

THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME: THE OBDURATE NATURE OF PANDEMIC BAIL PRACTICES

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Abstract. In an unprecedented move, the criminal courts in Ontario closed on March 20th, 2020 in response to the COVID-19 pandemic. Bail appearances, however, could not be suspended, resulting in the rapid move to virtual appearances. Despite the dramatic change in the modality of court appearances, remarkably little changed in how the bail court operated or processed bail matters. Observations from 80 days of virtual bail court reveal the obdurate nature of well know issues with the bail process, including the culture of adjournment, reliance on surety supervision, and numerous conditions of release. Problematically, the courts are closed to the public and the accused are rendered invisible in the virtual space, leaving them even more dependent on counsel and the court. Differences in access to technology and private space create additional barriers for the most marginalized. Consistent with Feeley's assessment that 'the process is the punishment,' the virtual model has layered new punitive elements onto an already punishing experience.

Keywords: bail; pre-trial detention; COVID-19 pandemic; virtual court; remote appearances; court culture; access to justice; digital divide; court efficiency

Résumé. Dans un geste sans précédent, les tribunaux criminels de l'Ontario ont cessé leurs activités le 20 mars 2020 en réponse à la pandémie de COVID-19. Cependant, les comparutions sous caution n'ont pas pu être suspendues, passant rapidement aux comparutions virtuelles. Malgré ce changement radical de modalité, il y a eu remarquablement peu de changements dans la façon dont le tribunal a traité les questions de mise en liberté sous caution. 80 jours d'observation de comparutions virtuelles révèlent l'intransigeance des problèmes déjà bien connus reliés au processus, y compris une culture qui favorise les ajournements, la surveillance sous caution et de trop nombreuses conditions. La fermeture des tribunaux au public s'avère problématique puisqu'elle entraîne l'invisibilisation des accusés dans l'espace virtuel, les subordonnant encore davantage aux avocats et au tribunal. Les différents niveaux d'accès à la technologie et à l'espace privé sont des obstacles supplémentaires pour les plus marginalisés. Tel que l'estime

Feeley, « le processus est la punition », et le modèle virtuel ajoute de nouveaux châtiments à une expérience déjà punitive.

Mots-clés : mise en liberté sous caution; détention provisoire; pandémie de COVID-19; tribunal virtuel; comparutions à distance; culture judiciaire; accès à la justice; fracture numérique; efficacité des tribunaux

INTRODUCTION

In the spring of 2020, as the world grappled with a pandemic no one understood or was prepared for, most criminal courts across Canada closed to in-person appearances and the provincial custodial population dropped precipitously. Statistics Canada reported in August 2020 that after remaining relatively stable for most of 2019/2020, the pre-trial detention (remand) population in Ontario declined by 29% (Statistics Canada 2021g). It is unclear if declining rates were driven by fewer cases, fewer accused being remanded, or people spending less time in remand. This reduction was achieved with little public outcry. Instead, collective anxiety about the COVID-19 virus seemed to translate into a fresh understanding of the risks of confinement and a sense that the risk to public health must be mitigated by releasing as many people as possible.

Critically, changes in the size of the pre-trial detention population are instigated by the discretionary decision making of the court. The pandemic has necessitated rapid changes to daily and routine operations and decision making, presenting the opportunity to see what the system is capable of in a time of crisis. There are lessons to be learned in how the system has adapted, how public health concerns are being balanced with concerns about risk, how notions of public safety are being reconsidered and how temporary changes may become entrenched practices. While a move to using more technology may be an advancement, it is replete with concerns about justice, access and equity, including the ability to facilitate private legal conversations, ensuring access to the necessary technology and keeping the criminal courts open, public, and accountable.

In this article, I present and reflect on data collected from 11 Ontario bail courts in the summer of 2020. Observations reveal at once the real challenges of rapidly shifting to a virtual model as well as what appears to be stability in how the bail court processes cases. Despite considerable decarcerative efforts early in the pandemic, more recent data (Statistics Canada 2020f) suggest the reduction may be temporary. One may have expected the court to be operating in an obviously different way.

This expectation however does not bear out in the courts observed. Most remarkable is the incredible resiliency and stability of court processes during these unsettled times. Despite a complete change in the modality of court appearances, how the court operated and the way the court approached the question of bail all these processes appear to have remained relatively unchanged. While making statistical inferences is not possible, the data paint a picture of a court that quickly adapted to the change in format and settled into the familiar pattern of addressing bail cases.

WHAT WE KNOW ABOUT BAIL IN CANADA

Before the pandemic, in Ontario, almost half (45%) of all people accused of a crime were held by police for a bail hearing (MAG 2020). Most people who applied for bail were ultimately released, with the consent of the Crown and were subject to an average of seven conditions of release (Myers 2017; Deshman & Myers 2014). Once imposed, it is a criminal offence to fail to comply with any condition of release. The median amount of time accused spent in the court process was four and a half months (139 days) (Statistics Canada 2020a). This time span is troubling as the more conditions imposed and the longer accused are subject to them, the more likely they will fail to comply (Sprott and Myers 2011). In the end, most cases were resolved by way of a guilty plea, with 58% of charges being withdrawn (for 34% of accused, all charges in their case were withdrawn) (Statistics Canada 2020e). A significant number of people experience arrest, detention and restrictive conditions, and make numerous court appearances over an extended period of time without ever being convicted. The most commonly imposed sentence for those who are found guilty is probation (Statistics Canada 2020d). For many people accused of a crime, pre-trial detention will be their only custodial experience. For people convicted and sentenced to custody (the most serious sentence imposed in 39% of cases), 47% are for 30 days or less, and 74% are for less than six months (Statistics Canada 2020b&c). In a system where many accused experience pre-trial detention, it is a criminal offence to fail to comply with a condition of release, and most charges are ultimately withdrawn after numerous court appearances - the process truly is the punishment (Feeley 1979).

Previous observational studies describe a bail court dominated by a culture of adjournment and risk aversion (Myers 2009), one that embraces the precautionary principle (Berger and Stribopolous 2017). The pre-trial release decision influences the accused's entire experience of the court system. The uncertainty of the pre-trial experience (Pelvin 2017;

2018), the challenges of securing surety supervision (generally a family member or friend who agrees to supervise the accused in the community and promises the court a sum of money should the accused commit an offence or fail to comply with their bail) and restrictive conditions of release (Manikis and De Santi 2019; Deshman and Myers 2014; Myers and Ireland 2021; Sprott and Myers 2011) are differentially experienced and set many people up to fail. People marginalized by race, poverty, mental health, and substance use have a different experience of the system (Sylvestre and Bellot 2015; Sylvestre et. al. 2015). Conditions of release further criminalize people for behaviour that outside of a court order is not a criminal offence. The presence of a release order, however, provides police with an additional mechanism and ‘justification’ for certain people’s intensive monitoring. Being held in pre-trial detention, even for short periods of time, exerts pressure on people to plead guilty (Friedland 1965; Kellough and Wortley 2002; Koza and Doob 1975; Pelvin 2017, 2018). People held in pre-trial detention are also more likely to be sentenced to custody and for longer periods of time (Koza and Doob 1975).

SHUTTERING THE COURTS

In an unprecedented move, the courts in Ontario closed on March 20th, 2020 and remained closed for in-person appearances until July 6th, 2020. Once the courts reopened, many case appearances continue to take place remotely, especially bail appearances. Most post-bail court appearances were adjourned to some point in the future. Seeking a ‘COVID adjournment’ became shorthand for the appearance being cancelled and pushed to a later date (at which point the matter might again be adjourned). People with previously scheduled court appearances were advised not to attend court, and trials were cancelled. Bail courts, however, could not suspend operations. By law, accused must be brought before a justice within 24 hours or as soon as in practicable after arrest (Criminal Code s.503(1)). A decision about release on bail may not be made at this first appearance, in which case the accused is held in pre-trial detention while they await this decision. Simply cancelling bail appearances and decisions is not possible. As a result, the court had to rapidly transition to holding remote hearings. Some locations had the capacity to conduct video-based appearances from the police station or the detention centre. Most courts, however, were not equipped to do so, with appearances primarily conducted by phone.

Historically, the criminal justice system has been slow to embrace the use of technology in the courtroom. Prior to the pandemic, most bail appearances were held in person in a courtroom. Not only were all legal actors required to be present, but so was the accused, necessitating their transportation from the detention facility as well as anyone proposing themselves as a surety. The pandemic forced the system to rapidly modernize standard practices, pushing aside previous institutional resistance to the use of technology. The difficulty that quickly became apparent is the limited established procedures in place for this sudden turn to virtual hearings. Before the pandemic, it was unusual for the court to use such basic technology as the phone or video for hearings, and most paperwork was submitted in hard copy.

METHODOLOGY

In June and July 2020, myself and a team of research assistants (hereafter referred to as the ‘observer’) observed eleven virtual Ontario bail courts. The courts varied in size and included urban and rural locations across the province. Each courtroom was observed for five full consecutive days. In courts with more than one bail court, both courts were observed. Over 80 days, 885 bail appearances were observed. On an average day a mean of 10.5 bail matters (median 9, range 1-37) and 11.8 non-bail matters (median 2, range 2-105) were observed. The bail courts were processing a lower bail caseload than seen in other observational studies before the pandemic. For example, Deshman and Myers (2014) saw an average of 20.5 bail cases each day while Myers (2015) saw an average of 29.9 bail cases. The lower caseload is likely attributable to interwoven factors, including a reduction in the police-reported crime rate, police being more likely to release accused rather than hold them for a bail hearing, and courts working to make bail decisions sooner after an arrest.

Observers generated a transcript of the court day, writing down everything that was said in court as well as any impressions about the process (noted in the margins as separate and contextual). As with in-person bail court, virtual court proceedings happen quickly, making determining who was speaking difficult as people regularly talked over each other and the court did not focus on one case at a time but instead frequently switched back and forth between cases. By generating a transcript of the day, we created a record of what happened in court. In doing so, we risked losing less information than if the observers completed the data collection sheets while listening to the proceedings. The court transcripts were coded, verified and entered for analysis. The standardized coding

sheet included all the information about how each person was addressed by the court that day. This included the type of counsel representing the accused, the outcome for the day, whether the Crown was consenting to the accused's release or seeking their detention in a show cause hearing. For accused who were released, information was recorded on the form of release, the amount of bail as well as the conditions of release. The transcripts also contained significant qualitative observer notes that capture the nuance and details of how the court was operating, challenges with the virtual processes and how the pandemic was discussed.

FINDINGS

My observations reveal a series of insights into how the court adapted to the shift to a remote format. I consider the findings in the context of what has been learned from pre-pandemic studies of bail courts.

The obdurate nature of bail practice

The pandemic created an opportunity to change how the court operated, with the possibility that remote appearances could improve access to justice and make the process more efficient. With no precedent for how to adapt to the rapid move to virtual hearings and the imperative to consider public health measures there was space to reconsider how we approach the question of bail. The opportunity, however, seems to have been largely missed. Rather, the pandemic demonstrates the extremely obdurate nature of the issues with bail. So entrenched are the challenges with routine bail practices that even a pandemic has not motivated real and sustained changes in decision making. The only thing that seems to have changed is the modality of the court appearance, which creates additional technological barriers and may amplify and exacerbate existing problems and inequities.

Culture of adjournment

A 'culture of adjournment' and risk aversion (Myers 2015) continue to dominate in bail court. Consistent with observations in Ontario bail courts prior to the pandemic, each day the court adjourned most matters to another day. The bail court made remarkably few formal decisions about whether to grant or deny bail on an average day. The frequency of adjournments is both longstanding and deeply problematic. Each adjournment is a short detention order where the accused is held in custody

until their next court appearance. Even short periods of time in custody have significant social and legal consequences.

In 68.7% (608) of the bail appearances observed, the case was adjourned to another day. While there were fewer cases before the court, an even higher proportion of cases were adjourned than has been seen in other pre-pandemic studies (in Deshman and Myers 2014, 58.7% of cases were adjourned and in Myers 2015, 53.2% were adjourned). The defence/accused requested most adjournments (79.4%, n=483). These adjournment requests were largely uncontested. Even if the Crown raised concerns, the adjournment was granted by the justice. It is noteworthy that the Crown requested 5.9% and the justice of the peace requested 12.2% of adjournments.

Table 1: Appearance outcome on the day observed

Appearance Outcome	% (n)
Adjourn	68.7% (608)
Release	23.2% (205)
Detain	1.9% (17)
Traverse	4.0% (35)
Missing/other	2.2% (20)
Total	100% (885)

The ‘culture of complacency’ noted by the Supreme Court of Canada in *R. v. Jordan*, 2016 is demonstrated through the ‘culture of adjournment’ that continues to dominate the bail process. Despite the reality of a pandemic and the imperative to release people as soon as possible, adjournments continue to be the most common daily case outcome.

Caution must be exercised to avoid generating new or amplifying old inefficiencies through the virtual process. Improving the use of technology may increase rather than reduce inefficiencies and prolong the time accused spend in the bail process. Similar to findings by Webster (2009), there appears to be even greater ease in requesting and being granted an adjournment in the remote format. The physical absence of the accused may facilitate the ease with which adjournments are granted. Remote technologies may provide improved efficiency in some areas while also increasing the resource pressures within the institution and increasing the number of appearances, days in remand, and time to case resolution.

In 51.3% of adjournments, the reason provided for the adjournment request was the need for more time to develop a plan of release (release plan and surety-related reasons combined).

Table 2: Reason provided to the court for an adjourn request

Reason for adjournment	% (n)
Release plan	36.5% (222)
Surety related*	14.8% (90)
Counsel related	10.5% (64)
Paperwork	4.1% (25)
No reason provided	8.9% (54)
Out of time	1.0% (6)
Other	23.2% (141)
Missing	1.0% (6)
Total	100% (608)

Note: Adjournments to locate a surety may be under-represented as this may be captured by the broader reason of ‘release plan.’

Understandably, defence counsel want to secure the Crown’s consent to release rather than proceed with a contested show cause bail hearing. Show cause hearings generate uncertainty, as it is unclear at the outset how the presiding justice will decide the question of bail. Adjournments are a routinized and taken for granted aspect of case processing. Being held in continued detention is not seen as problematic when the defence requests the adjournment. However, it is overly simplistic to blame delays in the bail process on defence counsel. This critique ignores the reality that defence counsel request adjournments most frequently for issues related to developing a release plan to satisfy the Crown. The frequency of adjournments thus, to some extent, rests in the hands of the Crown.

Release on bail

Consistent with observational findings prior to the pandemic, bail courts make remarkably few bail decisions each day. On an average day, the courts heard 2.1 consent releases and 0.78 contested show cause hearings. Across all observations, 19.0% (n=168) of accused were released on consent on the day observed. Show cause hearings were observed in 7.0% of cases (n=62). Of the 62 observed bail hearings, the accused was detained in 24.2% of cases (n=15), released in 56.5% (n=35), and adjourned without a bail decision in 14.5% (9) of observed hearings¹.

1. In 2 cases the process for release (consent release or show cause hearing) is unknown.

The median amount of bail promised to the court was \$750² (range \$100-\$62,000). To be released, accused had to consent to and agree to abide by an average of 7.52³ conditions (median 7, range 0-26). The average number of conditions imposed was the same as seen in other pre-pandemic bail court observations. For example, Deshman and Myers (2014) found a mean of 6.99 conditions (median 6.5) and Myers (2017) found a mean of 7.8 conditions (median 7). While release on bail is almost certainly better than being held in detention, each release condition creates a new pathway to detention. Conditions of release are supposed to be imposed with restraint and not be imposed to change the behaviour of the accused (R. v. Antic 2017).

Of the 205 accused who were released on bail on the day observed, 43.9% (n=90) were released on their own undertaking or recognizance, and 36.1% (n=74) were released with surety supervision. This is a considerable shift in the form of release required compared to other observational studies (Deshman and Myers 2014; Myers 2019). The proportion of accused released on an undertaking or their own recognizance suggests a concerted effort to release accused without the requirement of surety supervision.

Table 3: Form of release (all releases combined)

Form of Release	% (n)
Undertaking	4.9% (10)
Own recognizance (OR)	39.0% (80)
Surety	36.1% (74)
Bail program (BP) supervision*	15.6% (32)
Cash bail	2.0% (4)
Same bail or missing	2.4% (5)
Total	100% (205)

Note: own recognizance with bail program supervision

Ontario has demonstrated a longstanding and enduring reliance on surety supervision. In the CCLA report, Deshman and Myers (2014) found 56.25% of accused in Ontario were released with surety supervision. Myers (2019) notes 76.1% of accused required a surety to be released. Ontario’s reliance on sureties is not consistently seen, with other jurisdictions in Canada rarely requiring a surety for release (Deshman and Myers 2014). Surety requirements have substantial impacts and create

2. N= 167, 38 cases with a missing bail amount were removed
3. Missing/unknown in 13 releases.

barriers to release. As Pelvin (2017; 2018) notes, surety requirements result in some accused being detained, as not everyone has someone ‘acceptable’ and willing to take on this responsibility. Sureties are undoubtedly overused. Problematically, they are also presumed by the court to be effective in supervising the accused, ensuring they return to court, do not commit any criminal offences, and comply with the conditions of release, yet there is no empirical evidence upon which to make this assumption.

In *R. v. Antic* (2017), the Supreme Court of Canada took aim at how surety requirements were being used, admonishing the courts for an over-reliance on surety supervision which is contrary to the ladder principle in s.515(1) to (3) of the *Criminal Code*. The ladder principle means the least onerous form of release (unconditional release on an undertaking) must be considered and rejected as inappropriate before considering the next more restrictive form of release. A recognizance with a surety is the most onerous form of release and is not to be imposed until all less restrictive forms of release have been considered and rejected. It however remains unclear, what is responsible for this reduction in the use of surety supervision. The shift may pre-date the pandemic, something Yule and Schumann’s (2019) examination of bail decisions pre and post-Antic suggests. The other possibility is pandemic thinking and cautiousness. Criminal justice actors (led by the Crown) may be shifting how they use their discretion in light of the logistical difficulties related to requiring residential sureties when the government is encouraging people to only have contact with their immediate household. However, it is noteworthy that surety supervision or bail program supervision (a supervision option for some accused who do not have a surety available to them) was required in 51.7% (n=106) of observed releases.

The apparent reduction in the proportion of releases that require sureties compared to other observational studies is notable. However, looking at the courts individually revealed that the pattern of fewer surety requirements was not consistent across the courts. Sureties were rarely used in three of the eleven courts. It is not possible with available data to determine if, in these three courts, sureties were rarely used pre-Antic and pre-COVID. In the remaining courts, a surety was required in approximately half of the observed releases. While there are reasons to be optimistic that bail release practices may be shifting in Ontario in response to *R. v. Antic* or the pandemic, we must be constrained in the conclusions we draw.

Implicitly considering COVID?

Despite observations happening in the early months of the pandemic, COVID-19 was mentioned infrequently when participants were speaking to specific matters before the court. Overall, in only 14.5% (n=128) of cases was the pandemic mentioned. Having more specific vulnerabilities associated with custody put on the record occurred in 19.1% (n=169) of cases observed. Conceivably COVID or other detention vulnerabilities may be more likely to be mentioned in a consent release or show cause hearing. Looking at these situations separately, in 28.8% of consent releases (in 50 of 168) and 79% (49 of the 62) of show cause hearings, COVID was mentioned. In 10.1% of consent releases (n=17) and 45.2% (n=28) of show cause hearings, a detention vulnerability was mentioned. While both COVID and detention vulnerabilities were considerably more likely to be mentioned in a show cause hearing, adjournments are effectively short detention orders and, in these cases, COVID was mentioned in 5.6% of cases (34 of 608), and detention vulnerabilities in 20.7% (126 of 608).

The infrequency with which COVID or detention vulnerabilities were mentioned was somewhat surprising. Pandemic fatigue may result in a return to the status quo, where concerns for safety in custody are noted in passing but rarely used as arguments in support of release, as we settle into complacency or acceptance of the realities of the virus. It is plausible that initial fears have waned, reducing empathy for those who are in custody. The other possibility is that COVID has become a given, with court actors implicitly taking COVID into account. Implicit consideration, however, is problematic. The ladder principle in bail and Gladue principles in sentencing, where judges are to consider the unique background, colonial history, and circumstances of Indigenous peoples, have also been said to be 'implicitly' considered without demonstrable success. Implicitly taking something into account is not sufficient. Concerns need to be put on the record to ensure the risks of COVID are kept at the forefront when making the bail decision. Vigilance is necessary to ensure custody is only used when absolutely necessary. Even short periods in custody can be personally disruptive while enhancing the risk of being exposed to the virus. This heightened risk must be considered not only when denying an accused's release but when adjourning the matter. The high turnover of people returning to the community only enhances the risks. With most accused who apply for bail being released with the Crown's consent, the Crown's release requirements are what necessitates many adjournments. It seems unnecessarily risky in the context of

a pandemic to hold people in custody for a bail decision when they will ultimately be released.

Technological Challenges

The pandemic forced the court to rapidly change aspects of how it operated. Many of the technological capacities required for modernization were not immediately available. Physically appearing in court was a cornerstone of the bail process in Ontario; legal counsel, accused, and people being proposed as sureties have traditionally been expected and indeed mandated to physically appear in court. This practice is implicated in many delays and inefficiencies in the court's daily operation, as it can be difficult to have all the necessary actors together at the same time when the court is ready to hear their matter. Further challenging the move to remote hearings was the court's dependence on paper documents, having resisted the transition to email or other file sharing technologies. As a result, the transition to remote court operation was understandably difficult. In a large system characterized by the involvement of many independent actors, differential access to technology, and the need to protect privacy, it was a challenge to take up even the most basic technology. Despite being in uncharted territory, after years of reluctance the court adapted and managed to shift quickly to a virtual model, as there simply was no other option.

That said, this was not a seamless process. There were technological issues in 23.6% (n=209) of appearances observed. All court actors faced the significant problem of having difficulty hearing the proceedings. The poor sound quality was worsened by background noise from the police detachment or detention centre, from legal actors working from outside a courtroom and the intermittent automated announcement of people entering and exiting the virtual courtroom. Following what is happening in court is difficult even in ideal circumstances. Appearing virtually intensifies confusion and misunderstandings while presenting logistical challenges and serious barriers.

Observer Note: *I was often confused about who was speaking, especially before I had a chance to get used to each person's voice. People often only identified themselves the first time they spoke, but not each time they spoke. To the extent that there were people on the line who were calling in by audio-only, and especially in cases where the accused was calling in by audio-only, I think there should have been more frequent self-identification before speaking.*

Court transcriptionists have also raised concerns about sound issues in court recordings, as they have experienced difficulty deciphering what is being said in court (Hasham, 2021). As the official record of court proceedings and the only way to go back to know exactly what was said, audio quality is critical.

The frustration and annoyance with the process were apparent. People's patience wore thin when technology was not working properly, and when there were frequent interruptions, difficulties connecting, excessive and distracting background noise and people talking over each other.

Observer Note: *There were often interruptions with people calling in during a bail hearing - the JP's seemed to do their best to apologize to the accused. Nonetheless, there were interruptions and moments of "chaos" as the parties attempted to sort scheduling conflicts and confusions.*

In addition to significant sound quality issues, there was the complication of having everyone on the line at the same time with all the required documents in order. Indeed, in 17.7% (n=157) of appearances, there was an issue with the documents before the court. There were also regular difficulties connecting with the detention centre, having people call in when scheduled to do so, dropped calls, and the phone's running out of batteries.

Observer Note: *It seemed as though the courts are having some trouble adjusting to online and over the phone hearings. Throughout the week, there were many technical glitches such as offenders not being able to be heard or seen on video screens, delays in communicating with the jail or vacating the video conference room in the jail for a hearing, and trouble connecting everyone required to the phone line.*

Co-ordinating all the players and attempting to use antiquated equipment, including limited call lines and poor internet connections, disrupted the smooth and efficient operation of the court.

There was some confusion about whose role it was to contact the detention centre to get the accused on the line. Some courtrooms could not dial out and call the detention centre directly because the conference call tied up their one phone line. As a result, there were constant delays in reaching accused at the jails - reference to this was made daily (even hourly) by the Crown, defence counsel, and the justices of the peace.

Once connected to the detention centre there were often delays as officers moved accused around for their bail appearance.

Observer Note: *Every day that I was monitoring, at least one institution would be short-staffed. This would make the proceedings very slow since the officer would have to return each accused before returning with the next person. At times, the wait time would be ten minutes of silence between hearings. This, coupled with the constant referral to the court being overloaded, seemed like an obvious (if difficult to fix) area for improvement.*

Consistent with in-person bail court observations, dead time (time in court when nothing was happening on the line) consumes a considerable amount of the court's time each day.

Observer Note: *There was so much dead space where one party was waiting for an information, or an interpreter, or for the accused to get on the line. Some days it was a wonder any progress was made at all.*

Dead time, resulted in people having to wait, exasperating some's frustrations with the process and the technological challenges that only complicated what was already a trying process.

Observer note: *While awaiting the accused, the JP became angry that there were no matters to be taken care of. The JP hung up and requested to be called when the accused showed up. A few minutes later, the accused was reached, and all members of the court must be contacted again.*

Accused who were being moved around the detention centre or police station to access the phone or video link for their court appearance were also frustrated by delays and difficulties in ensuring everyone was present.

Accused: *They sent for me 30 minutes ago, and no one is here. Why did they call me when duty counsel is not here? (clearly upset).*

Trouble contacting people, both inside and outside of custody, could result in accused being adjourned to another day. The reproduction of scheduling and document issues regularly seen in in-person bail courts is exacerbated by the lack of staff continuity. Each day new Crowns and duty counsel have to figure out what is happening with any particular file. The result is little institutional memory about what happened at the previous appearance and what was supposed to have happened since.

To some extent the experience in bail court was driven by the personalities of the court actor's assigned to the court that day.

Observer Note: *The day really depended on the JP presiding. For example, one JP was brusque and dismissive with accused's (genuine) worries about incarceration during COVID. But on Friday, the JP was dedicated in their efforts to explain exactly what was happening to each accused and ensuring that they understood the process--to the point that court staff seemed ready to rebel at the long hours.*

Who is present in court matters, as the court actors' dispositions strongly influence the pace and tone of the court day.

While the courts were addressing smaller caseloads than seen in pre-pandemic observational studies, the labour of administering the bail process with all actors in separate locations left the impression that the virtual bail court was as hectic as the regular in-person bail court. The rapid, multitasking nature of case management was reproduced, augmented and complicated by conducting appearances by phone. Efforts to save time and process cases more efficiently resulted in a general sense of everything being rushed.

Observer Note: *One courtroom actor described the afternoon sessions as 'organized chaos. In this court, the JP called all of the institutions at once and, during any downtime, would ask the officers if they had someone available. This made it very difficult to follow the proceedings as so many people were talking at once. The constant call announcements of people entering and leaving the virtual courtroom phonenumber were very distracting. It also made it so multiple accused would be talking at once, sometimes with one hearing taking place in the downtime when counsel or the Crown was in the middle of another hearing. The purpose was to save time, but the cost was a lack of clarity, hearings blurring into each other, and a general sense of confusion for the accused.*

There was a sense of mass triaging as courtrooms were merged and files were bounced around in virtual space. The result was a process that was chaotic and, at times, difficult to follow.

Many of the technological issues that were witnessed can, with time, resources, training and proper planning be rectified in a way that will improve everyone's experience with the virtual model. Despite these opportunities for improvement, however, the move to virtual court appearances and resultant uptake of technologies raises lingering and novel questions about the operation of the system in terms of justice, access, privacy and transparency of process.

ACCESS, TRANSPARENCY AND PRIVACY CONCERNS

The move to virtual appearances has serious implications beyond the practicalities of daily court operations. With a long history of being open and publicly accessible institutions, the courts provide some measure of transparency and accountability in the administration of justice. One of the foundational principles of the justice system is the need for justice not only to be done but to be seen to be done (Lord Hewart 1924 in *Rex v. Sussex Justices* at para 259). The move to remote hearings challenges that axiom, as neither the public nor the media can attend court to observe and participate. When the courts closed the public effectively lost access and accused became largely invisible.

Protecting access to the courts

Observers called into the bail court before the scheduled start time and waited to be admitted to the court. While this usually happened as scheduled, there were several occasions when the observer could not access the court at the planned start time. This resulted from a shortage of available conference call lines or a more purposeful exclusion, where the observer was left indefinitely in the ‘waiting room.’ On a number of occasions, observers were asked to identify themselves. Some were questioned about why they were there observing the court.

Observer notes: *On the second day of monitoring, the JP asked me to identify myself. After lunch, I was unable to reconnect to the conference call. I surmise that I was placed in a waiting room as I heard regular, intermittent beeping reminiscent of a telephone’s busy signal. When I tried to call back in, the call automatically ended. It is troubling that I was screened from the court, especially after identifying myself. I understand the need for security, especially given the fact that one of the matters was subject to a publication ban under the code protecting the identities in a case involving minors. However, the open court principle is fundamental. It is wrong to prohibit the public from attending open court, especially without notice or cause.*

Calls were also, on occasion, dropped, and the observer was unable to re-gain access. In other instances, after a recess with a scheduled return time the court was no longer in session. The inability to access the courtroom may have been due to limited available conference lines. However, it is also possible this was a purposeful exclusion, betraying a certain suspicion of observers on the part of the court.

The visibility and transparency of justice

As the “very soul of justice” (Sierra Club of Canada v Canada (Minister of Finance 2004: para 52), the open court principle is of paramount importance. The open court provides a space for accused to have the process visible in a public forum. Bentham ([1834] in Paciocco 2005) states where there is no publicity, there is no justice. The open court principle is not just about physically accessing the courts; it is also about access to information about the court and how it is operating (Paciocco 2005: 398). However, as public health concerns have taken centre stage, the pursuit of safety and security has allowed unprecedented moves on the part of the government. Keeping information presented to a court from the public is contrary to the open court principle (Paciocco 2005: 390). Without having been provided access, an unknown number of interested members of the public have effectively been shuttered from the courts.

The Supreme Court of Canada has continuously affirmed that the open court principle is the starting point and that court closures are an exception that should only be reluctantly adopted (Paciocco 2005: 414). While some latitude made sense at the onset as the courts grappled with the rapid uptake of virtual technologies, this justification diminishes over time. The public health crisis has not abated and virtual courts will likely endure post-pandemic, yet the courts remain mostly closed to the public. What is happening on a daily basis in bail courts, what happens to the accused, has become invisible. The result is the fortification of a once open and public institution. The court is an essential space of accountability for the criminal justice process. The public, however, is unable to access the courts or reliable information about what is transpiring. The details upon which the court relies in making pre-trial release decisions are public knowledge. Rendering the process invisible has removed an essential check and balance. The government is simply telling us to ‘trust them’; however, decision-makers’ good intentions and judgment are not sufficient accountability mechanisms. Paciocco suggests we ought to have a “prudent suspicion of government” (2005: 395) and cautions that “‘Trust us’ is not fertile soil for the open court principle,” as the government must continuously demonstrate it is upholding the rule of law (2005: 396). The public must be able to see justice being done and evaluate the mechanisms employed in the process of pursuing justice.

Accused as dependants in the process

Little mention has been made of the fact that the accused has also been rendered invisible. In the process of shifting to virtual hearings, where most are conducted by phone rather than video, the accused is no longer

seen. Within 24 hours of an accused's arrest, they are to be brought before a justice of the peace to have the necessity of their detention reviewed (Criminal Code s.503(1)). This right has not changed; however, the meaning of being 'brought before a justice' has. The accused is no longer physically brought to court where they are seen in person by duty counsel and by the justice of the peace. Instead, at the time of arrest, the accused effectively disappears into custody and only appears as a disembodied voice in court. The decision about an accused's pre-trial liberty now happens without the accused physically appearing before the court and, consequently, without decision-makers really seeing them.

Muting accused

We know accused struggle to follow the criminal process in regular circumstances. The virtual format exacerbates these difficulties as accused do not benefit from legal counsel being physically beside them to advise, answer questions, and explain what is happening. While attending court in person from custody is fraught with unpleasant experiences, doing so also provides an important opportunity for the accused to voice their concerns on the record about their experiences and treatment in custody. Without the ability to speak to counsel or the court, the accused lack a critical avenue to draw attention to concerns with their confinement.

Officers facilitating remote access and members of the court have the power to mute and unmute the accused. While muting may be necessary to minimize background noise, it was also used to limit disruptions and 'protect' the accused from saying something they should not.

JP: (addressing the accused) – I understand your frustration; however, everything you're saying is on the record and advise...

*A: *interrupts JP* "don't mind/care if it's on the record." JP: * JP responds to A* she does care, cannot allow him to continue*

inaudible, some chaos

A: "jokes of officers trying to intimidate me by turning the lights on and off." JP muted all members, including A**

JP: "I had to use the mute function as I cannot allow him to continue, Ms. Curry, please continue on his behalf."

Muting an accused, even when intending to protect them, enhances their invisibility. While some courts had video connections, others did not. Muting an accused, especially when they may be unaware they are being muted, raises concerns that they are not being seen or heard in the

process, a consequence intensified by not having counsel physically with them to swiftly and more effectively intervene.

The court, however, appears to be legitimately concerned about the accused making incriminating statements or otherwise compromising their defence when speaking out. Accused may be seen as disrupting the flow of a hearing, unaware of the process, legal requirements and expectations of decorum. The solution, presumably well-intentioned, is to turn off the accused's microphone. In instances where the accused wanted to speak, they were 'muted' for their own good. This may or may not be with the accused's knowledge. Despite well-placed intentions, the realities of this silencing must be considered. People are incredibly vulnerable at the time of arrest and have little control or autonomy over their treatment while in custody. The court appearance offers a vital opportunity to be heard (even if only by their defence counsel) and for the court to witness and document the accused's concerns. Depriving people who wish to speak to the court this opportunity further darkens the black box of punishment which pervades the court process.

Facilitating private conversations

To facilitate private conversations between defence counsel and the accused, the observers and other court actors were asked to hang up or put the phone down.

Observer Note: *We were all told to get off the line for 15-20 minutes to allow for a private call between defence counsel and accused, then call back.*

Having 'private' conversations on the 'public' line is deeply problematic. Anyone can remain on the line and listen to what is supposed to be a confidential conversation. The court clerk has to stay on the line in some capacity to continue the conference call. Trusting people to exit the call so that a confidential conversation can take place is questionable. In other instances, the Crown proposed things to defence counsel, and defence counsel asked their client right on the line whether defence counsel should accept the proposal without holding a private conversation.

Problematically, the in-court private conversation may be an accused's only opportunity to speak to legal counsel.

Observer notes: *There was a pattern of those in custody being unable to access phones, especially during the mandatory 14-day quarantine, but also in general. This came up multiple times every day, and sometimes by the same detained individuals on more than one occasion, even with endorsements from the justice of the peace. In some instances, phone access was only granted on weekend afternoons, which made contacting legal aid or counsel near impossible.*

Barriers to confidential conversations with counsel raise due process concerns. Conversations between accused and their counsel must be facilitated in a way that ensures both access and confidentiality. It is imprudent to assume accused can contact counsel from custody as a substitute for private conversations at court, as accused may experience difficulties accessing the phone or reaching counsel from the detention centre.

The accused's reduced visibility has a number of consequences. Without being physically present in court, accused have limited opportunities to speak privately with counsel. The little time duty counsel had to interview clients when physically in the courthouse has now been reduced to a brief phone conversation. While some courts can facilitate private conversations in court using sound-proof interview rooms, most courts do not have this feature. To accommodate private conversations, everyone on the phone line is asked to put the phone down and return at a pre-determined time. This is clearly inadequate as privacy cannot be assumed to exist on a collective line. In addition to the challenges of interviewing clients to receive instructions and for pertinent information for bail, the lack of private and face-to-face contact impacts the rapport counsel can develop with their client. This concern for trust and rapport flows both ways. Counsel express concerns about receiving instructions and providing timely and pressing legal advice, while accused may be sceptical of legal counsel they never meet in person.

Feeley's notion that "the process is the punishment," is easily apparent in bail court. The move to virtual hearings has layered new processes on top of old, adding to the punitive elements of the process. These new and largely invisible processes are differentially experienced. While virtual court has undoubtedly reduced some inefficiencies and created opportunities for improvements in access to justice, these new ways of doing things are rife with difficulties that are most heavily experienced by those who are the most marginalized in the process. These practices are consistent with Ericson and Baranek's (1982) assertion that accused are dependants in the criminal process; with accused being objects to be coerced and acted upon by legal personnel, rather than subjects who act or play a meaningful role in shaping the nature of the process. Due to their lack of organizational knowledge of rules and processes accused

are excluded from active participation, making them observers rather than full participants. By rendering the accused invisible and silent we are intensifying their dependence on counsel and on the court. The pandemic and associated public health measures have further subordinated accused as dependants in a process they do not understand and have little ability to shape.

OPPORTUNITIES FOR IMPROVEMENT

The pandemic will undoubtedly result in permanent changes to how the court operates. Measures that were implemented as short-term fixes are becoming the new standard way of doing things. While there are challenges, continuing with more virtual processes has the potential to help address several issues of access and efficiency. For example, prior to the pandemic, in bail, set date and plea court, all matters were scheduled to appear in-person at 10 am (and in some locations, a secondary list was prepared for the afternoon). This meant a large number of people appeared at court at the start of the court day to wait for an indeterminate amount of time before their matter was called. Shifting to a virtual model facilitates improved scheduling, allowing people to avoid travelling to court, mitigating the need for childcare or taking time off of school or work.

Despite a smaller proportion of accused requiring a surety for release, sureties are still routinely required in many courts. Facilitating prospective sureties' access to the bail hearing is essential, especially when sureties often give evidence as part of a show cause hearing. Having to travel to attend court in person with little notice, perhaps on more than one occasion, can involve considerable personal hardship. Appearing by phone relieves much of the difficulties of attending in person. Scheduling appearance times also eliminates the need for accused to be transported from the police detachment or detention facility to appear in court, thus avoiding the many discomforts of the transportation process (see Pelvin 2017; 2018). Appearing from a remote location may also provide opportunities for accused to be heard outside of regular court hours.

While there are many opportunities to improve the court's operation through the virtual process, differential access to technologies may impact the accessibility of the court. The challenge is not only developing sufficient technical capacity but to maintain privacy and ensure the security of the process. The experience of virtual court undoubtedly affects different populations in different ways. Efforts must be made towards equalizing access to the necessary technology to fully participate in the

court process as accused, sureties and members of the public. The digital divide, issues of technological fluency as well as broadband coverage will ensure that some people have greater access to justice through a virtual model, while others are disadvantaged.

CONCLUSION

The pandemic-necessitated move to a virtual bail format will likely permanently alter how the court handles appearances and manages cases. The technological issues involved, however, are significant, not only frustrating the processing of bail matters but instilling additional inefficiencies and inequities in the process. While virtual appearances minimized in-person contact and physical transportation, there are enduring challenges with sound quality, having people present and facilitating private conversations with the accused's lawyer from police cells, correctional institutions and rural and remote communities. Technological inequities raise significant issues of access, security and privacy. The ability to access private space, computer hardware and reliable connectivity varies across people and contexts, ensuring a differential experience of the move to virtual hearings, creating additional barriers for the most marginalized.

Pandemic bail practices demonstrate what criminal justice actors truly value when it comes to bail—the expeditious daily processing of accused. Despite long standing claims that in-person court appearances, the ability to privately consult legal counsel, and public access are vital aspects of the court process, the pandemic exposed the tenuousness of these ideals. Once held up as critical elements of the court process, these ideals have been diminished or dismissed during the pandemic. This speaks to the fluidity of these requirements and affirms that from the perspective of those who work in the system, these are not in fact a priority, but are rather secondary or tertiary concerns. What has been revealed as essential is simply the ability to process bodies.

According to Alschuler (1968; 1975; 1976; 1979; in Feeley; 1982) the prevailing incentives for the court are institutional convenience and organizational maintenance, rather than concerns for justice. The courtroom workgroup has a vested interest in the efficient processing of cases, a shared goal that underscores the dependence of the accused in the process (Ericson and Baranek; 1982). Numerous adjournments are the norm, and surety requirements and conditions of release are imposed in the same way, despite a dramatic change in the state of world. Changing the mode of delivery did little to alter standard bail practices.

Rather, pre-pandemic practices have adapted to the new modality, while also engendering new elements that add to the punishing process.

Observations from virtual bail courts reveal the stability and continuity of bail practices, which have changed little from pre-pandemic practices. For a time, there was motivation to release as many people as possible. At the outset of the pandemic there was an impressive 29% reduction in the remand population. This reality however presents a challenge of optics and substance. If so many people could be released early in the pandemic, it logically follows that they did not *really* need to be in custody in the first place. Said differently, if we can significantly reduce the provincial jail population during a public health crisis, we are over-using custody. This uncomfortable truth ought to be kept close at mind as it appears that the remand population is now moving closer to its pre-pandemic levels (see Statistics Canada 2020f)

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