover, limited to the year of 2018, to account for the recent decision to include legal aid attorneys in the bail hearing process.

The first regression explores the mechanisms leading to detention, and whether an Indigenous accused is more or less likely to be detained, controlling for level of the charge, position of the crown, the defense’s position, and gender:

\[
\text{Detain} \begin{pmatrix} 0 \\ 1 \end{pmatrix} = \mathcal{F}(\text{Indigenous accused} + \text{level of the charge} + \text{crown position} \\
+ \text{defense position} + \text{gender} + \epsilon)
\]

The following three tests evaluate the likelihood with which an Indigenous accused may be assigned a particular condition of release. The first tests for conditions related to abstention from alcohol or drugs:
\[\text{Condition of Abstention} \begin{pmatrix} 1 \\ 0 \end{pmatrix} = F(\text{Indigenous accused} + \text{nature of charge} + \text{crown position} + \text{defense position} + \text{gender} + \epsilon)\]

The second tests for conditions related to homelessness or transportation:

\[\text{Condition of Residency} \begin{pmatrix} 1 \\ 0 \end{pmatrix} = F(\text{Indigenous accused} + \text{nature of charge} + \text{crown position} + \text{defense position} + \text{gender} + \epsilon)\]

The third tests for conditions that require some form of cash, whether that be a promise to pay, a surety, or a deposit:

\[\text{Condition of Cash} \begin{pmatrix} 0 \\ 1 \end{pmatrix} = F(\text{Indigenous accused} + \text{nature of charge} + \text{crown position} + \text{defense position} + \text{gender} + \epsilon)\]

An ideal model would test whether the implementation of these conditions would result in a breach, and ultimately detention. Given the time frame and availability of data, however, that is outside of the scope of this study.

C. Understanding the Bail Process

When a person is first arrested, the arresting police officer has the ability to determine whether an accused person is released on an appearance notice, meaning they are free to go, but may have conditions imposed upon them other than to appear at court, or whether they are detained to await their bail hearing. The police officer makes this decision in consultation with his or her supervisor. If the person is released, the police officers may impose conditions of release upon the accused. For example, an officer may impose a no contact order if the charge is
related to domestic violence. If the accused person is detained after arrest, they are guaranteed a bail hearing within twenty-four hours of their arrest. This twenty-four-hour period is crucial to the composition of this design, in that it isolates the role of racial bias specifically to the judge at the initial hearing.

Prior to the first appearance, the accused has the ability to meet with an attorney from legal aid, a pro-bono agency committed to providing low-income people with quality legal defense. Legal aid attorneys who appear at the bail proceedings are referred to as duty counsel, meaning that they have a heavy and fast-moving case load. For this reason, they are rarely able to meet with the accused person for more than a few minutes, often immediately before the bail hearing. Bail before a justice of the peace in Alberta is done on video link, so legal aid attorneys often do a telephone call for a very short period of time, and almost immediately before the hearing commences. While more time may be given to appearances before Provincial Judges, it is likely not significantly more.

This research design is “semi-random” because bail hearings are either heard by Justices of the Peace or Provincial Judges. Justices of the Peace (JPs) are not legally allowed to hear criminal cases. They can, however, set bail for criminal cases. The arresting officer will largely determine whether the accused should appear before a JP or a Provincial Judge. In general, the officer will make this decision based on whether they believe the accused should be detained pre-trial. In the event that they believe the accused should be detained, they are more likely to appear before a Provincial Judge. For this reason, I will run two separate analyses between appearances in front of JPs and appearances in front of Provincial Judges, in order to account for the greater likelihood that an accused appearing before a Provincial Judge will be detained.
During the bail hearing, the judge is presented with a charging packet, including “information,” being an informative sheet from the police, regarding the charge. This sheet does not include the criminal history of the accused, nor does it include any demographic information about the accused. Judges are often able to detect the Indigenous status of the accused, however, based on their name, or whether the arrest occurred at a police station near an Indigenous reserve. In the initial stage of the hearing, the government, referred to throughout this research as “the Crown” will give their position, therefore serving as a control variable in the regression. When the prosecution asserts their position, they must justify their request to detain using one of the three grounds for detention, as outlined in the background section of this thesis. This allows me to code the control variable, “Crown’s position,” as a categorical nominal variable using the primary, secondary, or tertiary ground as the different categories. The crown relies heavily on police reports from the point of arrest.

After this point in the hearing, the legal aid attorney can then state their position, occasionally agreeing with the position of the crown, or contesting it. While this access to an attorney assists the accused person in defending themselves, the legal aid duty counsel has similarly limited understanding of the extent of the accused’s circumstance. Thus, I also control for the position of the defense counsel.

[Because of the Covid-19 pandemic, the Alberta Courts Office was not able to generate and provide the data expected and needed to test these hypotheses. Therefore, this thesis is only able to present a proposed model for quantitative analysis, rather than quantitative results.]
4. Qualitative Results

This section explores the results from a series of interviews conducted with Alberta Provincial Court Judges and Justices of the Peace surrounding the issue of rising pretrial detention rates in the province. In the first section of this chapter, I outline the responses the judges have regarding the underlying reasons for rising pre-trial detention rates, with a specific focus on the role, if any, administrative justice offenses play in this trend. The second section of this chapter outlines the legal grounds for detention, and how each judge approaches imposing conditions of release relating to cash, alcohol and addiction, transportation and homelessness, and mental illness and disability. The third section of this chapter outlines the role that racial bias plays, if any, in the bail process. The fourth section outlines legislative responses through Bill C-75, the implementation of referral hearings for police officers, and the opening of a new urban Indigenous court in Calgary. Finally, the fifth section traces the potential consequences of pre-trial detention for an accused, including the potential for false guilty pleas. Throughout each of these sections, the judges consider the unique circumstances of an Indigenous accused, and the extent to which their status as an Indigenous person necessitates alternative intervention.

Ultimately, this section explores the mechanisms of the two principle hypotheses in these studies, evaluating the extent to which indigenous accused may be more likely to be detained than non-indigenous accused, partly as a result of the imposition of burdensome conditions of release, and the role that this plays in high and rising rates of pretrial detention in the province.

A. Underlying Reasons Behind Rising Pre-Trial Detention in Alberta

I. Administrative Justice Offenses
Some judges speculated that the rising pre-trial detention rates has an explicit connection to the larger Indigenous population in Alberta, in comparison to some other Canadian provinces. Many recognized that the people who show up for first appearances are often detained for what you would call “nuisances offenses” such as drunkenness, or because they do not have a place to go. In cases such as these, however, the factor that would tip the scales in favor of detention would be when a defendant appears in court for a nuisance offense, and the court sees that they have multiple failings to appear for previous court appearance, or failure to comply with certain conditions. In this instance, judges are often more likely to detain the defendant. Thus, many of the conversations in these interviews quickly turned to the issue of administrative justice offenses, and their role in detention.

The issue of administrative justice offenses in the context of Indigenous accused is something that weighs on some of the justices, particularly when they are dealing with non-violent breaches. One judge explained this using the example of “nuisance crimes” in comparison to domestic violence:

A lot of the Indigenous people who come before us, their crimes are very minor; It’s something like somebody is a repeat shoplifter. Often times they’ll be running between the reserves and the streets in Calgary. They’re the people that you and I would see in the streets of Calgary panhandling. It’s often a nuisance crime, such as loitering. But then what happens is that they never come to court, and so they have a huge record of failure to comply, and then what do you do with that person? Releasing them with conditions makes no sense because they will continue to break it, but detaining them because they are homeless or addicted makes no sense. Eventually we get to a point where we have no option but to detain. On the other hand, you see someone with no
record who beat the hell out of his wife, he’s going to get out, but this person with a huge number of nuisance charges but no violent crime will be detained. There’s something wrong with that.

One other judge noted that administrative justice offenses have a cumulative effect, resulting in significant records, “I’ve seen several accused where you will have a two to three-page record, with maybe two substantive offenses, and all the others administrative justice offenses, which then show up on their record.” The judge went on to explain that it is understandable in situations such as these why the crown would be unwilling to consent to a release based on seeing this, and so they will detain them. The judge described circumstances such as these as “truly overwhelming.”

This has a direct impact on the constitutional aspect of bail, as one judge outlined:

There’s a constitutional aspect to bail, which says that you are entitled to release unless the crown shows cause for detention. In the last few years in my court, I saw that when you saw people fail to meet their conditions, you were more likely to detain them. Of course, we want people to follow our orders and if they don’t we want to punish them, so you can get to a vicious downward cycle.

Many of the justice recognized, however, that the emphasis on prior breaches of release has lessened since the introduction of Bill C-75, and other reforms since Antic. One judge said, “Before there were counsel involved, I would personally get a lot more hung up on breaches of conditions and in my head I would think: ‘Well you think you can get away with this, I’ll show you,’” they continued, “But certainly, as I say, the person with the long record is looked at much differently now, and that’s a good thing.”
There was a recognition that there are other forces involved in the criminal justice system that can divert an accused away from detention before they even appear before a judge. Police officers, for example, have the ability to release an accused upon arrest with and issue of summons or an appearance notice. Similarly, officers can decide not to charge an accused with an administrative justice offense if they are found breaching a particular condition of release. Instead, they can refer the accused to what is called a “Referral Hearing,” which is a recent policy implemented by the Province to address the issue of administrative justice offenses. I will discuss this in the Policy Solutions section of this chapter.

Of course, not all administrative justice offenses are the same, as one judge pointed out:

I had somebody before me last night who failed to appear before a hearing for a historical sexual assault, or you know you have somebody who fails to appear for a trial. There’s a huge difference between that and someone who fails to appear for a smaller matter. Same things with breaches of condition. If you have someone who breaches a condition related to alcohol consumption versus violence. What you call administrative justice offenses are not the same, and so I don’t think you can have a generalized comment about them.

II. Cases of Reverse Onus

In Canada the presumption towards release, often expressed as the crown’s burden to prove that an accused should be detained, can sometimes be jeopardized by the frequency of administrative justice offenses, resulting in cases of reverse onus. The topic of the reverse onus came up in nearly every interview with the judges, as it outlines the limits of an accused’s presumption towards release. One judge outlines this connection using the following example:

So let’s say that the person who was charged with a [breaking and entering] a month ago was supposed to be in court, but they didn’t go to court. The provincial court would issue an
arrest warrant, so not only would the prisoner in the case where they are facing a charge have a fresh charge, but they would also be facing charges for failing to appear on the old charge…This presents a number of problems for the accused: If he commits an offense while he’s on release, the burden of proof to show why he should be released is then on him. This is called a reverse onus.

It almost seems that lower level they are charged, then the more likely it is that they will have these charges. If a person has a marginalized lifestyle, the chances of them showing up for court every time is not that strong. If they have an alcohol or drug problem, they’ll be released on orders of no consumption, that doesn’t work. Some defense attorneys will say not to impose that because they will fail.

Another judge outlined the ways in which administrative justice offenses occur as a result of burdensome conditions of release, which may often be irrelevant to the circumstance of the alleged crime itself:

I had a prosecutor who was consenting to a bail, which duty counsel agreed to. The accused was an Indigenous woman. The crown recommended a $200 deposit, and she started to cry, and I said: “Why does she need a cash bail?” and they said it was because she has a record of not complying, and I said “Well we’re under Antic” and pressured them to changing. So I asked her: “Do you have $200?” and she said no, and then I said that condition would be like incarcerating her. Then [the Crown] said they wanted a curfew, and that she should not be allowed to go to Winners. They said that this is because her last two records were failing to comply with a curfew, but then I found out that the crime happened at 3:00 in the afternoon, so I thought, ‘Of course I’m not imposing this.’ Then
there was also an alcohol condition, which I threw out because it was irrelevant to the crime. Duty counsel had agreed to all of these conditions, I think, because their client wanted out! They’re in an unequal bargaining position in that respect.

B. Evaluating Risk & Grounds for Detention

Federal bail provisions outline that an accused has a presumption towards release, meaning that the crown must meet the burden of proof that an accused should be released based on any of the three grounds of section 515 of the Canadian criminal code. The primary ground is whether detention would ensure attendance at court. “If someone has historically failed to show up, then that’s grounds to detain,” on judge said, “but there’s a lot of grey area there.” Another judge gave an example of an instance in which the primary ground may be relevant, but overruled due to circumstance:

Say the person is a fifty-year-old man and he’s been on a spree of shoplifting, but he hasn’t had a record for twenty years. Well, that gap would indicate to me that he has overcome that tendency, and something in his life has triggered this behavior. If that trigger can be controlled with a condition, well then I’ll do that.

In general, every judge said that they rely on prior records to indicate whether they believe that an accused is going to appear in court, and many stated that they rely on records because “prior behavior is indicative of future behavior.” In the event that the judge believes that no condition would compel an accused to appear in court, then that would be a situation in which they would have to detain. The issue of failing to appear is a particular problem with people who are experiencing homelessness, do not have a permanent address, or live outside of city limits, as I explore later in this chapter.
If they don’t show up for an administrative date, that’s a problem. But if a person hasn’t shown up for trial twice, or a docket day four or five times, then really you are looking like a fool if you release them again. Are the witnesses really going to show up again for the same thing? And you have to consider the tertiary ground on this – what on earth is the public going to think about this?

The secondary ground is to ensure protection of the public or the victim, such as in instances of domestic violence. There is, however, a changing understanding of what danger to the public means. “Some judges have seen failing to comply with certain conditions as posing a danger to the public.” One judge noted, “but St. Cloud clarified that we’re supposed to be focused on concerns for witnesses or victims, and you shouldn’t actually be factoring in these administrative justice offenses as much as people might be doing.” One judge outlined their philosophy for deciding whether to release or detain based on the second ground:

I’m very prone to releasing for property offenses. If I see super violent offenses, they really concern me, and I’m far more likely to scrutinize them. If I see something like a property offense, I will really try to release them. If I see something that concerns the safety of the public, then I’m more likely to detain.

Finally, the tertiary ground outlines the circumstances under which an accused should be detained in order to maintain confidence in the administration of justice. One judge referred to this as the “garbage can clause” because it is a catch all. There are four particular aspects that are relevant to this discussion on detention: the apparent strength of the crown’s case, the gravity of the offense, the circumstances surrounding the offense, and if the accused may be liable for lengthy incarceration.
One thing that goes to relief is how long is a person going to get in custody if they’re convicted, and how quickly can you get a trial. If you have someone on the docket for a crime whose maximum penalty for six months, it’s certainly hard to justify keeping someone who is innocent for longer than they might serve.

Many of the judges noted the contradiction inherent in the constitutional guarantees of federal bail guidelines, and recent statistics surrounding bail practices in the province. “As I say, you’re entitled to the presumption of innocence and you’re entitled to release,” one judge said, “and yet despite that we have an increasing detention rate at the pre-trial level.”

C. **Conditions of Release**

I. **Cash**

While Canadian bail guidelines generally shy away from using cash as a condition of release, there are guidelines per the laddering philosophy in *Antic* that allow a judge to impose cash as some sort of condition of release. There are different types of cash conditions, ranging from a promise to pay, to a surety, to a cash deposit. Many of the judges recognized that the use of cash can be burdensome for certain accused, and some pointed out that it is common for duty counsel to oppose forms of release where there is a financial obligation:

Let’s say, for example, a person doesn’t come to court, or breaches a condition of release such as consuming alcohol, the prosecution makes a move to enforce that debt. Something so inconsequential such as consumption of alcohol then means you could be a debtor to the government for the rest of your life…For people of means, [court debt] is not a big deal, but for the majority of people we get in the court, this can be quite a big issue.
All judges mentioned that cash should only be used as a condition of release in extreme circumstances, as per the laddering philosophy outlined in the criminal code, and reiterated in Antic. One judge noted that Antic specifically speaks about cash bail, and the extent to which it has been over utilized in the past, and should be thought of as a last resort. One judge explained the difference in the use of cash prior to and following the Antic decision:

Prior to Antic, the crown routinely asked for money, and they would scale that money based on their understanding of what they could pay. If it was a case of robbery, sometimes the crown would impose $1000 because it was a serious crime. I talked about the time crunch that judges face, and so when a crown judge appeared in front of me and they agreed with the defense counsel, there is a significant reluctance to change that. I think we’ve become a little more interventionist, because the Supreme Court in *Antic* and Bill C-75 say that you have to release a person on the least restrictive bail terms, and where you have vulnerable population.

Despite this, many judges suggested that there is an overuse of cash in Alberta in comparison to other provinces. One judge said:

I used to practice in Ontario, and when I came out to Alberta I was really shocked with their reliance on cash bail. Because if you look at the criminal code, it says that cash is the last place you go…When I came out here, the default here was cash. I remember thinking: Why are we doing cash?

When asked how frequently they believe cash is used in the cases that come before them, one judge said that they believed cash was used in at least half.

There is an understanding, however, that the decision in Antic is sometimes constrained by practical considerations needed to get an accused to appear in court:
I can tell you that practically, you’re often dealing with a person who is indigent, like a homeless person, and they have had real problems getting to court. If they were a person of means, the prosecutor would impose cash conditions. But imposing a $100 deposit on release would be tantamount to incarcerating them.

Similarly, some judges questioned the extent to which cash is effective in compelling an accused to appear at court, and thus whether cash is even useful to the court in the first place:

Sometimes I think we look at what Antic has said but the practicalities of the situations are such that the only way the person is going to appear, is with cash. I’ve often wondered how much these dollar amounts have compelled people to come to court - whether people show up more if they know they have to pay if they don’t show up. If it’s $1000 and a person is inclined not to show up in court, is $1000 really going to be that much of a difference?

Most judges indicated a similar thought process: The practical benefits of imposing a cash related condition to an accused’s release plan are most useful when the judge is concerned that they will not appear in court, but they can never really be sure if it works or not. One judge pointed out that if an accused lives more than 100 kilometers outside of Calgary, for example, there is a requirement to have a cash condition, though it could be as little as a dollar. Many judges said that it is rare for judges to seek cash as motivated by concerns for something like a domestic violence case. One judge said specifically that in a domestic violence situation, no amount of money is going to protect the victim from being subjected to violence.

Recently, Ontario came out with a decision (R v. Tunney 2018) that analyzed Antic, and referred to the extent to which Ontario relies on sureties as a condition of release, and suggest that Ontario uses sureties more than anything else. While this is not the case in Alberta, one
provincial court judge said that they estimate cash is used as a condition of bail in approximately half of the cases that come before them, whereas judges may only see a surety used every few months.

And yet, the prevalence of cash bail even with the protections outline in Antic and reinforced through Bill C-75 is a source of immense frustration for many of the judges:

What drives me nuts is people who walk into court who are being held on a $50 cash bail and can’t pay it. We don’t have debtor’s prisons, and you should not be incarcerating people for not being able to pay $50.

Similarly, one of the judges noted that there are very few judges who believe that cash is and effective or fair condition of release, and should only be used sparingly. One judge noted that the crown’s office tries to train prosecutors to stay away from cash as much as possible:

We’ve been studying [the effect of Bill C-75], and haven’t seen enough to see if it has made any sort of change. That’s certainly something we try to do with our prosecutors, we try to train them to consider particular circumstance. One of the circumstances is that sureties and cash bail only contribute to the incarceration rate, and we need to do what we can to ameliorate that.

II. Addiction

One of the major challenges that the court faces during bail hearings is how to approach the issue of addiction, given that a significant number of the cases that come before them have some sort of substance involved in the alleged crime:

Addiction is a huge problem, and we often say when we are chit-chatting in the hallways that if there was no alcohol there would be more crime, and drugs too. People behave in a way they wouldn’t when they are under the influence of alcohol.
Many of the judges agreed that if alcohol is involved in the offense, quite often the prosecutor will propose a condition of no consumption to that defendant. Most judges understand now more than ever, though, that alcoholism is a disease that has medical implications for many people in distress:

If I’m an untreated alcoholic, my ability to comply with that condition is non-existent, I’m going to be put into medical distress by trying to discontinue consuming that substance. Meth and opioids is another example. If I suddenly made an order that they couldn’t consume this drug, and they can’t consume it anyways because it’s a crime, in my view I am setting them up for failure or some sort of medical distress.

A number of judges have, however, been approaching the problem of alcoholism in more creative ways. Rather than implementing a no consumption order, for example, a judge might order an accused not to drink in public, so that they will not become a public nuisance. This approach is also supposed to address one of the ways in which alcohol can contribute to crimes, especially that of violence. In a domestic violence case involving alcohol, the strategy may be to implement a no-contact condition in addition to the no public consumption, so that a person can still drink in private, but not batter their spouse.

A number of years ago, one of these judges dealt with a lot of aboriginals realized that this was hopeless because he realized that you were setting them up for failure. So rather than putting in a no consumption order, you order them to not consume in public so that they can keep consuming, but not in public. Prosecutors use this a lot in the hope that people will not become a public nuisance. It sounds pretty clever and we all hope it works, but it seems to be one way to address the ways in which alcohol can contribute to crimes, especially crimes of violence. For violence and dv and alcohol, we would
implement a no-contact condition as well, so hopefully the person can still drink but not batter their spouse. We hope that this works, but there’s no certainty. It’s the best we can do, short of completely detaining the person.

Some judges pointed out, however, that there is a difference between addiction and intoxication: If intoxication causes a person to commit an offense, then it is no different than any other circumstance of the crime, and necessitates a condition of abstention. If the person is addicted, however, then a judge should not impose a condition on that because in such a case, there is an underlying factor that cannot be addressed with a bail condition, and that ultimately will be unable to prevent them from committing a serious offense. Similarly, if addiction causes a person to commit convenience store robbery with a firearm, that is substantively different from if it causes them to shoplift.

Imposing conditions when alcohol is a factor, well, alcohol is almost always a factor. It would be much better if we had systems in place for treatment of addiction. So again we come down to the societal issues which are much bigger than just bail.

In terms of drugs, recent legislation that legalized the recreational use of marijuana means that the courts are treating marijuana consumption like alcohol, meaning that they may impose no-consumption, or require people to stay away from dispensaries. This decision is controversial, with some judges expressing concern about its implementation: “I am not a fan of legalization of marijuana and the argument that was made in that regard about alcohol is legal, and my argument back to that is: just because we made a mistake with alcohol, doesn’t mean we should do that with marijuana.” For harder, criminalized substances, however, this presents a much larger challenge for judges:
We hold that people won’t be involved in criminal activity (while released on bail), and so that includes drugs. I can’t imagine giving a person the impression that they could continue on bail if they were consuming drugs.

When asked if they ever consider referring an accused to the safe injection site that recently opened in Calgary, most judges mentioned that they had not considered setting that as a condition, even though the purpose of the site is to provide people with a safe place to consume drugs under the supervision of doctors and social workers. Unfortunately, though, many judges still approach the issue of addiction with a tendency to detain:

[Unnamed Judge] brought up the issue of how we deal with untreated addicts: you just get to a certain point where the person is untreated or addicted, the only way to protect the public is to keep them detained.

The introduction of duty counsel in bail hearings, however, has provided the accused some opportunity to demonstrate an ability to comply with a treatment plan as an alternative to incarceration:

Some people will make plans to check into a treatment center as part of their released plans. This comes up frequently for aboriginals, if they suggest that they are planning to enter into treatment, that weighs heavily on a decision to release them.

Similarly, many of the justices and counsel have undergone trainings surrounding this topic, including trainings surrounding implementation of conditions in an attempt to curb the “piling on” of conditions that a person is not going to be able to comply with. For example, one judge noted that “you don’t throw on a condition of alcohol abstention for a crime only generally related to alcohol use.” Another judge explained this change in culture surrounding addiction and conditions of release:
The benefit of having the bail system that we have is that we have specific prosecutors who are dedicated exclusively to doing first appearance bail in front of JPs, and they do nothing but these, and they are really tuned in to the programs that are available and the outreach programs that can assist. They do have that awareness level of adding conditions that are not absolutely necessary is not appropriate or effective.

Treatment plans do, however, have some major limitations, as one judge explains:

If it turns out their stealing to support a drug habit, then I suppose sometimes you would say if they were released, you would have to have a plan about where they would go, they could maybe go into residential treatment and release them on condition that they will go to one of those residential treatment places near south country. The problem is that some of those places won’t take you if you have outstanding charges.

III. Homelessness and Transportation

As many judges pointed out, a large number of the measures put in place to have confidence in the ability of an accused to appear in court will be called into question when the accused is homeless. Homelessness and transportation are major concerns for judges during the bail stage, as some of the judges describe:

Homelessness is another problem here in Calgary, but that has a big impact on the first ground, which is whether we think they will show up in court. You can’t detain someone because they’re homeless, but it is better to have an address so you can show that they are unlikely to flee.

Similarly, transportation is a major barrier for many Indigenous accused, as criminal cases throughout the province are heard in the two major city centers, Calgary and Edmonton, which
may be a significant distance away from where the accused lives, and many of the Indigenous reserves in the province:

A lot of aboriginals may not have a car or a driver’s license and are going to have trouble getting to court, so a condition to report to a probation officer is going to be tremendously difficult to comply with. It may be easy for a person in Calgary, but someone on the Blood Reserve, for example, will have enormous problems.

The issue of homelessness and transportation, moreover, has an explicit connection to the implementation of cash as a condition of release, as described in the earlier section on cash bail. The practical considerations that judges face regarding homelessness constrain their ability to impose conditions of release other than cash, as one judge outlines:

Antic specifically talks about how cash bail has be over utilized in the past, and should be a thing of last resort. A practical reality for me, though, is that this is a situation where the crown has to show cause. If you live more than 100 kilometers outside of Calgary, there is a requirement to have a cash condition, but it can be as little as a dollar.

Judges still do what they can in order to help an accused comply with their reporting conditions, even if they live outside of the major city centers:

We take some of the sting out of reporting, allowing people to call in or report at satellite sites, but of course you have to account that some people don’t have cell service or they have lost their license or don’t have a car, and I think we’re fairly sensitive to that.

As in the case of alcoholism and addiction, judges rely on duty counsel to help them realize a plan of treatment in order to mitigate the potential for a failure to appear:

You can’t detain someone simply because they don’t have a residence. Often you’ll hear that the person is prepared to go to transitional housing, which range from shelters to
housing opportunities that deal with addiction. In the case of a domestic situation, you’d have someone who would say they are prepared to take counseling and stop drinking and meet my probation officer, and that gives the court some confidence that they will show up.

IV. Mental Health, Mental Illness, and Disability

In general, some judges cited addiction and mental health as one of the underlying reasons behind rising pre-trial detention rates, saying that there are many people who find their way into addiction because of mental health, then they don’t have support in their community, and they commit crimes. The lack of support in the community assures that an accused is going to come back into court, and be unable to comply with the conditions that are in place.

Mental health is another huge problem, and in a perfect world we would divert all people with mental health problems out of the criminal justice system, but again our system is imperfect: we have one system and it has everybody in it. It has young people in it, it has Indigenous people in it, it has people with mental health issues in it, and that’s a huge problem.

Many of the people who appear in the courtroom similarly live with physical, developmental, or intellectual disability. For the Indigenous community in Canada, fetal alcohol syndrome affects many people, and can present significant challenges for judges to address in court:

I have a lot of concern for people who have fetal alcohol syndrome and the cycle that we see with Indigenous people in particular where we’ve got a family in which gramma was an alcoholic, and most of her children were apprehended, and then the cycle repeats itself. Eventually I’ll see the daughter who has fetal alcohol syndrome and addiction, and
we apprehend her children who have fetal alcohol syndrome, and we try to keep the
children in their culture as much as possible, but it’s a no win situation. I’ve been to lots
of trainings on fetal alcohol syndrome. A lot of times, experts will say that people will
function much better in a regimented fashion, such as in jail.

Fetal alcohol syndrome is, moreover, not always easy to diagnose. The way that an
accused interacts with the justice system may be indicative of fetal alcohol syndrome, and yet
this is rarely an opportunity for a diagnosis and treatment:

Fetal alcohol syndrome is a real problem in aboriginal community. What I’ve learned
about this is that your mental processing is affected. I went to a presentation by an expert
and she said she can diagnose a person with fetal alcohol syndrome by looking at a
record, because it is just replete with failures to appear and administrative justice
offenses. I think it’s no secret that there is a lot of that in the aboriginal community
suffers from this and, you know, what are appropriate conditions for their release?

In a similar way that treatment plans may be available for an accused who is dealing with
addiction or homelessness, some judges will rely on duty counsel to refer an accused to the
court’s mental health programs in an attempt to curb some of these problems:

In Edmonton, there is a community court for mental health issues. In Calgary, they can be
referred to a mental health treatment program. So again, you’re looking for ways to pick
off the low hanging fruit and send it away. We all do that under the auspices of having
someone released into programming, but they have to be out of custody for this to work.
So we’re attacking some of the detention issues out front, so there’s a little self-
preservation here too, because it is a prudent use of resources to reduce our caseload by
getting some of these people moved to what I would term as a lower level of involvement with the criminal justice system.

V. Ability to Comply

The success of these varied approaches to imposing conditions of release hinge on whether an accused is actually able to comply with them. Often, judges will rely on counsel to express to them whether they believe the accused can comply with the conditions imposed upon them or not.

The major problem we face when imposing these conditions is that people want to get out. You ask people if they can control their drinking, and most people will say yes. I really question that. I think many people are very desperate – They will promise anything to get out. Maybe they promise they will comply with any conditions if that’s the key that’s going to get them out of jail that night.

Another judge gave an example about an instance when an accused was honest in their inability to comply:

A guy came before me who was charged with multiple instances of breaching a no-contact order, and he was representing himself so he had refused to talk to counsel, and it was a reverse onus situation because he was on bail before. I said: I’m concerned that if I grant you bail with a no-contact order, you will not comply. His response was: Of course I won’t – I love this woman. In that case, I kind of have no choice but to detain.

Ultimately, some judges believe it is not their responsibility to assess whether they believe an accused can reasonably comply with said conditions of release. Instead, they rely on counsel to indicate whether the accused will be able to comply:
If an accused is working with counsel, I don’t think I can go behind that. If counsel tells me yes the person can comply with those conditions, then I have no issues. I don’t think I have an ability to delve into that. If it’s something like a no-contact condition, or something more serious, if I don’t think the person is willing or able to comply with those conditions, then I detain.

D. Racial Bias & Bail

Some of the judges I spoke to recognized that they are certainly influenced by certain factors about an accused that they may not even recognize. One judge spoke about an experience in which they noticed their impression of an accused changed because of their age. They mentioned that in the past, they had spoken over the phone because she had been detained at a facility outside of Calgary. When the judge saw her in person, they were surprised to see that she was a young woman:

My impression of her was completely different. I guess I could always check the documentation for a person’s age, and it probably won’t influence the way I deal with the person, but who knows what influences us…If I make a mistake about a person’s age, am I going to draw assumptions about whether they are going to comply with their release conditions or not? I don’t know.

Other judges were skeptical that racial bias came into play in the courtroom, citing instead that the reason for an over representation of Indigenous people within the system was due to certain problems their culture and community faces. Table 1 outlines the varied responses to whether there is racial bias in bail.

Table 1. Judges Responding to the Question of Racial Bias in Bail

<p>| Key: |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>There is no bias in the justice system; overrepresentation is because of cultural and historical problems</td>
</tr>
<tr>
<td>B</td>
<td>Implicit bias still exists in many judges, and that comes across in their decisions, leading to an overrepresentation of Indigenous People</td>
</tr>
<tr>
<td>C</td>
<td>While judges may not be biased themselves, the current bail system generates disparities that are caused by race (disparate impact)</td>
</tr>
</tbody>
</table>

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>“The overrepresentation of certain people in the criminal justice system isn’t, in my mind, because of racial bias. It’s not because the police are biased against a certain culture, but because there are certain cultural problems that lead to crime, which need to be addressed. I’m sure some police officers are biased, but there are bigger problems to be addressed.”</td>
</tr>
<tr>
<td>B</td>
<td>“Probably wrongly, a number of Caucasian judges who didn’t grow up in an aboriginal community have certain impressions about aboriginal offenders. So you hope that we can overcome those impressions and falsehoods, as they probably are, and I’m sure that we all have them, but I think, even with a number of amendments to the criminal code, and the awareness of the ways that aboriginal people have been beset by colonialism and residential schools, they still exist.”</td>
</tr>
<tr>
<td>C</td>
<td>“When you ask is there a racial bias, I would like to say I hope not. As a former prosecutor I think that there is no intent, but maybe there is unconscious bias. In this particular issue, all these former failures to appear will ramp all this up. Those failures to appear could be because this woman lives on a reserve, she cannot get a ride, or she can’t find a way to physically get [to court]. So is it possible that there is bias in this respect? Yes.”</td>
</tr>
</tbody>
</table>

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>C</td>
<td>“When you talk about systemic racism, I think judges get leery of that because they say, ‘Well I don’t feel racist.’ I suspect that most judges are not cross-bearing, white-sheet-wearing racist. But the system creates issues we’re running into, and this is the place where we have constraints such as time and volume of hearings. We continue from our side of the ledger to look for solutions to stream people away who need to be streamed away because they’ve got drug issues, alcohol issues, and domestic violence issues, but it’s hard.”</td>
</tr>
</tbody>
</table>

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
</table>
| C | “I think there is [racial bias in bail]. I mean obviously if the judge is a racist, there’s nothing you can do to address that. The biggest problem is that a lot of people from the Indigenous communities don’t have the same structure; They might not have a job, or welfare, or transportation. It’s not so much systemic racism, but when the person shows up with ten failures to appear on their record, in a sense their race has caused the problem. If a white person came in with ten failures to appear, I would
like to think they would be treated the same as an Indigenous person, but I think white people are less likely to have that.”

“I’m reluctant to say that there is racial bias, but there are situations in which minority people will have more substantive problems in the criminal justice system, and they just have no support, and then they get more administrative justice offenses, and then the crown seeks their detention or imposes cash.”

I. Role of *Gladue* in Bail Hearings

While *Gladue*, the 1999 case that illustrated a judge’s obligation to consider the unique circumstances of an Indigenous person in the criminal justice system, has historically been used as a sentencing case, all of the judges noted that they rely on “*Gladue* factors” when making a decision regarding bail, even if they are unable to access a *Gladue* report. One of the judges pointed to sections 439.2 and 493.1 of the criminal code, which illustrate the principle of restraint. “Defense lawyers are always reading that back to us,” they said, “and we are conscious of that.” Similarly, one judge pointed to the case Regina v. D.D.P. 2012 ABQB 229, paragraphs 9-13 as a good example of how the circumstances of an Indigenous offender can be considered in planning for their release on bail. Table 2 outlines the ways in which judges incorporate *Gladue* factors into their bail decisions, and whether they believe *Gladue* factors should be considered at the bail stage.

**Table 2. Judges Approach to *Gladue* Factors at Bail Hearings**

<table>
<thead>
<tr>
<th>Key</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td><em>Gladue</em> factors are relevant at the bail stage, and must be given consideration</td>
</tr>
</tbody>
</table>
| A   | “We are required to consider their circumstances; it is written in the criminal code now. Most [judges] are pretty alert that we have to give special consideration to aboriginal offenders. We’re cognizant of the problems we’re learning about these communities are facing, and recognize that some of the
conditions we apply to western offenders are not appropriate for aboriginal offenders.”

| A | “In Alberta we certainly talk about the over-representation of Indigenous people in jails and that is a big factor we need to consider, especially with recent legislation, and in fact that is something that we talk about out loud now in bail hearings and it really wasn’t something we did before.” |
| A | “Just as a matter of practice -- I hear this regularly that duty counsel, in a joint proposal for release -- they’ll say this is an Indigenous person and the Gladue factors apply, and we’ve considered that in the joint submission.” |
| A | “There’s an overrepresentation of that population, and the court has to be very careful to make sure that Gladue factors are addressed in bail if they are appropriate, and to have an understanding of the person’s background and their history. And the more you know about that, the more you can address the appropriate procedure, and if it’s release what do you think the conditions would be.” |

The above quotes illustrate an awareness of the judge’s responsibility to take Gladue factors into consideration when making any decision regarding bail. One judge outlines the practical effects these factors may have on their decision to impose certain conditions of release:

I know that Indigenous people have problems getting to court because lots of social and transportation issues, and so as a practical matter when somebody comes before me who is Indigenous, I don’t look at the record for fails to appear in court to be as significant as someone who is living in a city.

Given time and resources constraints, however, judges often rely on counsel in order to make these Gladue factors known to them when they are making their decision:

I think there’s a pretty good basis to say that Gladue applies for bail hearings as well, but the other part of it is that for the bail hearing we don’t get a Gladue report and so we rely
on counsel. Sometimes I don’t know if a person is Indigenous, so it’s really up to counsel to raise that for me, and then I take that into account.

Some of the judges, however, mentioned that they are concerned about the ways that protections in the criminal code for an Indigenous accused to be treated differently according to Gladue are, actually, discriminatory against Indigenous victims:

I have a lot of concerns about that, in that a lot of bail hearings that we do now are domestic violence. When we take Indigenous status into consideration, I sometimes think we are discriminatory against Indigenous victims. We tend to be more likely to release if the person is Indigenous. I think to myself then, what are we doing to the Indigenous victim? Are we saying they are not as worthy as a non-Indigenous victim?

The same judge ultimately goes on to say: “I absolutely do appreciate the issue, and I’m not unsympathetic to it, but I don’t think our bail system addresses all the societal issues that are out there, but I wonder sometimes if we’re not creating another problem.”

Another judge expressed similar doubts of Gladue’s ability to protect Indigenous communities, and weighed these concerns in tension with an understanding of a particular community’s ability to mediate and resolve conflicts themselves, beyond the purview of the justice system:

Quite often of course in the Indigenous community, the victims are also Indigenous people. Does that make a difference; I don’t know? I suppose the experience is that they may be more likely to be forgiven. It could be that the defense counsel has spoken to the victim, and they would not object to his release if he gets counseling. If you’re trying to figure out if they are going to beat someone else up, though, I don’t know what you can do about it. I sometimes wonder if Indigenous people say: Look this person is beating up
on us, and we are Indigenous too and we deserve to be protected like any other community.

E. Other Factors Influencing Bail Hearings

I. Role of Crown & Duty Counsel: Rising Frequency of Joint Submissions

Almost every judge that I spoke to mentioned that since the implementation of crown and duty counsel at bail hearings, they have noticed an increase in the presence of joint submissions. The practical implication of this rise in joint submissions is that judges are less likely to oppose the joint recommendation, or drastically alter the proposed conditions of release:

The basic rule is that when you get a joint position, there has to be really something dramatic that you overrule or question it. You might question for clarification, but since it’s an adversarial system, if both sides agree to it… I mean I have never overruled and agreement on bail. Sometimes I’ll add or take away one or two clauses.

One justice of the peace noted that the crown will rarely oppose release, and this is often because they have already worked with duty counsel to prepare and agree upon a form of release. Sometimes there may be disputes over certain conditions, but the justice noted that it is rare at this point for the crown to oppose release if appearing before a JP.

When asked what may prompt a judge to override a joint submission, or make and alterations to the proposed conditions of release, the majority of justices said that they most often make alterations in the case of violent offenses. One judge said:

If it’s a joint submission, or a routine matter, like someone shoplifting from a liquor store, I’ll probably go along with the joint submission, and I’ll probably do that without hearing circumstances of the offense because it’s a low grade offense… But if it’s a joint submission relating to any crime of violence or threats, I’ll always require the prosecutor
tell me what the circumstances of the offense are, and I do that because I have to be satisfied that there will be safety.

In fact, judicial discretion, one judge pointed out, is supposed to be exercised extremely rarely, as outlined in the Antic decisions (paragraph 60-70).

The vast majority of people who appear before me are released on bail, and the vast majority of those cases are consented to by the crown, and they are a result of agreements between the accused and the released.

One judge noted that, in fact, the judge is very rarely the key decision maker in pre-trial proceedings, and this has a significant impact on the ability of a judge to intervene on matters of cyclical incarceration:

I think people studying this fail to understand that [time served pre-trial] is a significant proportion of the time served by the Indigenous population. I imagine there’s quite a big what we call “churning of the mill,” which gets people coming in and out of the justice system on a continuous basis where they don’t interact with the apex of the decision, the judge, because there are so many decisions being made outside the courtroom. As a result, you have a young man, for example, who has lost half of a year of his life with very little ability of the judge to intervene.

Many of the judges noted, however, that counsel is largely helpful and has offered them a better picture of the circumstances of the accused:

Counsel is always effective. It helps me to acknowledge that if you give an order, the order will be explained in some detail. In provincial court, if you can get a lawyer who can speak on their behalf, it is so much more effective than dealing with a self-represented accused.
It is important to note, however, that there is an imbalance in the extent to which the crown or defense will lay out evidence at the bail stage, which may come at the expense of the accused, as one judge explains:

The crown presents as many issues as it wants. In the bail hearing, the crown doesn’t have to call evidence – they can just lay out whatever they think their case is, and they can include hearsay and evidence that may not be admissible in trial. I think this is sort of a counter balance to the presumption of innocence and release because judges get wider stream of information…The defense will quite often not want to tip their hand, although they can and I’ve seen defense counsel come out the gate flying to say that my client is innocent and he was not there. But I’ve also seen them say look I’m not going to get into the substantive aspects other than to say look here’s a plan of release.

It is rare, though, that these hearings involve an extended back and forth between the crown and defense counsel:

Quite often in bail hearings though when I tried it as a young lawyer, I was told “this isn’t a tennis match” and so it’s less likely that you get a back and forth. You can appreciate that where you’ve got four million people, you’ve got practical concerns surrounding time.

Sometimes, it is in the accused’s interest to waive their hearing before a justice of the peace, and appear before a provincial court judge to avoid some of the problems described above:

You can appear before a Justice of the Peace, or you can appear before a Provincial Court Judge, and it’s your choice. There’s a justice who will hear your case right here and right
now, or you can appear before a provincial court judge. Very often, though, their lawyers are not ready and so the smart ones, if I can call them that, they will wait.

Delaying a bail hearing in order to appear before a provincial court judge may be helpful for the defense to prepare, but it means that the accused will ultimately spend more time detained; the twenty-four hour guarantee to appear before a judge only means that you are guaranteed an appearance, not that a decision will be made regarding your potential release within twenty-four hours.

F. Policy Solutions

I. New Guidelines in Bill C-75

Some judge expressed that they have noticed a significant difference in the release rates of accused since Antic and the introduction of the crown and duty counsel, and implementation of Bill C-75. “Ever since we brought in crown and duty counsel, my experience is that I release more people now than before.” This has potentially significant implications for the forces of bias in decisions to release or detain. One judge said, “We get our files before hearings, and you know it’s human nature that my gut tells me: this person is getting out, and this person isn’t. A lot of times now my gut will say that this person is getting detained, but they will be released, especially now that we deal with joint submissions from counsel.”

Ultimately, Bill C-75 has codified what Antic originally said; one judge described it as a “wake-up call,” because now they now have to abide by the laddering system. They must also justify their reasoning using a new bail form, form 11 (SEE APPENDIX), in which you have to explicitly detail the mechanisms through which you move from the lowest level of burdens, release with an undertaking, to promise to pay, then surety, then cash deposit. One judge
described the goal of Bill C-75 by saying: “The idea is to lessen pre-trial detention and to ensure far more releases. Having fewer conditions will also result in fewer charges with failing to comply, which are the administrative justice offenses.”

On judge reflected on the impact that C-75 has had on the volume of cases that appear before them:

In the last six months, there’s been a re-ordering of priorities. The Antic decision talks about a ladder of conditions. If it’s a first time, they’re usually supposed to release them on an undertaking, and Bill C-75 emphasizes that police are supposed to be releasing a lot more people than they are. It’s given the police greater latitude to release people. As a result, anecdotally we’ve seen a reduction of a number of bail hearings we see at the provincial court level.

II. Reducing Administrative Justice Offenses - Referral Hearings & Conditional Sentences

The vast majority of judges mentioned that there is political will in the province and the court to address the issue of administrative justice offenses, and pointed to a recent introduction of “referral hearings.” These hearings came into effect in December of 2019 as a result of Bill C-75, and they allow an accused to be brought back into court by a police officer if they are found breaching any conditions, at which point a judge will adjust the nature of the conditions of release, and allow an accused to be released without processing a new charge on their record:

Bill C-75 makes significant changes…well some say significant changes, but it actually puts into statute what the common law says about bail to some extent. But one thing it does change is that it does give police latitude to release people.
The philosophy of this program is to ensure that someone who is out on bail and finds themselves in a condition they should not be, such as becoming homeless, will not obtain six or seven breaches out of only one encounter with the police.

That system has changed though and now there is a new provision in C-75 that went into effect in December, where now let’s say a police officer arrests someone for breaching a drinking conditions, the police officer can charge the person with breaching their release order, which is a felony, now what the police officer can do is that he can give the person an appearance notice to appear in court before a provincial court judge who would then consider if their earlier release should be conducted, and if this hearing is conducted, then the felony may not go on their record as a conviction. And I don’t know the data on this, but I wonder how many charges this is removing out of the system. It’s still early and will take a few months before we start getting data on what the impact is on reducing these sentences. I think that’s going to have a big impact because like I say if the person had a whole bunch of failing to appear or failing to comply charges.

Judges noted, however, that they have not seen many of these referral hearings occurring. One reason behind this, they believe, is that it is relatively new policy. Another reason, though, is that the success of this program hinges on the position and actions of the police. In general, some of the judges said that any policy that is overly complex and burdensome for a police officer reduces the likelihood that they may enact this changes. This is, however, tempered by the fact that the two major city centers in Alberta, Calgary and Edmonton, have very progressive police chiefs who one judge described as “willing to look outside the box” to deal with the issue of pre-trial detention.
Another judge referred to this change from Bill C-75 as the implementation of what they call “conditional sentence,” which they explain using the following example:

If someone is released on a conditional sentence and they breach it, they are brought back into court and the judge has the jurisdiction to add new conditions, extend the CSO, or have the person go to jail. On that philosophy, the person doesn’t have new charges. The philosophy of that has been adopted to bail, so that someone out on bail who is caught up with someone they shouldn’t be, or homeless. You do see charge sheets that have six or seven breaches out of one encounter with the police and that looks horrible on their record.

These referral hearings are new, and so little time has passed since their implementation, and some judges commented that they are unsure how effective they have been:

They just changed the law in December, where they can send them in front of a judge for a review, but I’ve only heard one happen. And I think the government thought they would save a lot of time by doing that, but they aren’t really doing much.

III. Introduction of Indigenous Court

Early this year, a few justices and court workers opened an Indigenous court in Calgary, which is the first urban Indigenous court in the province. One judge mentioned that an urban Indigenous court, in contrast to the Indigenous court already in existence on reserves, had not been feasible in the past because it is “hard to create a court to serve all nations.” The court works to provide services for Indigenous accused and connect them to providers within the city, thus diverting them away from detention. One judge who has been heavily involved in the process described the model of the new urban court:
I’m very much hoping that this will lead to less incarceration for Indigenous people, because what we did is set up a community support system for people in the city to bring them together to a case management table. For people who have severe addiction and don’t have a place to live and would normally be denied bail, we would refer them to these support agencies. Here the various support agencies will step up to help them.

The implementation of an urban Indigenous court also allows the Indigenous community to practice traditional methods of conflict resolution, which may aid in diverting Indigenous accused from the criminal justice system. One judge outlined an example of such a practice in two nations located just outside of Calgary:

Both the Tsuut’ina and Siksika Nations have peacemaking practices, that is sort of a mediation service run by the Indigenous community in which elders can intervene and try to smooth things over. It strikes me that this is one good way to deal with this, though they might become involved further along in the criminal process. If the accused and the victim both say they are prepared to go into peacemaking, this would help with their release. That diverts a lot of people out of the system. I don’t know how much of a part it plays now, but that is something that could be helpful.

While the urban Indigenous court is still new, one judge noted the extent to which it is already working to connect people with the necessary services in order to comply with a healing plan, or engage in conflict resolution:

The results that I’m seeing through the stats that we’re keeping, is that far fewer people are being detained. Alberta is one of the worst places for this. If you look at the number of Indigenous people in our population, and their overrepresentation in the pre-trial system, it’s shocking. The results that I’m seeing are that the people who would have
never gotten release, are now coming into that court and being able to access them right away.

**G. Consequences of Pre-Trial Detention for an Accused**

I ended each interview asking the judges to tell me about the potential consequences that pretrial detention can have on an accused in terms of their personal life or the outcome of their case. Many judges noted that the potential consequences could be numerous and severe. Some judges were quick to note their obligation to the public, while others focused on how pre-trial detention divides communities and enforces historical oppression against Indigenous communities. Table 3 details the judge’s responses to particular consequences for an accused if they are detained.

**Table 3. Judge’s Thoughts on Potential Consequences of Pre-Trial Detention**

<table>
<thead>
<tr>
<th>Key</th>
<th>Thought</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Protection of the public should be the primary concern, not the consequences for an accused</td>
</tr>
<tr>
<td>B</td>
<td>Pre-trial detention makes an accused more likely to engage in crime, not less</td>
</tr>
<tr>
<td>C</td>
<td>Pre-trial detention tears apart families</td>
</tr>
<tr>
<td>D</td>
<td>Pre-trial detention can result in the loss of a job or a home</td>
</tr>
<tr>
<td>E</td>
<td>Pre-trial detention results in false guilty pleas</td>
</tr>
</tbody>
</table>

A

“I think it’s an important factor to consider, but we consider many factors including the strength of the crown’s case and the likelihood that they are going to be detained. So boohoo you are going to be in jail and your wife and family will be upset about it, but that’s your fault, not mine, and my biggest concern always comes down to protection of the public. In most cases, pretrial detention will have an adverse effect on the individual, but sometimes you are protecting them from themselves, and you have to think of the big picture.”

B

“That is something I have great regard for. I know when I am detaining someone, I am making their life worse for the foreseeable future. I’ve been to the remand center, and I know that prison is not easy – there are predators, and there is a lack of security: lots of violence, and there’s access to drugs in there even though there’s not supposed to be. So you may in fact have them housed in a place that
can get them worse in their addiction, and get worse in their criminality. People refer to remand as the ‘university of crime.’”

| C, D | “If you incarcerate someone for any length of time, then they lose their job. But then you also have a person who has got multiple children and they are no longer working, then those kids lose their funding from that, and they don’t get to see their dad or they only see them in distressing conditions that don’t aid their development. It adds extra stress on their family, wife and parents, who have to pick up the slack from their custody.” |

| A, D | “As far as their personal life, of course you’ve got to consider if they’re working full time, they’re going to lose their job. If you detain them and the matter is going to trial, you know that they’re going to lose everything - their job and their apartment. But I mean obviously if they are a danger to the public, that doesn’t really help the person they go and victimize. I suppose if they had the job and the apartment, they are more likely to show up because they have a certain amount of stability in their life, whereas if they’re homeless they’re maybe more likely to go on the run where nobody can find them. But you have to consider: Can I protect the public?” |

| B, C, D, E | “Pre-trial detention results in false guilty pleas, can result in the loss of a job - many have entry level jobs. They can lose their residency – many are renters and can lose their assets as a result of an eviction. Psychological harm, exposure to criminal culture or gangs is often cited, especially for younger people. If the person has children, and women are vulnerable to this, the minute that the women is detained, child services will get involved, and her ability to get the children back will be decided by a family court judge, which could take months or years. In particular, for Aboriginals who are living on a reserve in Alberta, they are in a network of people from their own community, and when they are detained in custody in a large city center, they are cut off from their support network.” |

One judge followed up their answer by asking the following questions: “What happens to the person who is detained, runs a trial, and is found not guilty? Then the time they have spent incarcerated is lost, and it’s a tragedy.”
I. Pre-Trial Detention, Innocence & False Guilty Pleas

Being detained pre-trial comes with all the hardships listed in the previous section, and results in greater desperation. With desperation, many judges noted that an accused will be more likely to take a plea:

I remember being told years ago that the bail hearing [as a prosecutor] is the most important thing you are going to do, because if a person is detained, you are most likely going to get a resolution.

The alternative for many accused is months to years of waiting for a trial. One judge noted that the legal aid system in Canada, in contrast to the public defender system, is prone to delays wherein an accuse will “spend so much of their time trying to get their lawyer through legal aid, that they end up spending months in custody.” One judge outlined the problem many accused will get arrested and can get an attorney within a week after speaking to duty counsel. Sometimes there are people who…especially if they are uncertain or if they are appealing being rejected by legal aid, it’s not uncommon to wait for weeks, and then they have to put a plan in place with their lawyer once they get them.

One judge gave an example of how the pressures of pre-trial detention can force an accused to waive certain protections offered to them through Gladue, and ultimately take a plea without a judge ever intervening in the process:

I quite often have Indigenous people who haven’t gotten bail and are pleading out to a number of charges. They agree to the notion that they have served enough of their sentence pre-trial. One of the benefits of pre-trial is that you get 1 and ½ days credit for every day you serve pretrial. They waive their Gladue report because that takes weeks or months to prepare, and they’ve already come to an agreement, and by the time they show
up in front of me, they have already figured everything out, and my hand is tied. At every stage of the way, none of the decision makers, being judges, have an ability to impact any of these decisions that lead to a *fait accomplis*. The defense will often concede to the prosecution, then the case is closed.

Table 4 demonstrates the potential for pre-trial detention to lead to false guilty pleas:

**Table 4. Judge’s Thoughts on Pre-Trial Detention and False Guilty Pleas**

<table>
<thead>
<tr>
<th>Key</th>
<th>Thought</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>“The frustration and danger is that someone who is detained pre-trial and is waiting forever, they will just plead guilty. Then get their one day or their ten days, which is a lot shorter than waiting for their hearing.”</td>
</tr>
<tr>
<td>A</td>
<td>“False convictions – you worry about it, it’s in the back of your mind. If you think you’re going to get a year in jail, it might be worthwhile to have your trial. But if you’ve already been here for three months, and the crown is only asking for six months, then maybe they will take the plea to get it over with.”</td>
</tr>
<tr>
<td>B</td>
<td>“We have a specific section of the code, 606 1.1, where the defense is supposed to go through a bunch of questions when the person is taking a plea, and you know that they are having this discussion behind closed doors, and then they’re doing it in front of you. Every once in a while someone will say: “I am doing this because I need to get this over with.” I immediately strike the plea. In my mind, you have to go to trial. And this may cause a person more pain because they have to spend more time in custody, but I can tell you on a personal level that most judges have this fear that you are sending someone to jail who did not commit a crime.”</td>
</tr>
<tr>
<td>C</td>
<td>“You can see that happens more in vulnerable population, rather than for a well to do person who is going to fight to clear their name. An Indigenous person will start doing a cost benefit analysis: If I fight this, how much longer am I going to be in custody? or if I take the plea, I’ll go to jail but be out earlier because of good behavior. Structurally, we try to avoid this but it is hard to get a trial on in a short period of time, and sometimes when you rush to trials, things are missed, and miscarriages of justice”</td>
</tr>
</tbody>
</table>
happen, and then you may get somebody is sentenced because they are just rushing. So there is an emotional toll – I didn’t understand the depth of it. That’s what takes the most out of judges on a personal level, because we wrestle with these situations all the time and for the good judges, that wears on us.”

“A

“The interesting piece about wrongful convictions is that the studies have focused pretty much exclusively on the big cases, the murders, and you know sexual assaults or significant cases where people have spent many years in jail. I really worry that on a micro level, there is some person who was detained last night, who is thinking I just want to get over it and I want to get out, so I’m just going to plead guilty.”

C

“I know from both my experience as a trial lawyer that Indigenous people, their culture is largely conflict avoidant, and so to come into court and to say to a person of authority, when they are already marginalized individually as well as culturally, “no that’s wrong,” in relation to the crown’s assertion – that is very, very difficult, and so that is in some ways apart from strictly the bail issue, that feels generally with the concern of admitting guilt, because they are not pre-disposed to challenging assertions like that. And I’ve seen it. I used to do court east of Calgary on various reserves, and accused people would come in and they would immediately just say “yea I did it” without any kind of thought to challenge things, and it was very troubling to me because they are just trying to get out of court, and this is all a meaningless exercise for them.”

A

“It’s very strategic, isn’t it? A

And it’s hard to argue against the strategy, because they’re in custody, and maybe they have a long record for failing to appear in court and don’t show any ability to comply, so they are detained. And then they know that if they wait for a trial it could be weeks or months down the road. Remand gives them double or 1.5 credit, so they get out. They not only acquire a record that they don’t deserve, but it makes it much more likely they will be detained on the next round.”

A

“We have many, many instances, and we don’t track these, but there are many instances where the accused, after they’ve plead guilty, will say to the probation officer, ‘Well I just wanted to get it over with…I wasn’t guilty of that.’ For me, it’s more common sense, sadly. You get so many people coming through the justice system, you have them on a busy docket court, you have them speak for five minutes to duty counsel who says, “you can plead guilty now and I can argue for time served, or you can plead not guilty and we can set a trial date” and I think it just stands to reason that this would be something that would occur with some frequency.”
5. Conclusions & Recommendations

Bail is an often overlooked component of the criminal justice system – dismissed as only the precursor to the more important and consequential decisions involved in a criminal case: the trial, or the decision to accept a plea. Pre-trial detention, moreover, is rarely given attention as an area for reform. This research demonstrates that the decisions made at the earliest stages in the justice system, the first appearance, can have major consequences for an accused and their community. For communities that are over-represented in the justice system, such as the Indigenous community in Alberta, the bail stage can serve as a critical opportunity to either ameliorate the social marginalization that members of an overrepresented community face, or further exacerbate disparities within the justice system.

This research project began with the question: Are there racial disparities in Alberta bail proceedings? Clearly, there are. The data show that Indigenous people make up only 4% of the population in the province, and yet comprise 41% of the population in custody in the province. There is a consensus among all interviewed judges, moreover, that Indigenous people are more likely to appear in court for minor “nuisance” offenses than any other group, and that they are more likely to cycle in and out of detention. Certainly, this overrepresentation can be traced back to a long history of marginalization and colonial oppression in Canada, ranging from periods of dispossession and displacement, to cultural genocide enacted through the state’s residential school system, to other discriminatory policy surrounding health and sanitation, education, and employment in Indigenous communities. Figure 1 outlines each of societal conditions and the marginalization that Indigenous people face, and how they lead to involvement with the justice system.
It is well established that members of the most disadvantaged group are over-represented in the criminal justice system of any society, partly because all the other systems designed to divert them have failed to do so. One judge described the criminal justice system as “the last social safety net” for many marginalized people. It would erroneous to assume, however, that these social conditions are the sole determiner of disparate outcomes in the criminal justice system. While this research acknowledges the role that historical oppression plays in Indigenous involvement in the justice system, the focus of this paper is whether the criminal justice system itself, and the many forces within that system, create higher rates of pre-trial detention for this group.

The mechanisms by which the justice system disproportionately detains Indigenous people are twofold: First, by detaining Indigenous people at a higher rate than other groups, and second, by imposing burdensome conditions of release, which ultimately lead to detention. The first phenomenon can be summarized by the question: Are there racial disparities within pre-trial detention, as a result of determining the relative risk of an accused if granted release? I hypothesized that while deciding to grant or deny bail, judges are more likely to detain Indigenous people than non-Indigenous people. The first statistical test outlined in chapter three was designed to test this hypothesis. Due to circumstance related to the availability of data at this
time in Alberta, I have not been able to run this test as of yet. The qualitative component of this study can, however, shine light on the extent to which this hypothesis holds true.

The Canadian criminal code has codified specific protections for Indigenous people in the justice system, as outlined in the 1999 *R v. Gladue* decision. Gladue directs courts to take into account the history of the accused, with particular attention to the circumstances of Aboriginal offenders, and to seek all available sanctions, other than imprisonment. While Gladue is a sentencing case meant for the trial stage, all of the judges agreed that they take “Gladue factors” into consideration while making decisions related to bail. These factors include, but are not limited to: the personal effect of the residential school system; experiences in the child welfare or adoption system; effects of dislocation or dispossession of Indigenous land; and family or community history of suicide, substance abuse, or victimization.

Taken on its face, the presence of Gladue factors in bail hearings should mitigate the possibility for direct discrimination against an Indigenous accused. In fact, Gladue should ensure that an Indigenous accused is treated favourably to an accused of any other racial background, and therefore, that they should be less likely to be detained by a judge, proving this hypothesis incorrect. When asked about how they take Indigenous status into consideration, all judges responded that they consider Gladue factors, and try to ensure an Indigenous accused is not detained wherever possible. Some judges even expressed frustration or disdain for this system, suggesting that by treating an Indigenous accused favourably, they actually discriminate against Indigenous victims, given that most crime is committed within the same community, or even family.

Without the results from the statistical test, it remains uncertain whether the scenario described above is true. Based on extensive conversations with these judges, however, it seems
as though Indigenous people are still being detained at higher rates, despite the intent of Gladue. This is due to the fact that almost every judge mentioned that the factor that often tips the scales in favor of detention, especially for non-violent offenses, is whether the accused has multiple failings to appear for a previous court appearance or multiple failings to comply with previous conditions of release. Judges must make a decision to detain based on three grounds: whether the accused is a flight risk, whether they pose a danger to society, and whether releasing them would shake the confidence of the public in the effectiveness of the justice system. The issue of releasing an accused with a long record of failure to comply jeopardizes the tertiary ground, according to some judges, shaking the public’s confidence in the justice system.

Based on the evidence presented through the interview process, most of the Indigenous people who appear before the court have long histories of failing to apply, ultimately leading to their detention. The implication of this finding is that the over-representation of Indigenous people in pre-trial detention may not be due to direct discrimination, but due to a subtler form of discrimination, referred to throughout this thesis as disparate impact discrimination, related to the imposition of burdensome conditions of release.

The role of disparate impact discrimination in pre-trial detention can be summarized through the question: Are there racial disparities in Alberta bail proceedings as a result of assigning conditions of bail? Specifically, I hypothesize that when assigning conditions of bail, judges are more likely to assign conditions related to abstention of alcohol or drug consumption and permanent housing to Indigenous people, regardless of the relevance to the original charge, or whether they believe the defendant can reasonably meet those conditions.

This hypothesis can be broken down into three parts in order to test the various components. The first test is whether judges are more likely to assign conditions relating to
abstention of alcohol or drug consumption, or conditions related to housing and residency. The subsequent two statistical tests outlined in chapter three were designed to test this hypothesis. As previously mentioned, the results of these tests are not available as of yet. The qualitative component of this study can, however, shine light on the extent to which this hypothesis holds true. Many judges indicated that dealing with addiction is one of the greatest challenges they face in a bail hearing. While they do what they can to mitigate the potential for an accused to break their conditions, such as imposing a no public consumption order rather than a general non consumption order, many people dealing with alcoholism or drug addiction breach their conditions, and end up detained.

It is important to note that addiction is often a product of, or directly related to, and underlying mental illness or disability. Addiction is rarely treated as a mental health problem, despite that fact that many judges recognize that it is a medical disease, and not a choice. Despite this, some judges still maintain that detention is the best option for people dealing with addiction or mental illness and disability. One judge noted that they sometimes feel as though when they detain someone with an addiction, they are “saving them from themselves.” Similarly, one judge mentioned that people with mental disability, such as fetal alcohol syndrome, do better in “structured environments,” such as jail. Other judges were quick to point out that the remand center in Calgary is actually a horrible place to recover from addiction, due to the availability of drugs, and that it is certainly no replacement for treatment or care facilities.

Similarly, many judges indicated that setting conditions of release for an accused who is homeless, housing insecure, or lives on a reserve outside of the city limits can be challenging to work with. This is because they need to ensure that the primary ground, ensuring that an accused will appear in court, is met. Many recognized that you should not be detaining an accused simply
because they are homeless, but that is often what happens. Even when judges impose conditions related to maintaining permanent residency at a given address, staying in a shelter, or reporting frequently to the court, an accused may face transportation or residency problems, ultimately breaching those conditions.

It is worth noting that addiction, displacement, or housing insecurity are all *Gladue* factors, and thus have historically impacted the Indigenous population at higher rates than any other group. While the imposition of conditions related to addiction or housing may not be directly discriminatory, they affect the Indigenous population more profoundly than the remainder of the population. Disparate impact discrimination suggests that the mechanism by which a system can generate a racial disparity is through imposing some sort of seemingly race neutral test, that is in fact not race neutral in effect, and thus disproportionately impacts one group over another.

The second major part of the hypothesis states that judges may impose these conditions of release to Indigenous people, even if they are not relevant to the circumstances of the offense itself. Simply, this means that judges might be inclined to pile on conditions related to addiction, permanent residency, or others, even if drugs, alcohol, or the domestic situation of an accused was not a factor in the alleged crime itself. One judge spoke about an instance in which they noticed that the crown was seeking to impose a curfew and a condition of abstention for a theft that occurred at three o’clock in the afternoon, with no alcohol involved. In this instance, the judge was able to throw out those conditions, but this serves as anecdotal evidence that an accused may be burdened with conditions that are irrelevant to their case. Other judges indicated that this is rarely the case, but it is unclear at this stage.
The statistical models proposed in chapter three test for this phenomenon by controlling for the nature of the offense itself, such as whether it was a drug-related offense, or theft at a liquor store. While this offers an indication of whether judges are imposing conditions of release that are irrelevant to the crime itself, it has some serious limitations. Specifically, this test is limited in that it does not account for aggravating factors related to the crime itself, such as whether the accused was drunk when they allegedly committed the offense. Without taking these aggravating factors into consideration, this model may inflate the rate that judges impose conditions that are unrelated to the offense.

Finally, the third major part of the hypothesis asks whether judges are imposing conditions of release regardless of whether they believe that an accused will be able to meet those conditions. This test is the crux of this research in some ways, because it gets to a point that many judges mentioned, which is that they feel as though the end up in situations wherein they have no option but to trust an accused when they say that they can abide by these conditions. Most of the judges recognize, however, that many people are very desperate, and will say whatever they need to in order to be released. High rates of pre-trial detention can be seen, therefore, as a product of imposing unrealistic conditions of release, and not recognizing the desperation with which many accused appear in court and agree to these conditions.

Taken together, the evidence presented in this research suggests that despite the protections outlined in Gladue, Indigenous people are more likely to receive conditions of release that are related to abstention from alcohol or drugs, or housing and residency. Having established this, the final question becomes: How do racial disparities in outlined in hypothesis one and hypothesis two contribute to high rates of pre-trial detention in Alberta? Figure 2 outlines the mechanisms through which the imposition of burdensome conditions of release, and the
subsequent breaches of said conditions, contributes to high rates of pre-trial detention in Alberta, and exacerbates existing racial disparities in the system.

**Figure 2. Mechanism Through Which AJOs Lead to Detention**

Under this model, an accused first appears before a judge. If they are Indigenous, they will likely be released at the bail hearing for a first time offense. Upon their release, however, the judge may impose conditions that are burdensome, and potentially even irrelevant to the alleged crime itself. Given the unmanageable nature of these conditions, the accused may breach their conditions of release. A police officer may arrest the accused, and process these breaches as new charges, resulting in the addition of potentially multiple administrative justice offenses to their criminal record. When they appear a second time, a judge may release them again with similarly burdensome conditions, or they may decide to detain them, citing the first or second ground as reason to do so. Ultimately, the imposition of unmanageable conditions of release may result in a cycle of arrests, leading to detention.
A. Alternative Explanation for High Pre-Trial Detention Rates: A Continued Reliance on Cash

Part of the motivation for this research is to examine potential alternatives to an American bail system, which relies heavily on cash. Canada has many theoretical and legal safeguards to protect against the use of cash as a conditions of release at the bail stage: bail bondsmen are illegal, the laddering philosophy outlined in *R v. Antic* ensures that cash should legally only be a last resort, and there are alternatives to cash deposits even if cash becomes necessary (sureties). The guidelines surrounding the use of cash in *Antic* have recently been codified in the criminal code through the implementation of Bill C-75, thus ensuring that cash must be a condition of last resort. And yet, most of the judges remarked that cash is still widely used throughout the Alberta system. One judge estimated that there was a condition related to cash in approximately half of the cases that came before them. Without access to Alberta court data, it is unclear if this estimate is true. Relying on the qualitative data, the implications of this finding is that if cash remains an option for bail in any form, even only as a last resort, the judges and prosecutors will continue to impose cash-related conditions upon an accused. The over-reliance on cash in Alberta could, therefore, be an alternative explanation for high and rising rates of pre-trial detention in the province.

B. Limitations & Generalizability

While the breadth of these interviews shed light on many crucial aspects of the relationship between bail, the over-representation of Indigenous people, and the pretrial detention system, there are some limitations in these findings. Notably, many of the judges were quick to point out that they actually have very little ability to intervene in bail decisions. Many of the judges noted a trend in the amount of uncontested bail hearings, called joint submissions, that
appear before them, wherein the prosecution and defense have already agreed to a certain release plan before they appear before a judge. There are legal guidelines, moreover, cautioning judges against over-riding a joint submission, unless absolutely necessary. Many of the judges pointed out that the bargaining power between the prosecution and the defense are not equal: the defense will be more hesitant to advocate on behalf of an accused for fear they will incriminate them, whereas the prosecution is able to introduce any evidence, including hearsay, into the bail hearing. Judges do not see these negotiations, however, and many admit that they do not have as much responsibility in making a decision. A more precise investigation into the forces that decide the nature of a particular release plan would involve extensive interviews with both prosecutors and defense attorneys.

Additionally, some may suggest that another limitation of this study is that it is not generalizable beyond the context of Alberta. It is true that Alberta is unique in some respects, such as its relatively high Indigenous population, the attention that the province has paid recently to the issue of bail, and the legal protections that the Canadian criminal code offers to Indigenous accused. These characteristics distinguish it from other communities, such as those in the United States. Despite these concerns, this study is fundamentally about how a system interacts with members of marginalized groups – those facing historical and structural racism and poverty – and whether that interaction exacerbates their over-representation in the criminal justice system. Similarly, this study questions the adversarial nature of the criminal justice system, and the extent to which it leads to detention over all other options. Certainly, those problems are not unfamiliar in the American context, or in any legal system that is punitive and adversarial. While some of the policy responses explored in this thesis may be unique to Alberta, the exploration of
the problem, being the over-representation of certain groups in pre-trial detention, could be applied to any other adversarial system.

C. Areas for Further Research

This study raised a number of key areas for future study, either in the context of the Alberta court system, or elsewhere. First, almost every judge emphasized that a condition involving cash – be it a surety, promise to pay, or deposit – is only necessary if the court is concerned that the accused is unlikely to appear for their upcoming court appearance. One judge mentioned, however, that they questioned the effectiveness of cash as an incentive to appear for court, saying: “If it’s $1000 and a person is inclined not to show up in court, is $1000 really going to be that much of a difference?” To the best of my knowledge, no researcher has empirically tested whether a person is more likely to show up for their court date if they have some sort of cash condition imposed on them. The logic of cash bail as an incentive to appear in court makes seems rational, and yet it is certainly true that people do not always act rationally, particularly if they are desperate or afraid. A study on the effectiveness of cash in compelling a person to appear in court would be helpful in deciding whether cash should even remain a part of bail proceedings, or be abolished altogether.

Secondly, more research is needed to evaluate the role of other major actors in the criminal justice system in bail proceedings, particularly regarding the imposition of particular conditions of release. As I mentioned in the limitations section, the judge is only one actor in the system, and the prosecutors and defense attorneys are the main actors who propose plans of release and prepare conditions of release. A more holistic study of this topic would involve an examination of the practices of other actors within the system.
Finally, the consequences of pre-trial detention for an accused can be severe. It can result in the loss of a job, a home, or family. One of the most concerning consequences of pre-trial detention, however, is that it may result in a false guilty plea. There has been significant attention given to innocence in high profile cases, involving severe crimes such as homicide or sexual assault. Relatively little has been done, however, to study the salience of false guilty pleas for lower felonies. As many of the judges pointed out, there is a strategic aspect to accepting a guilty plea when one is innocent: an accused can accept greater credit for time served, and potentially walk out of custody faster than they would if they went to trial. Even if it means less time served, the conviction can follow an accused throughout their life, impacting their prospects for employment, housing, or participation in other government programs. Greater attention to the issue of false guilty pleas is needed to fully understand the many harmful effects of being detained pre-trial.

D. Policy Implications & Conclusion

The findings presented in this paper demonstrate how the imposition of certain, seemingly race-neutral, conditions of release generate a disparity between the detention rates of Indigenous and non-Indigenous accused, despite the existing legal protections specifically for Indigenous people in Canadian criminal proceedings. While this thesis not only highlights existing problems within the Canadian bail system, it may also serve as a warning for American policy makers, as pressure builds within the country to move away from its cash-reliant system, to one that more closely resembles the Canadian system. Ultimately, this research makes the case that abolishing cash bail may not be able to ameliorate the over-representation of certain groups in the justice system, nor reduce the number of people in custody at the pre-trial stage.
It is clear that judges understand the severity and complexity of the problem of over-representation of Indigenous people in the justice system, and the extent that it contributes to rates of pre-trial detention. One judge described the current situation as “a population in crisis, and a system that is struggling to meet demands.”

There are many policy reforms that may alleviate some of the problems outlined in this thesis. The codification of the laddering principle in Bill C-75 may serve as what one judge described as “the wakeup-call we all need.” The introduction of referral hearings, in which police officers can bring an accused to court to have their conditions adjusted rather than incur charges, may help curb the effect of administrative justice offenses on an accused’s likelihood to be detained. It seems, however, that these reforms may not be substantial enough to alleviate the burden that Indigenous accused face in the pre-trial system. One judge described their fear surrounding these changes, by saying “Sometimes I think we keep trying to change a system that’s broken, and we don’t end up making it better, we just end up making it different.”

Instead, perhaps the solution lies in looking outside the traditional bail model to meet the unique needs of different accused. “Our system is imperfect,” one judge said, “We have one system and it has everybody in it – it has young people in it, it has Indigenous people in it, and it has people with mental health issues in it, and that’s a huge problem.” The introduction of the Calgary Indigenous Court provides an exciting alternative model to the existing system; one that prioritizes culturally informed healing, recovery and conflict resolution. As Canada attempts to meet the goals outlined in the Truth and Reconciliation Commission’s calls to action, policymakers must confront the fact that the protections outlined in Gladue are not working for indigenous people at the pre-trial stage. Without a transformative approach to bail, the direct discrimination that the Supreme Court was concerned about in Gladue may have only
transformed into a subtler form of disparate impact discrimination, by which the criminal justice system continues to generate disparities in critical outcomes, such as pre-trial detention rates.
Sarah Mackenzie

Works Cited


Department of Justice Canada, Legislative Background: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to
other Acts, as enacted (Bill C-75 in the 42nd Parliament). August 2019. 


https://open.alberta.ca/publications/alberta-bail-review-endorsing-a-call-for-change#summary

“Legal Services Society Publications Explain Aboriginal Legal Rights | Provincial Court of British Columbia.” 


Prison Policy Initiative. “Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time.” 
https://www.prisonpolicy.org/reports/incomejails.html (November 6, 2019).


