Canadian Journal of Law and Society / Revue Canadienne Droit et Société (2024), 1–21
doi:10.1017/cls.2024.3

RESEARCH ARTICLE / ARTICLE DE RECHERCHE

Reasonable Bail or Bail at All Costs? Defence Counsel Perspectives on a Coercive Environment

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Abstract

Bail decisions are largely shaped by private, out-of-court negotiations between Crown attorneys and defence lawyers. While accused persons rely on the professional expertise of defence lawyers to navigate bail negotiations and secure them the best possible outcome, much remains unknown about how lawyers prepare for and negotiate bail. This study examines the process of bail preparations and negotiations from the defence's perspective based on data from 18 semi-structured interviews with defence lawyers. The findings show that, while defence lawyers argue for reasonable bail terms, their ultimate goal is to obtain a release for their client. Defence lawyers also prioritize collecting and strategically using information about the case and the Crowns and justices with whom they work. They often adopt a risk-averse and cooperative approach with Crowns to avoid delaying or preventing their client's release, even if that means agreeing to additional conditions. Our findings inform efforts to reform bail processes.

Keywords: Bail; judicial interim release; conditions; court culture; criminal justice administration; defence lawyers; courtroom workgroup; *Charter of Rights and Freedoms*

Résumé

Les décisions relatives à la mise en liberté sous caution sont largement influencées par des négociations privées entre les procureurs de la Couronne et les avocats de la défense qui se déroulent hors cours. Même si les accusés s'appuient sur l'expertise professionnelle des avocats de la défense pour négocier leur mise en liberté sous caution et obtenir le meilleur résultat possible, il y a encore beaucoup d'inconnus qui entourent les manières dont les avocats se préparent à de telles négociations et le déroulement même de ces négociations. Cette étude examine de ce fait le processus de préparation à la négociation, et la négociation en soi, en lien avec la mise en liberté sous caution, du point de vue de la défense. Pour ce faire, cet article se base sur des données de 18 entretiens semi-structurés

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https://doi.org/10.1017/cls.2024.3 Published online by Cambridge University Press

avec des avocats de la défense. Les résultats montrent que même si les avocats de la défense plaident en faveur de conditions raisonnables de mise en liberté sous caution, leur objectif ultime est d'obtenir la libération de leur client. Les avocats de la défense accordent également la priorité à la collecte et à l'utilisation stratégique d'informations sur l'affaire ainsi que sur les procureurs et les juges avec lesquels ils travaillent. Ils adoptent souvent une approche coopérative et peu encline au risque avec les procureurs afin d'éviter de retarder ou d'empêcher la libération de leur client, et ce, même si cela implique d'accepter des conditions supplémentaires. Nos conclusions éclairent les efforts visant à réformer les procédures de mise en liberté sous caution.

Mots clés: caution; mise en liberté provisoire par voie judiciaire; conditions; culture des tribunaux; administration de la justice pénale; avocats de la défense; acteurs judiciaires; *Charte des droits et libertés*

Introduction

Judicial interim release—commonly known as "bail"—is a crucial early step in the criminal justice process that has profound implications for the rights of accused persons and their case outcomes. Whether a person gets bail influences their likelihood of pleading guilty and their chances at trial (Friedland 1965; Kellough and Wortley 2002; Euvrard and Leclerc 2017; Pelvin 2017; Dobbie, Goldin, and Yang 2018; Lerman, Green, and Dominguez 2022). Moreover, excessive bail conditions set accused persons up to fail as they often lead to bail breaches and additional charges (Sprott and Myers 2011). In recognition of its importance, the principle of reasonable bail has been part of Canadian criminal justice policy for generations, and the *Charter of Rights and Freedoms* (1982) constitutionally guarantees the right not to be denied "reasonable bail without just cause" (s 11(e)). Yet, in 2017, a unanimous Supreme Court of Canada (SCC) in *R v Antic* admonished that "it is time to ensure that bail provisions are applied consistently and fairly," which suggests that reasonable bail may not, in fact, be achieved routinely (see also *R v St-Cloud* 2015; *R v Myers* 2019; *R v Zora* 2020).

The gap between this well-established legal principle and the reality of actual bail practices warrants a closer examination (see e.g. Myers 2015; Roach 2008; Yule and Schumann 2019). Although bail courts are public, most cases are resolved by agreement, meaning that important decision-making about release occurs during private and often relatively brief conversations between the Crown and the defence prior to entering the courtroom. This information is then communicated by the Crown to the justice[1] in open court. As such, much remains unknown about what the defence does in their quest to obtain

[1] The term "justice" refers to justices of the peace (JPs) and judges who make decisions during bail hearings. JPs are the most common judicial decision-makers in Ontario's bail courts, but some judges preside over some bail courts. Bail reviews or appeals also occur in Superior Court before a Superior Court justice. Appeals occur when the accused believes the JP or judge misapprehended the facts or incorrectly applied the law during their bail hearing. These appeals occur very infrequently, partly due to the delays that stem from pursuing them.

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reasonable bail for their clients. Drawing on interviews with eighteen criminal defence lawyers in Ontario, Canada, this study examines the bail preparation and negotiation process from the defence's perspective and garners their insights into the extent to which obstacles to achieving reasonable bail exist and, if they do, what steps can be taken to overcome them.

The Law on Bail: Reasonable Bail as a Constitutional Right

Section 11(e) of the *Charter of Rights and Freedoms* (1982) indicates that "any person charged with an offence has the right ... not to be denied reasonable bail without just cause." The *Criminal Code of Canada* states that bail can only be denied to (1) ensure the accused will appear in court; (2) protect the safety of the public, witnesses, or victims and/or prevent the accused from committing an offence; or (3) maintain the public's confidence in the administration of justice (*Criminal Code* 1985, s 515(10)(a) to (c)). When determining whether the accused can be released back into the community and under what conditions, the legislative framework of bail directs justices to use the ladder principle to ensure the fewest and least onerous conditions necessary are imposed (*Criminal Code* 1985, s 515(2.01)). The lowest rung of the ladder indicates that accused should be released on an undertaking (i.e. without conditions and on their own recognizance). For most offences, if the Crown feels this release is inappropriate, they can argue for a more restrictive release, which might include release with a surety and/or conditions (*Criminal Code* 1985, s 515(4)). Individuals are thus legally protected against unreasonable detainment or release on bail with overly restrictive terms.

In recent years, several Supreme Court and Superior Court justices have underscored these legally binding principles of bail in response to growing concerns about inconsistencies between criminal law and bail outcomes. Most notably, in its 2017 *Antic* decision, the SCC encouraged a "return to the first principles of bail, as both a matter of law and as a matter of practice" (as described in *R v Tunney* 2018, para 36). The *Antic* Court unanimously wrote that the right not to be denied reasonable bail without just cause enshrines the right to the presumption of innocence. The "just cause" that warrants a denial of bail must occur only within a narrow set of circumstances—that is, if a judicial decision-maker, during a bail hearing, determines that the accused's detention is necessary due to the risk of an accused absconding, re-offending, or damaging public confidence in the administration of justice (*R v Hall* 2002; *R v Antic* 2017; see also Baker 2010, 29–36).

For accused who are granted bail, the *Antic* decision reaffirmed the ladder principle, which states that accused must be released on their own recognizance and without conditions unless the Crown can show cause why a more restrictive form of release is necessary. This includes monetary requirements, which are considered unreasonable if they are coercive and essentially deny bail when an accused cannot raise the required funds (*R v Antic* 2017). Shortly thereafter, the Superior Court of Ontario in *R v Tunney* (2018) reiterated this sentiment, attributing the misapplication of the law to a departure from the spirit of bail as outlined in the *Criminal Code.* In 2020, *R v Zora* specified that reasonable and

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necessary conditions are those that are the least onerous, tailored to the accused's circumstances, sufficiently linked to the accused's risks of release, and clearly articulated by the court. In sum, reasonable bail means that any requirements of release should directly relate to the individualized nature of the accused's case and their circumstances and be the least onerous possible to secure a release.

Bail in Practice: Unreasonable Bail Outcomes

While bail legislation and case law emphasize that accused have the right to reasonable bail, the overwhelming consensus among Canadian scholars and legal professionals is that the current approach to bail threatens or violates the rights of accused persons (Myers 2017; Roach 2008; Sprott and Myers 2011; Wyant 2016; Yule and Schumann 2019). Research shows that court actor behaviour regularly conflicts with the law on bail in various ways, including preventing timely release and imposing unnecessary conditions (Sylvestre, Blomley, and Bellot 2020). While most accused successfully obtain a release when they try, that rarely occurs during their first appearance before a justice. For example, Myers (2015) found that court actors adjourned over half of the daily docket to another day. Wyant (2016) addresses other aspects of Ontario's slow court culture, including a lack of opportunity for the defence to communicate with their clients during the bail preparation stage and an underfunded Legal Aid system. He also noted issues with justices who make sureties testify during bail hearings—which forces the defence to prepare the sureties—and the defence's and prosecutor's lack of access to timely case information (Wyant 2016). The use of adjournments is particularly troubling because these delays force accused to spend additional time in pretrial detention where they face conditions that are problematic, such as isolation, loss of employment, and barriers to communication with loved ones (Pelvin 2017). Being held in pretrial detention, even for short periods of time, exerts pressure on accused to plead guilty to escape the conditions of remand (Friedland 1965; Kellough and Wortley 2002; Pelvin 2017, 2019).[2]

When accused are released into the community, the courts too often default to the use of conditional bail with terms of release that do not relate to the three grounds for detention or even the alleged crime (Myers 2009; Sprott and Doob 2010; Myers and Dhillon 2013; Myers 2017). Accused persons also often receive a high average number of bail conditions (e.g. 7.8 in Myers's 2017 study and 6.1 in Schumann and Yule's 2022 study). Moreover, a surety release, which is the highest

[2] Pelvin's (2019) study of 120 men and women jailed after arrest finds that remand conditions in Ontario facilities are harsh. Because the remand population is housed in provincial correctional facilities, they lack the activities and programs that exist in federal prisons; there is usually no work, no school, and little or no recreation. Prisoners are locked in cells, almost always with at least one other person, for sixteen to seventeen hours per day. When lockdowns occur, they can be in their cells for days or even weeks with no opportunity to shower, exercise, or communicate with loved ones. Judges are also aware of the poor conditions in remand: the Supreme Court has recognized that "conditions in remand centres tend to be particularly harsh; they are often overcrowded and dangerous, and do not provide rehabilitative programs" (*R v Summers*, 2014, para 2).

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step up the ladder, has been the norm in many Ontario courts, even for nonserious offenders with low risk (Myers 2009; *R v Antic* 2017; *R v Tunney* 2018). Described as stemming from a culture of risk aversion, these bail conditions arguably set accused persons up to fail because they are punitive, unwarranted due to an insufficient link to the accused's risks of release, or seek to change an accused's behaviour (Sprott and Myers 2011; Myers 2017; Myers and Dhillon 2013; Webster, Doob, and Myers 2009). While accused themselves typically express relief when they receive bail instead of custody (Yule et al. 2022), they are also often acutely aware that being released with conditions puts them at risk of accruing additional criminal charges, even for noncriminal behaviour, if they are caught breaching their conditions (Canadian Civil Liberties Association (CCLA) 2014; John Howard Society of Ontario (JHSO) 2013). Bail conditions join other spatiotemporal restrictions (such as probation and conditional release) that have "become pervasive, often imposed in contravention to the law and generating an important number of offences against the administration of justice through breaches of court orders" (Sylvestre, Blomley, and Bellot 2020, 212). The length of time accused spend in the court process—approximately four and a half months (Statistics Canada 2020)—is also worrying because the more conditions imposed and the longer accused are subject to them, the more likely it is that they will fail to comply (Sprott and Myers 2011). Sylvestre, Blomley, and Bellot (2020) see these conditions as a means of facilitating the surveillance and arrest of marginalized people. Even during the early days of the COVID-19 pandemic when criminal justice processing was forced to change, many of these long-standing issues endured (Myers 2021). Taken together, an accused person's right to timely bail decisions and releases with narrow conditions, though safeguarded in legislation, appears to be weakly enforced in practice (Friedland 1965; Myers and Dhillon 2013; Sprott and Doob 2010; Webster 2007, 2009).

Bail Negotiations: The Role of the Defence

Defence lawyers are best positioned to advocate for reasonable bail. As members of the courtroom workgroup, defence counsel work alongside the Crown and the justice in a formally adversarial system that is intended to arrive at a just bail outcome that balances the public safety and administration of justice concerns of the Crown with the liberty interest of the accused. While the justice acts as a final arbiter of the accused's detainment or their release terms, the vast majority of bail determinations (over 80%) are made through consent-to-release hearings in which the defence and Crown present agreed-upon terms of release (Myers 2017). The judicial capacity to reject and revise those terms formally exists, but there are strong informal pressures to defer to the agreement and even some emerging jurisprudence that would caution justices *not* to upset an agreement absent a gross injustice (*R v Anthony-Cook* 2016 applies this standard to joint submissions in sentencing). Minimal or no discussion or negotiation occurs with the defence in open court during consent-to-release hearings (Myers 2017; Yule and Schumann 2019), meaning that the operation of bail is largely in the hands of the two "adversaries": the Crown and the defence.

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While Crown and defence attorneys are officers of the court who must faithfully execute the law and adhere to the ethical norms, they fulfil different functions. As a public representative arguing the state's case, the Crown's role is to search for "truth," protect the public's safety, and maintain confidence in the administration of justice, which, in their view, may require strict or extensive release terms (Myers 2009; Ministry of the Attorney General 2017). We suppose that the Crown is likely not indifferent to the accused's liberty interest and the proper implementation of the law on bail; however, it is also likely they prioritize competing values, such as public safety.

In the adversarial system, the defence is formally required to act in the client's interest, which generally means pursuing the least strict release terms possible to minimize the adverse effects to their client (Ministry of the Attorney General 2017). As the main court actor guarding the accused's liberty interest, defence counsel are the primary countervailing force pushing back against onerous restrictions. If they choose not to fulfil this role, or pursue it less aggressively than they might otherwise, unduly onerous bail outcomes are almost certain. At the same time, defence counsel must respect the directions of their clients and, as this study shows, that dynamic can also lead to the acceptance of onerous bail conditions. None of this means that defence counsel's work is unidimensional or that their objectives are unambiguous; indeed, much of the scholarship on defence counsel has noted the difficulties in reconciling ethical, moral, legal, and practical demands (Lee et al. 2014; McConville et al. 1994; Woolley 2016) and that representing the "whole client" can be challenging (Moore 2004, 105–07). Our claim is simply that examining the role self-perception of defence counsel is crucial to understanding the dysfunctions of the bail system.

The formal responsibilities of courtroom actors are supplemented or modified by informal cultural norms. In some cases, these informal norms may govern the workgroup's behaviour more than the official rules embedded in legislation and case law (Myers 2015). Scholars have often considered these norms and practices as part of "local courtroom culture" (Church 1982; Kritzer and Zemans 1993; Eisenstein et al. 1988; Ostrom and Hanson 2009; Canadian studies include Baar 1991 and Moyer 2005). Criminal justice policy offers court actors considerable discretion, little managerial oversight, and little formal accountability if they fail to follow the law on bail, which may allow informal norms to thrive (Myers 2015). A lack of formal oversight might lead court actors to collectively internalize various informal norms as the best way of doing things, even if they conflict with formal rules and legal principles. Lipetz (1980) notes that the daily routines and relationships between court personnel mean that "[m]embers of a workgroup reward and punish one another for cooperation or conflict" (p. 48; Rumgay 1995). Such informal cooperation could be to achieve the goal of clearing the daily docket and resolving bail cases as efficiently as possible (Myers 2015). Since the defence plays a crucial role in protecting the accused's liberty interest, their internalization of these or other norms may compromise their pursuit of reasonable bail.

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Current Study

Court decisions and legislation stress the importance of "reasonable" bail, yet very little research examines how actual bail negotiations between Crowns and defence lawyers unfold to produce those often "unreasonable" bail outcomes. Existing research on bail in Ontario is primarily based on courtroom observations, recorded bail decisions, or interviews with accused, but most bail negotiations take place during private conversations between the defence and Crown. Without evidence regarding the nature of private bail discussions between the Crown and the defence, it is unclear whether the defence confronts obstacles when advocating for their clients at the bail stage and the extent to which they may actively participate in the creation of onerous bail plans. The current study seeks to address this gap by asking: What is the role of the defence in the bail preparation and negotiation stage of the criminal court process? The focus here is exclusively on the perceptions of defence counsel. A full understanding of the courtroom dynamics would require the participation of other actors—especially Crowns—but a better account of how defence counsel perceive their own role is a crucial starting point, especially since defence counsel are the advocates one might expect to oppose onerous bail conditions. If the situational and power dynamics do not allow them to prioritize opposing conditions, it is difficult to see how "reasonable bail" will ever be assured in the Canadian adversarial system.

Data and Methods

Sample

We conducted interviews with defence lawyers who were recruited from the publicly available Criminal Lawyers' Association website. A recruitment email was sent to approximately 1,150 email addresses and over a hundred lawyers responded. After screening to ensure people met the study's eligibility criteria of having conducted a minimum of five bail negotiations with Crown attorneys during the previous two years in Ontario, the first author attempted to set up interviews with approximately thirty lawyers. Unfortunately, several people who expressed initial interest ended up being unavailable or unresponsive, and data collection ended prematurely in March 2020 due to the COVID-19 pandemic.

The final sample includes eighteen defence lawyers. As Table 1 shows, participants' ages ranged from their late twenties to their late sixties, and more identified as male (n = 11, 61%) than female (n = 7, 39%). Most participants were white and practised law in cities with a population of over 100,000 residents. Their experience with bail negotiations varied from two years to several decades, and the number of bail negotiations they conducted in the previous two years ranged from five to hundreds. Three participants (17%) were full-time duty counsel and four (22%) were private defence and per diem duty counsel[3] who also accepted Legal Aid certificates. The remaining eleven (61%) participants

[3] Per diem duty counsel are private bar lawyers, paid by Legal Aid Ontario on an hourly or daily basis, who work with low-income clients in courthouses.

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Table 1. Paticipants' Demographics and Experience (*N* = 18)

	Categories	*n* (%)*
Age range (years)	20–29	1 (6%)
	30–39	6 (33%)
	40–49	5 (28%)
	50–59	5 (28%)
	60–69	1 (6%)
Gender	Female	7 (39%)
	Male	11 (61%)
Race	White	15 (83%)
	Mixed–race	2 (11%)
	Asian	1 (6%)
Main city of practice size	Small city (<100,000 residents)	2 (11%)
	Mid–sized city (100,000 to 500,000 residents)	8 (44.5%)
	Large city (>500,000 residents)	8 (44.5%)
Type of lawyer	Private defence†	11 (61%)
	Hybrid private defence/per diem duty counsel	4 (22%)
	Full–time duty counsel	3 (17%)
Range of years of experience with bail negotiations	0–4	3 (17%)
	5–9	5 (28%)
	10–14	2 (11%)
	15–19	3 (17%)
	20–24	1 (6%)
	25–29	2 (11%)
	30–34	1 (6%)
	35–39	1 (6%)
Number of bail negotiations conducted in the past two years	<20	4 (22%)
	20–50	4 (22%)
	51–99	0 (0%)
	100+	10 (56%)

*Rounding means some categories equal more than 100 percent.
†The majority of these private defence lawyers do not consider themselves fully private because they do Legal Aid certificates.

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were either fully private defence lawyers or defence lawyers who accepted Legal Aid certificates but not per diem duty counsel work.

It is important to note that the nonrandom sampling of Ontario lawyers limits the generalizability of the study's findings. Moreover, the relatively small sample size prevented an examination of how different demographic characteristics, including race, gender, age, and work experience, may affect defence lawyers' experiences in bail negotiations. The sample also included a limited representation of duty counsel, for whom the Attorney General acts as a gatekeeper, making them harder to access than private defence lawyers. Finally, we acknowledge that the information we obtain from defence lawyers reflects what they *say they do* to advocate for reasonable bail, but we cannot ascertain how closely this aligns with what they *actually do*. Despite these limitations, the sample includes diverse participants, particularly regarding years of experience and type of practice.

Data Collection

The first author conducted semi-structured interviews with participants from mid-January 2020 to early March 2020. The interviews included a combination of closed- and open-ended questions that took respondents anywhere from thirty-seven to ninety-six minutes to complete. The interview questions were emailed to the participants before the interview to encourage pre-interview reflection. The main interview question from which the data were derived was: Can you describe a typical bail negotiation with the Crown, including what you do to prepare before for it and what happens during the negotiation? Follow-up questions included: What are your priorities during these negotiations? Can you describe the extent to which power dynamics exist during bail negotiations with the Crown? Does the particular Crown/justice with whom you are working shape how you approach the bail negotiation? How so? and Do you think most bail negotiations lead to fair outcomes for your clients? How so? These interview questions were informed by the existing research on bail, but the open-ended nature of the questions created opportunities for new information and themes to emerge. The interviews, which occurred either in person (n = 8) or by phone (n = 10) at the participants' discretion, were audio-recorded and then transcribed.

Analytic Strategy

Braun and Clark's (2006) approach to thematic analysis was adopted to identify dominant themes regarding the role of defence counsel in bail preparations and negotiations. The data were reviewed three times in order to build a thematic account of the information: (1) after an initial close read of the interview transcripts, preliminary codes for themes were identified; (2) the next reading of the data focused on whether new themes emerged and connected them with relevant theoretical understandings; (3) finally, the key themes were solidified in a third review of the interview transcripts. Themes were identified when several participants discussed the same broad concept and subthemes emerged when several participants discussed more detailed examples that related to the broad

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themes. Ultimately, three main themes emerged regarding defence lawyers' strategies to secure "reasonable" bail for their clients, including prioritizing release over reasonable bail conditions; recognizing that the Crown holds most power in the negotiations; and being aware of judicial tendencies ("know your bench").

Results

Theme 1: Release Trumps Reasonable Bail

Participants viewed bail as a very important stage in the criminal court process. At the same time, they also described preparations and negotiations as not particularly complex, even when the cases involve complex allegations. Rather than involving novel or ambiguous questions of law, most bail negotiations are relatively straightforward and predictable. Participants also described the bail process as hectic and disorganized due to its urgent nature but reported that previous experience enables them to generally know what to expect. Additionally, the way bail negotiations unfold between the defence and the Crown is not uniform—who approaches whom can "go either way," depending on the Crown, the day, and the contents of the daily docket (Eric).[4]

One of the first things the defence does during the bail stage is determine the Crown's position on release (n = 8). They often anticipate a Crown's position based on the allegations, the criminal record, and the onus, but they also ask the Crown directly. Dean stated: "I like to get an initial position out of them and ask, 'What are your initial thoughts on this [case]?'." In other instances, the Crown may instruct the defence to discuss the bail plan with them before they take a position on release, but Crowns are not supposed to behave this way. Rather, Victor explained they are "required to take a position" before asking or hearing about the defence's potential release plan. However, Crowns sometimes mark a case for detention and then ask the defence to share their plan before making their final decision. Eric explained: "I will not engage in much conversation with any prosecutor until I'm aware what their position is on bail. They may say, 'What are we doing?' and I'll say, 'What's your position?' That's usually the first interaction." If the Crown is seeking detention, the negotiation is brief or nonexistent, and the bail plan instead shifts to making the best presentation before the justice. Conversely, if the Crown is amenable to release, a conversation occurs, which may require negotiating a bail plan that the Crown finds mostly or fully agreeable.

Reviewing the case synopsis (n = 13), the criminal record (n = 11), and, in some cases, the disclosure helps the defence determine how to structure the bail plan; afterwards, they are ready to initiate negotiations with the Crown (n = 16). This often involves approaching the Crown to make a "pitch" to "sell" the predetermined bail release plan, which might include conditions, monetary requirements, and supervision to alleviate Crown concerns about the client's risks of release. Most times, the pitches are informal, and they happen quickly in a courtroom, the

[4] Pseudonyms are used to protect the confidentiality of our study participants.

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hallway, or the Crown's office with a bail-vetting Crown once the Crown has time to speak.

In their negotiations with the Crown, participants explained that they seek release terms that are relevant to the allegations and the client's circumstances and the least restrictive considering the risks of release (n = 16). They defined unreasonable or onerous release terms as those irrelevant to the allegations or the circumstances and those too restrictive, thereby setting clients up to violate their bail conditions. In seeking reasonable release for their clients, defence lawyers discussed how they are mindful of their client's housing, finances, and social connections. Max explained they also try to narrow conditions for certain allegations, such as "no use of certain websites" instead of "no Internet." Further, they consider the extent to which some of their clients' identities and lived experiences, including race, addiction, or mental illness, might justify a less onerous release plan with more community support. Finally, they incorporate specific client instructions about whether they can meet a particular condition. Release terms that do not "set people up for failure" were a common concern, so participants stressed that they try to craft plans their clients can follow (n = 16). Respondents insisted they are willing to disagree with Crowns and argue before justices to obtain reasonable terms (n = 16).

Despite the defence's preference to fight for reasonable bail, the client's overwhelming desire to avoid additional pretrial detention hampers those efforts. Many interviewees noted that being released is more important to clients than being released on reasonable terms (n = 10). Accused typically agree to almost anything to avoid remand, and most clients want out of custody as soon as possible. Kathy said that the defence's job is to do what their client wants, within reason and within boundaries. Therefore, as much as a defence lawyer may believe specific Crown requirements for a consent release are unreasonable, they must respect their client's direction to secure a timely release. Allen elaborated by saying:

> As a defence lawyer, your client wants out, and the Crown may approach you with a[n onerous] proposed consent release. I see this all the time. ... Clients end up agreeing to [those conditions] because they want to get released from custody. When you're presented with it as a defence lawyer, you go to the client, and you say, "The Crown will agree to your release, but the Crown wants these conditions. If we don't agree to these conditions, we can have a contested bail hearing." The uncertainty is present. You can't give a client a guarantee that they're going to be released, even though they should be released, and even though they should be released on less restrictive conditions. Faced with the alternative—the risk of being detained versus a guarantee of release—clients will often agree to a release on what I would characterize as much more restrictive conditions than would be reasonable if you applied *Antic* and the ladder principle.

In other words, the potential risks of waiting for a hearing to debate release terms outweigh the potential risks of a strict release from the clients' perspective, which defence counsel must respect. Whether or not the Crown "consciously takes advantage of the leverage of the risk of detention, or whether

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it's part of the systemic subconscious, it's a reality that puts defence lawyers and their clients at a significant disadvantage" (Allen).

The participants' comments regarding the devastating consequences of pre-trial detention, including often inhumane and isolating conditions, slow case resolutions, and lives put on hold, highlight the dynamics that lead to favouring release over all else. Lukas explained:

> Every time someone spends a night in [pre-trial detention] who shouldn't be there, it's a societal loss. [Remand is] a terrible, terrible place. Absolutely terrible. You send someone with mental illness into [remand], they're going to get worse really quickly. You send someone who's young and racialized and a little angry, he's going to come out angrier and more justified in thinking that society isn't fair.

Eva stated:

> [Accused persons are] in a whole different world. Their lives get put on hold; they lose jobs; they lose their housing. It's a very serious thing to have someone in detention and to have that on your shoulders. ... When someone's in custody, things don't move. ...You're waiting on courts; you're waiting on disclosure; you're waiting on witnesses. So, the whole purpose of being retained for bail for a defence lawyer is to try to get that person's freedom back while the proceedings continue. That is the priority.

Participants spoke at length about remand conditions, including their clients' inability to shower, eat "decent" food, and attend relevant programming, especially for "the poor, the vulnerable, the racialized, [and] the marginalized" (Lukas). Defence lawyers viewed remand as more debilitating than unnecessarily restrictive release orders and a violation of accused persons' fundamental rights. Since being in the community "makes all the difference in the world" for moving cases forward (Lukas), the pressure to have their clients out of custody overshadows the entire negotiation process for the defence.

Theme 2: The Power of the Crown

The goal of getting clients out of remand and back into the community is best achieved when the defence can negotiate a joint consent release with the Crown. However, perhaps the most substantial barrier that defence lawyers face when trying to secure reasonable bail conditions in consent releases is that Crowns hold significant discretionary power ($n = 16$), giving them an inherent "upper hand" in negotiating (Dean). According to Calvin, "the Crown has an enormous amount of power" because they are the "triage person ... who can grant or withhold their consent" for release and "very few justices will interfere with a joint submission." Kaito likewise pointed out that Crowns go "home at the end of the day, no matter what," but "my clients won't [go home] if things go wrong," which is "inherently imbalanced." The defence can easily get stuck with contested or delayed hearings based on the Crown's decisions. As Calvin explains:

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> The Crown can set the terms because if the Crown says, "We'll agree to release," almost every single defence lawyer is going to say, "Great! What terms do you require?" The Crown can pick whatever terms they want. They can put somebody who's on a theft under, but has an outstanding record, on house arrest. If they say it, and we agree to it, then that's what it's going to be. You're almost never going to opt for a contested bail hearing to challenge a condition or two.

The power imbalance creates pressure for defence lawyers to satisfy Crown attorneys by presenting or accepting what the defence perceives as unnecessarily onerous conditions to secure a joint release.

Some participants (n = 6) framed negotiations as the need to "convince" the Crown to consent, despite the formal onus being upon them. As such, actions at the bail preparation and negotiation stage may revolve around persuading the Crown that the defence's bail plans are "good enough" for a consent release (Victor). Defence lawyers may propose conditions that make the Crown feel inclined to release rather than those that directly relate to the clients' risks of release and their unique circumstances (n = 6). An underlying assumption is that the narrowest terms may not make the Crown feel comfortable enough to consent to release or craft a joint submission. Manas explained:

> I'm looking at a release plan, and I'm looking at it from a reasonable standpoint as opposed to taking a really aggressive approach. Obviously, the client wants to be released, and [the client] wants to be released on the least restrictive conditions for the least amount of bail money. But I will usually try to craft something that I think is going to gain the Crown's approval. Whether that's agreeing to certain conditions, whether it's a certain sum of money, etcetera. ... If you go in with an aggressive bail plan [that's] your best-case scenario, you may turn off the Crown.

Agreeing with the Crown is usually the best approach during negotiations, even when the defence feels that Crowns ask them to agree to terms that a justice might otherwise reject (Eric, Max). Doing so avoids the risks of arguing matters before a justice that come with an uncertain outcome compared with securing a joint submission (Calvin).

Against the backdrop of Crown power, the defence's approach to bail preparations and negotiations is informed by their assessment of the reasonableness of a particular Crown (n = 18). Jacob explained that information about the Crown's personalities, gleaned either from prior experience with them or insights from other defence counsel about the Crown's reputation, means that negotiation approaches and outcomes depend "on whom you're dealing with." Participants (n = 10) described reasonable Crowns as those whom the defence anticipates will be amenable to release and who exercise appropriate discretion by "consenting to terms and having somebody out on release on consent rather than running contested hearings" (Nicole). Beyond release, Crowns perceived to be reasonable accept bail plans that are realistic and relate to the allegations and the client's circumstances; they do not fight for "terms that are virtually impossible" to

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obtain or keep (Max). For example, Max discussed how he negotiated with a Crown who approved his client's supervision with an addiction support person rather than a surety. A surety would have been difficult to obtain considering the client's marginalized circumstances, which may have effectively denied bail.

Defence counsel also assess Crowns as cooperative or not ($n = 14$). Cooperative does not mean they expect Crown attorneys to always agree with them, but rather that prosecutors are willing to provide fair opportunities to negotiate (Dean) and listen and take defence counsel's comments seriously (Heidi). A fair opportunity to negotiate also stems from Crowns who work towards as much agreement as possible. This can occur by suggesting terms that address the risks of release that the defence has not yet proposed (Jacob) or by narrowing the disagreement and not taking things personally (Kathy, Anna). Ultimately, the participants view reasonable Crowns as "flexible" and people worth building and maintaining relationships with, which can result in "quite a collegial, civil discussion" about bail (Eric, Jacob).

Participants discussed Crowns who they believe advance unreasonable positions on bail ($n = 16$). Some Crowns make release challenging by being inclined to seek detention regardless of the allegations or the clients' circumstances. It is common for defence lawyers to avoid interacting with them. As Eric explained: "Some [Crowns] are much more willing to seek someone's detention than others. ... I know the Crowns I'm dealing with, and I know what their general tendencies [are], so I won't engage in a conversation I know is likely to be fruitless based on who the prosecutor is."

Kathy shared that excessive terms can be "unreasonable" and "unfair," such as "requiring an alcoholic not to consume alcohol." Another "unreasonable" term is requiring a surety for marginalized people who have no access to one. For example, Max stated:

> You think to yourself, "That's a detention because this person doesn't have anybody in the world." If they had somebody, they wouldn't be in this situation to begin with. The only people that they have are their friends on the street, or their social worker, and then me. ... What that essentially means is [they are] going to stay in custody.

In addition, some participants discussed how some Crown requests have nothing to do with the allegations and how they respond to these requests. For example, Lily explained:

> There's nothing that has anything to do with these allegations that's related to nighttime or [a] curfew. [A curfew] is not an appropriate condition, and you want to run [a hearing] based on a curfew condition? Let's go. I don't mind. You're the one who's going to look like an idiot in front of the JP who says, "Really? You're wasting two hours of my time over a curfew when this offence was allegedly committed at 6pm? Why would you do that?"

Some Crowns are unwilling to work with the defence to determine a consent release or at least narrow the issues ($n = 13$). Instead, they tend to frame bail

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negotiations as a take-it-or-leave-it situation. Allen shared that "there's an extortive quality" to this type of negotiation. These Crowns do not provide an opportunity for negotiation, which Heidi explained when she stated: "Some Crowns are very opinionated, and they've decided [on their position], for the most part, before I open my mouth." These Crowns do not give the defence an opportunity to persuade or offer ways to improve the bail plan to ease their concerns. According to Jacob, uncooperative Crowns are "abusing their authority," "stretching their power," and "will never trust" what the defence says, even if they have known each other for years. As a result, the participants avoid these "inflexible" Crowns if possible because negotiations with them are rarely productive (Jacob).

Participants suggested several factors that might explain why Crowns may be more or less reasonable in their view. First, they discussed the Crown's level of experience: junior Crowns tend to be seen as taking a more risk-averse approach than senior Crowns, who tend to be more "reasonable" (n = 8). According to Allen, senior Crowns "have a better sense of what a serious case is, what a strong case is, [and] what kinds of conditions are appropriate," and "they're less nervous about proposing a release with less restrictive conditions." Kaito shared that senior Crowns seem to be more reasonable than junior Crowns because "they're less worried about being fired or not being promoted, so they can do what they feel is right." Second, the Crown's interpretation of a defence lawyer's experience and reputation might also influence them to behave more or less reasonably (n = 7). These participants said the defence's reputation as an advocate who is knowledgeable, experienced, and unafraid of arguing makes Crown attorneys negotiate fairly and take them seriously. Third, strong, collegial relationships between defence lawyers and Crown attorneys might also influence Crown behaviour (n = 10). Shaun suggested that when the two sides have a strong relationship, they are more willing to negotiate and behave cooperatively than if they had no relationship or a bad one, which is beneficial for securing a release. Building relationships to maintain a friendly working environment requires trust. Jacob stated: "The relationship is very important. ... I never want to mislead the Crown. That way, when I tell them what the situation is, they'll listen to me." Finally, several participants (n = 8) suggested that *R v Antic* (2017) "helped push Crowns to be more reasonable" (Kaito) and cooperative with the defence as Crowns are "more willing to negotiate" and negotiations are "more collaborative" than pre-*Antic*, where the Crowns tended to have a "presumption of guilt" that was "adversarial" and "inhumane" (Manas).

Ultimately, whether the defence thinks of a Crown as reasonable or unreasonable or vice versa determines the trajectory of negotiations. If they believe they are dealing with a reasonable Crown, they are willing to speak with them because they anticipate that negotiations will lead to reasonable releases with narrow and relevant terms. However, if they view a Crown as unreasonable, they might challenge the Crown's power by threatening to abandon or actually abandoning the negotiation and relying on the justice to figure out the issues (n = 15). As Max shared: "If the Crown I'm speaking to is notoriously unreasonable, I say 'We're having a hearing.' That's it. I don't even try to negotiate."

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If the Crown is a "detainer" (Paula), defence lawyers will do their best to avoid them and let the presiding justice decide the issues of bail, especially if they anticipate that the justice will rule in their favour (Lily).

Theme 3: "Know Your Bench"

When facing a Crown who is seeking detention or unreasonable terms of release, the defence shifts their focus to assessing whether a justice is likely to pursue reasonable bail. Respondents emphasized that not all justices interpret and apply the law on bail the same way. Lukas explained: "There are justices of the peace who are much more prone to release; there are justices of the peace who are much more prone to detain. Part of being a good criminal defence counsel is to know your bench."

Participants framed reasonable justices as those who make reasonable bail decisions (n = 13) and tend to release (n = 5). Making reasonable bail decisions requires justices to be "in-line with the more recent jurisprudence on bail," "impartial," "smart." "willing to listen," and willing to resolve cases until the court's formal closing time (Victor, Allen, Nicole, Kathy). According to Allen, these justices are "not biased" in favour of the Crown and might encourage Crowns to take more reasonable positions. They intervene to deny unreasonable Crown requests and favour the least restrictive terms necessary. Importantly, they view most accused as releasable if the bail plan is strong enough.

In contrast, some defence lawyers assert that certain justices make unreasonable bail decisions (n = 14) and are known detainers (n = 8). Allen argued that unreasonable bail decisions are not the least restrictive considering the allegations and occur when justices "unreasonably accept the Crown's submissions and either detain someone or impose even more restrictive conditions than the Crown had proposed." Participants suggested that unreasonably restrictive bail outcomes might stem from JPs' lack of legal training or from a lack of consideration about how conditions cause bail breaches and make bail overly "punitive."

The defence's approach to negotiations largely depends on whether they view the justices as reasonable. Nicole shared:

> There are some JPs who are great. There are some JPs who are smart, but tend to not be very defence-oriented, and [they] detain people quite a bit. And then there are other JPs who are, for a lack of a better term, not particularly bright, and [they] lack insight into the nature of bail. Depending on which one of those types you're dealing with, you sort of adjust your strategy accordingly. If it's a JP who is both smart and understands bail and is prepared to listen, and generally is reasonable in terms of whether they release or detain, then I would have no hesitation in arguing both the form of release and terms of release and running any contested hearings in front of them. If it's a JP who is one of the other two kinds, who either does not understand bail or is really difficult and tends to detain people, then I would prefer to have a Crown I can negotiate a release with, so I don't put my client's release in jeopardy.

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Participants attempt to avoid justices who they anticipate will be unreasonable in two ways. First, they negotiate diligently with the Crown to agree to a consent release. Second, if negotiations with the Crown fail, some defence use tactics to ensure a more reasonable judicial decision-maker. Several participants (n = 12) suggested they would employ strategies of adjourning cases or switching courtrooms in the hopes of minimizing their exposure to certain justices. Such extreme measures may be receding as some participants reported that justices began applying the principles of bail more strictly following the *R v Antic* (2017) decision. Consequently, defence counsel feel more confident disagreeing with Crowns during pre-court negotiations and pursuing narrower releases. Both pre- and post-*Antic*, when defence lawyers know their bench, they are better positioned to anticipate and negotiate bail in ways that benefit their clients.

Discussion and Conclusion

The role of defence lawyers as the accused's advocate in the pursuit of reasonable bail is not well documented. By speaking with defence lawyers about their experiences in private, out-of-court bail negotiations with Crowns, we learn that defence lawyers—who are the main court actors incentivized to resist onerous bail conditions—are limited by the wishes of their clients and must operate strategically against Crowns and justices. The results suggest that the presence of uncooperative Crowns and unfair justices in bail court, structural incentives, and informal court culture norms mean that securing reasonable bail for accused is far from guaranteed.

The findings reveal that the reality of preparing for and negotiating bail diverges from what the law requires members of the courtroom workgroup to do, potentially undermining the presumption of innocence and "reasonable bail." For instance, the formal law explicitly discourages an excessively risk-averse approach to bail (*Criminal Code* 1985; *R v Antic* 2017; *Act to amend the Criminal Code* 2019; *R v Tunney* 2018; *R v Zora* 2020). Yet, particularly when discussing release conditions, both the Crown and the defence act in ways that undermine the least restrictive means necessary to address the three grounds for detention (*Criminal Code* 1985, s 515(10); *R v Antic* 2017). Past bail research documents how justices and prosecutors behave in a risk-averse manner (Myers 2009). These actors are goal-oriented towards public safety and protecting their reputation if an accused person re-offends while on bail (Wiseman 2016). Past research also discusses the cooperative nature of the courtroom workgroup, which leads to the cooperative crafting of joint submissions that create quick and simple consent hearings (Myers 2015; Yule and Schumann 2019). However, extensive cooperation between the courtroom workgroup and risk-averse Crown and justice behaviour lead to major deviations from the law on bail.

This study confirms not only that risk aversion is prevalent among defence lawyers, but also that defence lawyers experience risk aversion differently than their courtroom counterparts. Defence counsel risk aversion is at least partially a function of their client's desire to obtain release even at the cost of onerous conditions, and that has been internalized by the defence. For example, a long-

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standing reality in Ontario's bail courts is the overuse of sureties (Myers 2009; *R v Tunney* 2018), and some defence counsel strategies inadvertently lead to unnecessary surety releases when they over-prepare by securing a surety before they know if one is necessary for release. If the defence pitches a restrictive release plan at the beginning of the bail negotiation, the prosecutor will almost always accept it. Beyond surety releases, the defence, following their clients' instructions, will agree to conditions they know the client is unlikely to be able to follow, such as avoiding contact with a spouse who is a co-accused. Accused persons, and their lawyers by extension, might agree to almost any condition requested by the Crown or the justice to avoid the risk that arguing matters will cause delays or detainment. Like waiving their right to a trial, accused persons essentially waive their right to a bail hearing where their lawyer could argue matters and potentially secure a narrower release. Ultimately, bail at all costs is the overwhelming priority.

A related finding highlights that rather than acting as adversaries pitted against each other, Crown and defence attorneys often behave "cooperatively" with one another when negotiating bail to secure a joint submission consent release. Indeed, it is common for defence counsel to co-create onerous bail plans. It may appear that the defence is working against their clients' desire for a *reasonable* release, but it is a rational reflection of their client's desire for a *certain* release. Prior research based on courtroom observations documents the Crown's discretionary power (Myers 2017; Wyant 2016; Yule and Schumann 2019) that puts defence lawyers at a significant disadvantage in bail negotiations. Crowns are afforded significant discretion because they control the flow of the daily docket and decide whether to consent to release and on what grounds. Therefore, it is unsurprising that most participants believe Crown attorneys have most or all of the power while negotiating bail, and many feel compelled to acquiesce rather than argue. Although the defence bears some responsibility for offering sound legal advice and discouraging clients from accepting conditions that are unrelated to the three grounds for detention, they lack the means to fully combat the power imbalance between themselves and the Crown.

These results provide further insight into defence lawyers' frustrations about the seemingly enduring nature of unequal power dynamics and the culture of coerced cooperation that shape the bail negotiation process. The current court structure pressures the defence to cooperate with the Crown, even when it means agreeing to unreasonable bail conditions, if they fear that the alternative —arguing matters during negotiations or before the justice—will lead to worse outcomes for their clients. To address this, Sylvestre, Blomley, and Bellot (2020) insist that "[u]nconditional release must be the norm for granting release" and that "[w]hen the alternative to custody is unconditional release, it suddenly becomes easier to challenge unreasonable conditions of release" (p. 220). For them, this "radically changes the power dynamic among legal actors, in particular for defence attorneys" (Sylvestre, Blomley, and Bellot 2020, 220). Arriving at this new norm is likely to be challenging, especially at a time when bail is under media scrutiny for not being tough enough.

The prospects for more reasonable bail likely require improving the likelihood that justices and Crowns will act reasonably in implementing bail as legally

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prescribed as well as better funding of the bail system. The findings suggest that *R v Antic* (2017) eased some defence concerns because it spurred justices to intervene and challenge seemingly unreasonable Crown submissions. Justices and Crowns are more likely to interpret and apply the law correctly post-*Antic*, although some participants questioned whether the change is truly widespread and permanent. The findings also highlight the importance of appropriate government funding for a functional bail system. For example, eliminating funding for Legal Aid certificates at the bail stage created more pressure for duty counsel to get through cases quickly, thus incentivizing cooperation rather than advocacy. More reasonable bail outcomes for accused depend on behavioural changes in Crowns and justices and government intervention. Our study underscores the role of informal courtroom culture—namely, the shared goal of getting work done via negotiated justice—as an important factor in the bail process that warrants further investigation. As Grech (2017, 8) argues, the factors contributing to the bail decision-making process are "nuanced, varied and interdependent and, as such, should not be examined individually but rather in terms of their interactive effects."

Counting on defence counsel alone to resist onerous bail conditions is unlikely to bring bail practices into conformity with the law on bail. Faced with clients prioritizing release, uncooperative Crowns, and justices who might not question onerous terms, defence lawyers are not as incentivized to push against conditions as the formal adversarial model would suggest. Instead, they adopt strategies that make onerous conditions more likely. Truly disrupting the bail culture that results in unreasonable bail likely requires changes in Crown behaviour, perhaps making them more accountable for the conditions they routinely ask for, or better training for JPs who make most bail decisions. Future research that examines Crown perspectives would be useful to compare how different officers of the court, who represent conflicting interests, prepare for and negotiate bail. A careful consideration of the Crown perspective is also essential to avoid making assumptions about their role in achieving reasonable bail. Our study has focused solely on the perceptions of defence counsel, but it is reasonable to conclude that Canadians will witness the constitutional principle of reasonable bail manifest in practice only when all courtroom actors make reasonable bail a priority.

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Cite this article: Nixon, Jenaya, Carolyn Yule, and Dennis Baker. 2024. Reasonable Bail or Bail at All Costs? Defence Counsel Perspectives on a Coercive Environment. *Canadian Journal of Law and Society / Revue Canadienne Droit et Société* 1–21. https://doi.org/10.1017/cls.2024.3

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