

**Explaining Inefficiency in an Ontario Bail Court: Perspectives of Criminal
Defence Lawyers**

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ABSTRACT

Some academics and government officials have implicated defence counsel as the primary ‘villains’ in lengthy case processing times in Ontario bail courts. It has been suggested that defence counsel contribute to increasing case processing time through their use of ‘unproductive’ adjournments. This study examines this allegation through semi-structured interviews with defence counsel who practise in one Eastern Ontario bail court. The findings put the evidence that blames defence counsel into context and show that the explanations for their conduct are more complex than they may initially appear. They also reveal several explanations for bail inefficiency which are unrelated to the role of defence counsel but correspond *grosso modo* to the traditional factors associated with lengthy case processing time in the broader court process. The study concludes that although defence counsel are partly responsible for lengthy case processing times in bail court, they are only one contributor among many others.

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INTRODUCTION

Bill C-25 - the “Truth in Sentencing Act” - came into force on February 22, 2010, eliminating a sentencing convention that had been evolving in the Canadian criminal court system since the early 1970s. This convention allowed judges to give offenders a two-for-one credit at sentencing for the time that they spent in pre-trial custody for those cases in which a custodial sanction was handed down. For every day that an offender spent in remand, two days were subtracted from his or her intended sentence.¹ The Canadian government recently expressed concerns that this convention encouraged defence counsel and their clients to purposely extend court proceedings in order to accumulate more time in remand and thus additional credit at sentencing (Canada, 2009b; Library of Parliament, 2009). In part because of these concerns, Bill C-25 was passed, eliminating the two-for-one convention in favour of a one-to-one ratio.²

Throughout the debate surrounding Bill C-25, Members of Parliament and Senators from all of the major political parties (with the exception of the New Democratic Party) consistently placed blame on defence counsel and their clients for extending case processing times and contributing to the rising remand population (Canada, 2009b). Indeed, it was purported that the passing of the Bill would “unclog the courts” (Library of Parliament, 2009, p. 7) by reducing the manipulation of the two-for-one credit by defence counsel and accused persons. In some cases, the accusations against defence counsel and their clients were particularly inflammatory. For

¹ The courts did not always award credit based on the 2:1 ratio given that the exact amount was based on the individual circumstances of the case. However, the two-for-one ratio generally appeared to be the norm. For additional information on this subject, Manson (2004) provides a detailed examination of the two-for-one credit issue.

² Notably, the Bill also provides for credit up to a maximum of one and one-half days for each day spent in pre-sentence custody, if the circumstances justify it. However, this 1.5:1 credit is seen as the exception (Library of Parliament, 2009). In addition, preventing defence counsel from taking advantage of the two-for-one credit was not the sole purpose of the Bill. It is, however, the only objective relevant to the purposes of the current study. For additional information on *Bill C-25*, see <http://www2.parl.gc.ca/Content/LOP/LegislativeSummaries/40/2/c25-e.pdf>.

example, on October 7th, 2009, Conservative Senator Claude Carignan emphasized the malicious nature of the alleged defence tactics:

We must not be naive and get caught up in the game played by criminals and gangs. We hear about criminals who instruct their lawyers to put off entering a plea on their behalf so that they can benefit from two-for-one credit, which leads me to believe that some people are playing the system. (Canada, 2009b, p. 15)

These allegations continued throughout the debate, and were subsequently echoed in the media – albeit less forcefully (MacCharles & Tyler, 2009). There was, however, a considerable amount of opposition from lawyers’ associations, who vehemently denied the government’s claims (Canada, 2009a). On May 25th, 2009, Paul Alexander, a Canadian barrister, went as far as to claim that the Bill was a “solution in search of a problem” (Canada, 2009a, p. 14). Further, the Bill prompted opposition from academics and non-profit organizations, who claimed that the two-for-one convention promoted fairness and warned that its elimination would have a detrimental effect on an already strained correctional system (Canada, 2009a).

Bill C-25 is one of several recent attempts by the government to increase court efficiency in the Canadian criminal justice system. Indeed, lengthy case processing time has been a concern expressed by academics (Doob, 2005; Webster, 2006, Webster & Doob, 2004), government officials (Department of Justice [DOJ], 2007; Office of the Auditor General [OAG] 2008b; Thomas, 2010), and the media (Loyie, 2010; Moharib, 2010; Nguyen, 2010) over the past decade. In addition, Justice Ministers at the provincial/territorial and federal levels have also recognized that cases are taking too long to reach a resolution (Canadian Intergovernmental Conference Secretariat [CICS], 2007, 2008, 2009). As a result, some provincial governments

have established initiatives aimed at reducing case processing times in their criminal courts (see, for example, *Justice on Target*; Ontario Ministry of the Attorney General [OMAG], 2010).

The concerns expressed by the Ontario government are reflective of the negative consequences associated with court inefficiency. Lengthy case processing time risks violating the rights of accused persons (*R. v. Askov*, 1990) and has been shown to create difficulties in the prosecution of cases (OAG, 2008b; Webster 2007, 2009) and contribute to public dissatisfaction with the criminal justice system (DOJ, 2007; OAG, 2008b; Ryan, Lipetz, Luskin, & Neubauer, 1981; Tyler, 2001). Given the consequences associated with lengthy case processing time, it is perhaps not surprising that a considerable amount of research has been undertaken with the aim of identifying its causes.

Court efficiency research has highlighted formal causal factors for lengthy case processing time related to the workload and resources of the court (Church, Carlson, Lee & Tan, 1978a; Church, Lee, Tan, Carlson & McConnell 1978b; Doob, 2005; Luskin & Luskin, 1986; Mahoney, Winberry & Church, 1981; Webster, 2006), the nature of the cases entering the court (Klemm, 1986; Luskin & Luskin, 1986; Neubauer & Ryan, 1982; Webster, 2007; Webster & Doob, 2004), case processing characteristics (Doob, 2005; Klemm, 1986; Luskin & Luskin, 1986; Neubauer & Ryan, 1982; Webster & Doob, 2004), and the administrative procedures used to organize the court (Church et al., 1978a, 1978b; Luskin & Luskin, 1986; Mahoney et al., 1981). However, these explanations have – to a large extent – been repeatedly shown to be weak, inconsistent, or resilient to simple intervention. As a result, attempts to explain court efficiency began to focus on less formal aspects of court structures and procedures related to the culture of each particular court (Church, 1982; Church et al, 1978a, 1978b; Heath, 2010; Klemm, 1986; Leverick & Duff, 2002; Mahoney et al., 1981; Messick, 1999; Ostrom, Hanson, & Kleiman,

2005; Ryan et al., 1981). These studies demonstrate that court practitioners also play a role in the efficiency with which cases are processed in the courts through the informal practices that they establish, the expectations and norms that they develop, and the incentives that motivate them.

Although there are numerous studies that explain court efficiency as it relates to the whole court process, only a few studies have limited their scope to specific criminal procedures, such as the bail process (Myers, 2009; Webster 2007, 2009; Webster, Doob & Myers, 2009). Indeed, the amount of time required to complete the bail process in Ontario courts has increased in the last decade (Webster et al., 2009). It is particularly important to understand lengthy case processing at this stage of the court process because of the heightened impact on accused persons (Friedland, 1965; Hagan & Morden, 1981; Manns, 2005; National Council of Welfare [NCW], 2000; Office of the Provincial Ombudsman of Saskatchewan [Ombudsman Saskatchewan], 2002; Trotter, 1999) and criminal justice institutions (DOJ, 2007; OAG, 2008a, 2008b; Ryan et al., 1981; Tyler, 2001). Since accused persons are required to remain in custody while a determination of bail is decided, there is also a host of theoretical concerns to consider when lengthy case processing occurs during the bail process (Ashworth, 1994; Friedland, 1965).

There is a limited amount of research to-date that has attempted to explain lengthy case processing in Ontario bail courts (Heath, 2010; Myers, 2009; Webster 2007, 2009; Webster et al., 2009). However, this research has suggested that the use of (repeated) adjournments is contributing to lengthy case processing times (Myers, 2009; Webster, 2009). This finding is in line with broader court efficiency literature which has revealed that a passive attitude towards adjournments can extend the amount of time required to complete the court process (Church, 1982; Leverick & Duff, 2002).

Within this context, it is particularly notable that defence counsel are largely responsible for adjournment requests in Ontario bail courts (Webster 2007, 2009; Webster et al., 2009). Further, it is unclear whether the adjournments requested by this group of court practitioners are ‘productive’ (i.e. ensuring that the next appearance will move the case toward a determination of bail) or, on the contrary, ‘unproductive’ (with no apparent purpose related to resolving the case). Both academics (Heath, 2010; Webster, 2007, 2009; Webster et al., 2009) and government officials (Canada, 2009b; Library of Parliament, 2009) have suggested that defence counsel may be requesting adjournments for strategic (‘unproductive’) reasons that are unrelated to the advancement of the case. The most damning of these allegations is that defence counsel were purposely drawing out bail proceedings to accumulate two-for-one credit at sentencing. The Federal Government’s concern with this assumption, in particular, is reflected in the enactment of Bill C-25.

The problem with the suggestion that defence counsel are the principal source of case processing inefficiency in bail court is that this issue has received only minimal empirical examination (Weinrath, 2009), with most recent research only raising the hypothesis of defence manipulation (Webster, 2007, 2009; Webster et al., 2009). Further, there are a host of traditional explanations for lengthy case processing time identified in the wider court efficiency literature which may also explain the current recourse to adjournments in bail court. Perhaps, more notably, the voice of defence counsel has been almost entirely absent from this debate. Despite the fact that defence counsel are arguably the most frequently identified ‘villain’ in relation to lengthy case processing time in bail court, little to no research has examined the problem from their perspective. In order to fill this gap in the research, this study will identify those

explanations proposed by defence counsel for lengthy case processing time in one Eastern Ontario bail court.

To this end, Chapter I – A Review of the Literature – presents a summary of the various academic explanations for lengthy case processing time in both the court process generally, as well as the bail process specifically, and describes the factors which implicate defence counsel as significant contributors to bail inefficiency. Chapter II – Method – outlines the research context and describes the manner in which the data were collected and analyzed. Chapter III – Analysis - presents the findings of twelve semi-structured interviews that examine the role of defence counsel in contributing to bail inefficiency as well as other factors proposed to explain lengthy case processing time in bail court. Chapter IV – Discussion - summarizes these explanations, evaluates them within the context of the broader court efficiency literature, and discusses their theoretical, methodological and practical relevance. The final chapter offers potential avenues for intervention and proposes suggestions for future research.

CHAPTER I: A REVIEW OF THE LITERATURE

There have been increasing concerns about lengthy case processing time in the Canadian criminal court system over the last several decades. Despite efforts to increase the efficiency of the court process, both academics (Doob, 2005; Webster, 2006, Webster & Doob, 2004) and government officials (DOJ, 2007; OAG, 2008b; Thomas, 2010) have shown that cases continue to take longer to complete than they did in the past. This has been a topic of discussion at recent Federal-Provincial-Territorial Meetings of Deputy Ministers responsible for Justice (CICS, 2007, 2008, 2009) and large scale initiatives have been undertaken to reduce court processing times (e.g., *Justice on Target*; OMAG, 2010). This issue has also captured the attention of the public as a result of media reports focusing on unreasonable delay in the courts (Loyie, 2010; Moharib, 2010; Nguyen, 2010).

Given the importance placed on criminal court efficiency by academics, practitioners and the public, it is unsurprising that a considerable amount of research has sought to determine the extent of the problem (Webster, 2006; Webster & Doob, 2004), understand its impact (DOJ, 2007; OAG 2008b; Tyler, 2001), and identify its causes (Church et al., 1978a, 1978b; Klemm, 1986; Leverick & Duff, 2002; Luskin & Luskin, 1986; Mahoney et al., 1981; Neubauer & Ryan, 1982; Ostrom et al., 2005; Sipes, Carlson, Tan, Aikman, & Page, 1982; Webster, 2009). Further, several researchers have focused exclusively on specific court procedures, such as the bail process, in order to understand what is contributing to inefficient case processing times (Myers, 2009; Webster, 2007, 2009; Webster et al., 2009).

1.1 Court Efficiency in Canadian Criminal Courts

Court efficiency is often discussed in connection with court delay. While the expressions are frequently interchanged in the literature, “efficiency” is the preferred term in this study as it is more consistent with recent research (see, for example, Doob, 2005; Webster, 2009).³ Court efficiency is generally discussed in terms of the time (usually in days) required for a case to reach final disposition (see, for example, Church, 1978a, 1978b; Luskin & Luskin, 1986; Neubauer & Ryan, 1982). In recent years, however, some research has expanded the way in which court efficiency is measured to include the number of appearances required to complete a case (Doob, 2005; Webster, 2006; Webster, 2007; Webster & Doob, 2004).

Accordingly, inefficient case processing is often discussed in terms of lengthy case processing times/appearances (see, for example, 1978a, 1978b; Doob, 2005; Luskin & Luskin, 1986; Neubauer & Ryan, 1982; Webster & Doob, 2004). However, it is important to note that this operational definition (as employed in this thesis) does not suggest that efficiency is exclusively a question of the speed with which cases move through the court process. Rather, it is related to a more nuanced notion of the adjudication of cases as quickly as possible within the confines of the principles of justice. Indeed, the speedy resolution of bail without consideration of other legal values such as fairness or equity would arguably lead to less (rather than more) justice being done (see, for example, Edwards, 1999; Ostrom & Hanson, 2000; Raine, 2000).

Canadian courts have been reluctant to impose any strict limitations on the time available to process a case through the criminal justice system. In some instances, however, loose guidelines have been recommended for specific phases of the court process. In *R. v. Morin* (1992), the court suggested a reasonable period of “institutional delay” of eight to ten months.

³ “Court delay” was the term favoured in the literature when this area of study became popular in the 1970s. Since the beginning of the twenty-first century, the more neutral expression of “court efficiency” has been commonly adopted.

Institutional delay runs from the time that the parties are ready for trial to the time that the system can accommodate the proceedings. In *R. v. Askov* (1990), a period of delay in the range of six to eight months between committal and trial was deemed acceptable. In both of these cases, however, it was stressed that these guidelines are highly dependent on the circumstances of the case.

Although the expectations surrounding reasonable case processing times are somewhat ambiguous, Canadian government officials have clearly recognized that it is currently taking too long for cases to reach final disposition. Concerns about lengthy case processing time have been addressed at Federal-Provincial-Territorial Meetings in recent years (CICS, 2007, 2008, 2009). These meetings are attended by federal, provincial, and territorial justice ministers. At the conference held in September 2008, for example, all of the Ministers agreed to share information and best practices with the aim of making the justice system more effective. More specifically, the Ministers agreed to work in partnership to reduce ‘unproductive’ court appearances and case delays.

An examination of average case processing time in adult criminal courts sheds light on these concerns. Between April 2008 and March 2009, cases took – on average – 229 days (approximately seven and a half months) to be processed in Canadian criminal courts (Thomas, 2010). However, while this figure provides some insight into the national pattern of case processing, it does not provide a picture of the variability across Canadian provinces and territories.

Indeed, Webster and Doob (2004) found substantial variation in case processing time for a selection of Canadian provinces and territories in 2002. This pattern held even when cases

without bench warrants were examined.⁴ The results showed that over 25% of cases without a bench warrant in Quebec, Ontario, and Nova Scotia took over eight months to be processed compared to less than 7% of cases in Prince Edward Island, Northwest Territories, Yukon, and Alberta. In addition, over 18% of these cases took more than nine appearances to be completed in Ontario and British Columbia compared to less than 5% of cases in Prince Edward Island, Northwest Territories, Nova Scotia, New Brunswick, and Alberta.

More notably for the purposes of this study, Webster and Doob's (2004) study revealed that Ontario was above the national average in terms of both the amount of time and the number of appearances required to process cases through the criminal justice system. In 2002, 21.6% of cases without a bench warrant took more than eight months to be processed across Canada compared to 26.5% of comparable cases in Ontario. In addition, 17% of these cases took more than nine appearances to be completed across Canada compared to 26% in Ontario.

Not surprisingly, court efficiency is of particular interest to criminal justice officials in this province. In fact, the Ontario Ministry of the Attorney General has declared that current case processing times are unacceptable (OMAG, 2010). As a result of these concerns, the *Justice on Target* initiative was created in June 2008. As part of this initiative, an expert panel of criminal justice practitioners was created to determine how to increase court efficiency in the criminal justice system. Of particular concern was the increasing amount of time and number of appearances required for criminal cases to reach disposition.⁵ The Ministry of the Attorney General aims to reduce the average number of days and court appearances required to complete a criminal case in Ontario by 30% over a four-year period.

⁴ Examining cases without bench warrants ensures that lengthy delays are not attributable to circumstances beyond the court's control. More specifically, it excludes cases in which the accused failed to appear in court, (often dramatically) extending case processing time.

⁵ For a full summary of these statistics, see <http://www.attorneygeneral.jus.gov.on.ca/english/jot/>.

Equally notable, the problem of lengthy case processing time has become more pronounced over the last decade in this province. Between July 2009 and June 2010, charges in Ontario took – on average – 211 days and 8.9 appearances to be disposed, compared to 176 days and 6.7 appearances in 2000 (OMAG, 2010). This represents a 19.9% increase in elapsed case processing time and a 32.8% increase in the number of appearances required to reach disposition over less than a decade.

It is not surprising that Ontario justice officials are taking this problem very seriously. These concerns are rooted in the negative consequences associated with court inefficiency. Indeed, a considerable amount of research has gone into understanding the impact of increasing case processing time in the criminal justice system (Friedland, 1965; Manns, 2005; NCW, 2000; Trotter, 1999).

Particularly from an institutional perspective, lengthy case processing time can have a detrimental effect on the fairness of the justice system (DOJ, 2007; OAG, 2008a, 2008b; Ryan, et al., 1981; Tyler, 2001). In the Supreme Court of Canada case of *R. v. Askov* (1990), it was affirmed that unreasonable delay in the criminal court process violates the legal rights of accused persons. It was ruled that the accused's right to be tried within a reasonable amount of time, as guaranteed under Section 11(b) of the Canadian Charter of Rights and Freedoms (1982), had been infringed and a stay of proceedings was directed. Following this decision, other courts followed the precedent created by *R. v. Askov* and thousands of cases were dismissed on similar grounds. In addition, the longer that it takes for a case to reach disposition, the more likely that witness' memories will fade and evidence will become unreliable (OAG, 2008b; Webster 2007, 2009). Clearly, it is not in the public's interest to see cases thrown out or the effectiveness of the

prosecution's case reduced simply because the courts are unable to process cases in a timely manner.

Further, unreasonable case processing time can also result in substantial public dissatisfaction as victims and witnesses must endure prolonged disruption to their lives (DOJ, 2007; Ryan et al., 1981); the impression may be created that the justice system is unfair (DOJ, 2007; OAG, 2008b). In fact, Tyler (2001) found that procedural fairness is the most important factor in determining people's views of criminal justice institutions.

1.1.1 Explanations of Criminal Court Inefficiency

Given the multiple negative consequences associated with increased case processing time, it is no surprise that significant effort has gone into explaining it as a first step in correcting the problem. Since the mid 1970s, researchers have investigated a variety of potential causal factors. These include the workload and resources of the court (Church et al., 1978a, 1978b; Doob, 2005; Luskin & Luskin, 1986; Mahoney et al., 1981; Webster, 2006), the nature of the cases entering the court (Klemm, 1986; Luskin & Luskin, 1986; Neubauer & Ryan, 1982; Webster, 2007; Webster & Doob, 2004), the manner in which cases are processed (Doob, 2005; Klemm, 1986; Luskin & Luskin, 1986; Neubauer & Ryan, 1982; Webster & Doob, 2004), and the administrative procedures used to organize the court (Church et al., 1978a, 1978b; Luskin & Luskin, 1986; Mahoney et al., 1981). Research has also investigated the impact of informal relationships, norms, and practices of court practitioners on court delay (Leverick & Duff, 2002; Ostrom et al., 2005; Sipes et al., 1982). All of these factors are generally considered to contribute to increasing case processing time or the number of appearances required to complete a case.

Explanations of increased case processing time that are associated with the workload or resources of the court examine the number of cases entering the court and the staff available to

process them. Some researchers have investigated whether the size of a court (as measured by the number of charges or cases that it processes) has an impact on the timely processing of cases. Court practitioners tend to believe that lengthy case processing time is predominantly a problem for large, urban courts (Church et al., 1978a). This is supported by Webster (2006) who found that large courts generally took a greater number of days to process cases than medium courts, which in turn took longer to process cases than small courts. In contrast, Church and his colleagues (1978a) found that court size was a weak predictor of lengthy case processing time. Although they found a general pattern of slower courts being somewhat larger and faster courts being somewhat smaller, there were several notable exceptions that reduced the strength of this predictor.

Since examining the size of the court in isolation ignores the impact of the resources available to process cases, most research has looked instead at caseload. Caseload is calculated by dividing the number of cases entering a court by the number of judges available to deal with those cases. Adopting this definition, there has consistently been no relationship found between caseload and lengthy case processing time (Church et al., 1978a, 1978b; Doob, 2005; Luskin & Luskin, 1986). More specifically, courts with smaller caseloads are no faster at processing cases than courts with larger caseloads. In fact, Church and his colleagues (1978b) reported that when additional judges were hired and the demand for court services stayed constant, individual judges tended to process cases more slowly. This suggests that the addition of resources can actually be detrimental to court efficiency. These findings cast doubt on strategies to reduce case processing time that exclusively involve increasing the number of judges in a court.

When lengthy case processing time is examined in light of the nature of the case, researchers have focused on such factors as the type of offence(s) with which the accused is

charged, the complexity of the case, and the type of lawyer defending the accused. Findings are mixed in terms of the impact of offence seriousness and case complexity. Offence seriousness is generally considered to increase when the offence carries a high maximum sentence or when violence is involved. While some researchers found that longer case processing times were associated with more serious offences (Doob, 2005; Luskin & Luskin, 1986; Webster & Doob, 2004), others found a weak or inconsistent relationship between these two variables (Klemm, 1986; Neubauer & Ryan, 1982).

Case complexity is usually considered to increase with the number of defendants or the number of charges in a case. There is evidence to suggest that both case processing time (Webster & Doob, 2004) and the number of appearances required to resolve bail (Webster, 2007) increase with additional charges. Luskin and Luskin (1986) found a similar relationship between the number of defendants involved in a case and the time to disposition. They reported that cases took – on average – seven days longer for every defendant involved. In contrast, Neubauer and Ryan (1982) reported that neither the number of defendants nor the number of charges impacted case processing time. Further, research has shown that case processing time is not related to the type of lawyer representing the accused person. More specifically, cases with privately retained lawyers do not take distinguishably longer to reach a resolution than those with court-appointed lawyers (Luskin & Luskin, 1986; Neubauer & Ryan, 1982).

Predictors related to the way in which a case is processed have been found to be some of the strongest predictors of lengthy case processing time (Klemm, 1986; Luskin & Luskin, 1986; Neubauer & Ryan, 1982). Research has consistently shown that cases that go to trial take longer to process than those that do not go to trial (Doob, 2005; Klemm, 1986; Luskin & Luskin, 1986; Neubauer & Ryan, 1982; Webster & Doob, 2004). The involvement of a preliminary inquiry has

also been shown to increase case processing time (Webster & Doob, 2004). In addition, there is evidence to suggest that accused persons who are detained during the bail process have their cases processed faster than those who were released (Luskin & Luskin, 1986; Neubauer & Ryan, 1982). Overall, the manner in which a case moves through the court system seems to have a more consistent impact on case processing time than the nature of the case itself.

The administrative procedures that are implemented in a court to process cases dictate the way in which it is organized. For example, some courts hire court staff to keep track of where cases are in the court process. Courts that monitor their cases “have functions in case processing beyond simply providing trials for litigants who desire them” (Church et al., 1978b, p. 32). These courts control their own calendars and keep track of cases in a structured, centralized manner. It is not surprising that courts who adopted an automatic and routine system to move cases through the system were found to be faster at processing cases (Church et al., 1978b; Mahoney et al., 1981).

There has been a considerable amount of debate, however, about the most effective calendaring system to use when monitoring cases. Calendaring systems are generally implemented in one of two ways. Master calendars hold cases in a pool awaiting various stages of the court process, such as bail or trial, and cases are assigned to judges at a time when a particular action is necessary (Church et al., 1978b). This system is intended to promote the efficient utilization of judicial resources. Scheduling is simplified because judges can be replaced easily if they are not available and cases should be processed more efficiently because the slow processing of cases by one judge is equalized by the fast case processing of another (Church et al., 1978b).

Under an individual calendar, a case is permanently assigned to a judge at filing and that particular judge handles all aspects of the case until it is disposed (Church et al., 1978b). This is intended to fix the responsibility for case management and motivate judges to dispose of their caseloads expeditiously (Church et al., 1978b). Empirical studies have found that the type of calendar used by a court has a minimal or uncertain impact on case processing time (Church et al., 1978a; Luskin & Luskin, 1986). However, despite statistical evidence that indicates otherwise, these researchers continue to assert that the individual calendar increases individual accountability and, therefore, productivity (Church et al., 1978b, Luskin & Luskin, 1986).

In sum, explanations of court inefficiency based on workload and resources, the nature of cases entering the court, and administrative procedures are generally weak and inconsistent (Church et al., 1978a, 1978b; Klemm, 1986; Mahoney et al., 1981). The extent of court inefficiency varies considerably across courts with almost identical structures, caseloads, and resources (Church, 1982, Messick, 1999). In contrast, case processing characteristics are consistently shown to impact case processing times (Klemm, 1986; Luskin & Luskin, 1986; Neubauer & Ryan, 1982; Webster & Doob, 2004). This is because additional procedures such as preliminary inquiries and trials generally require more preparation time and appearances, naturally extending the amount of time required to complete a case. Unfortunately, there is little room for intervention in this area without compromising the integrity of the justice system. For example, while a trial may extend the amount of time required to resolve a case, it would be unreasonable to the accused to deny him/her this right merely for the sake of efficiency.

Given these findings, many studies have emphasized the importance of less formal aspects of court structure, procedures and caseload on case processing time (Church et al., 1978a, 1978b; Klemm, 1986; Mahoney et al., 1981; Ryan et al., 1981). Klemm (1986) claimed that the

most interesting finding in her study was “the lack of any recognizable pattern with regard to offense and system characteristics” (p. 21) and Church and his colleagues (1978a) concluded that the crucial element in reducing case processing times was the “concern on the part of judges with the problem of court delay and a firm commitment to do something about it” (pg. 82). These conclusions are not to suggest that explanations based on court resources and formal rules and procedures are unimportant, but rather that “these elements operate through a comprehensive system of informal relationships, norms and practices of court practitioners” (Church, 1982, p. 398).

The importance of addressing less formal aspects of case processing is demonstrated through an examination of the “speedy trial acts” passed in several American states. These court delay-reduction initiatives, which seek to change the formal rules and procedures of a court, have been found to be more effective when they also target the attitudes and behaviour of judges, lawyers and other court staff (Church, 1982; Messick, 1999; Ryan et al., 1981; Sipes et al., 1982). Speedy trial acts set formal deadlines for the completion of each stage of the criminal court process. They have been found to be successful when judges are committed to reducing delays and willing to spearhead efforts, and to have failed when they are implemented over strong objections from judges and other court practitioners (Messick, 1999).

Court efficiency research started to address the impact of a court’s culture on the efficiency with which cases moved through the system beginning in the 1970s (Steelman, 1997). A court’s culture is determined by the informal practices, norms and expectations shared by court practitioners within a court system (Church, 1982). To the extent that it is defined in the literature, Church (1982) asserts that court culture generally includes the following key ideas: 1) informal practices, 2) practitioner incentives, and 3) practitioner expectations and norms. These

elements work together to shape a culture that can work towards or against efficient case processing.

Informal practices dictate how practitioners interact with each other and conduct their business within the court (Church, 1982). For example, some lawyers abide by a “professional courtesy” whereby requests for adjournments are not contested (Church, 1982; Leverick & Duff, 2002). Leverick and Duff (2002) discovered that prosecutors and defence counsel operated on a “tit-for-tat” system whereby neither party would oppose the first adjournment requested by the other side. This strategy was employed to ensure that the same courtesy would be extended to them in the future.

The way in which court appearances are set, such as trials or bail hearings, can also be established informally. Some judges may prefer to schedule more cases than they can handle to ensure that there are still cases to hear if one or more are adjourned. Others set firm dates to discourage adjournment requests and encourage lawyers to prepare fully for court (Church, 1982; Sipes et al., 1982).

Various incentives can also encourage or discourage court practitioners to speed up the resolution of a case (Church, 1982; Messick, 1999; Ryan et al., 1981). For example, some defence lawyers are not paid by their clients when they first agree to take a case. Under these circumstances, there is an incentive to delay disposition until they are paid by their client (Church, 1982). Similarly, lawyers may adjourn cases to collect additional money from legal aid if the number of appearances is the basis for compensation (Mahoney et al., 1981). On the other hand, some judges may fine lawyers who seek unjustified adjournments or try to delay the resolution of a case. The threat of having to pay a fine creates an incentive to resolve the case in a timely fashion (Messick, 1999).

In addition, practitioner expectations and norms develop through experience working in a particular court (Church, 1982). Lawyers may adapt their working practices to fit these expectations. For example, when requests for adjournments are continuously granted, lawyers may fail to prepare for a court appearance because they assume that they will be able to delay the proceedings to another day (Church, 1982; Mahoney et al., 1982; Sipes et al., 1982). Similarly, Hucklesby (1997) found that defence lawyers would discourage their clients from making a bail application if the court was perceived to have a “harsh” reputation because it was assumed that the request would be denied.

In fact, certain types of cultures are associated with more efficient courts. In particular, the court efficiency literature emphasizes the importance of judicial leadership on efficient case processing (Church, 1982; DOJ, 2007; Mahoney et al., 1981; Messick, 1999; Sipes et al., 1982). The judiciary should assume responsibility for the expeditious disposition of its cases from the beginning to the end of the court process if they wish to prevent court delay (Church, 1982). Cultures in which the court controls the pace of litigation generally experience shorter case processing times than cultures in which judges allow the lawyers to set the pace of litigation (Mahoney et al., 1981; Sipes et al., 1982). Indeed, practitioners from efficient courts frequently cite the leadership qualities of the chief justice as a reason for the court’s effectiveness (DOJ, 2007).

In the past, court culture has been criticized as a vague term that is problematic to measure (Church, 1982; Klemm, 1986). Compared to formal explanations of court efficiency, the subjective nature of court culture makes it difficult to define and therefore difficult to use as a basis of comparison. The number of cases entering a court, for example, is much easier to quantify than the quality of a judge’s leadership. As a result, studies conducted in the 1970s and

1980s often discussed a theoretical link between court culture and court efficiency as opposed to an empirical one. In recent years, however, a growing number of studies have attempted to operationalize court culture by investigating specific cultural factors that contribute to court inefficiency (Heath, 2010; Leverick & Duff, 2002; Ostrom, et al., 2005).

Ostrom and his colleagues (2005) developed an analytical framework that permits comparisons between court cultures. This framework classifies court culture along the dimensions of *sociability* and *solidarity*. Sociability refers to the “degree to which judges and administrators get along and emphasize the importance of social relations” (p. 2) while solidarity is the “degree to which a court has clearly stated and shared goals, mutual interests, and common tasks” (p. 2). Ostrom and his colleagues (2005) found that “hierarchical” courts, which emphasize solidarity and de-emphasize sociability, were the most efficient at processing cases. These courts stress the importance of established rules and procedures, clearly state court-wide objectives and maintain that effective leaders are good co-ordinators and organizers. In contrast, “communal” courts, which emphasize sociability and de-emphasize solidarity, had the slowest case processing times (Ostrom et al., 2005). In these courts, the importance of getting along and acting collectively is stressed and management and procedures are open to interpretation.

Leverick and Duff (2002) and Heath (2010) found that high rates of adjournments, and consequently, longer case processing times, are associated with a passive attitude on the part of court practitioners. In *passive/co-operative* cultures, adjournments are rarely opposed and seldom questioned by judges. In contrast, courts with low rates of adjournments had *proactive/judge-led* cultures in which judges/Justices of the Peace questioned requests for adjournments aggressively. For fear of being criticized in court, the prosecution and defence would avoid asking for adjournments unless it was absolutely necessary (Heath, 2010; Leverick & Duff, 2002).

Consistently asking for adjournments results in a significant amount of court time being spent putting off action until the next day - a process Mahoney and his colleagues (1981) call “case churning.” It is no surprise that this practice can be detrimental to court efficiency (Leverick & Duff, 2002; Luskin & Luskin, 1986; Mahoney et al., 1981). Luskin and Luskin (1986) found that each adjournment increased a case’s processing time by an average of 17 days.

1.2 Bail Efficiency in Ontario Criminal Courts

While research over the past 3-4 decades has largely been focused on understanding and explaining court inefficiency generally, attention has recently been turned to the question of lengthy case processing time at particular stages of the criminal justice process (see, for example, Myers, 2009; Webster, 2005; Webster et al., 2009). This shift in focus likely reflects the belief that certain factors contributing to increasing case processing times generally may be more/less prominent during specific phases of the court process. As such, avenues of intervention may be different, depending on the particular point in criminal court proceedings. Indeed, limiting the examination of court efficiency to specific criminal procedures may permit a more focused (and presumably) more effective means for intervention.

One of the specific criminal procedures receiving attention in Ontario in recent years has been the bail process (see, for example, Myers, 2009; Webster 2006, 2007; Webster et al., 2009). The bail process constitutes the period from an accused person’s first appearance in bail court to the formal determination of whether the accused will be released on bail or detained until trial (Webster et al., 2009). Only accused persons who were detained by the police following their arrest appear in bail court. The efficiency with which this procedure is completed has become particularly important in recent years as accused persons in Ontario are increasingly beginning the criminal court process by way of the bail process. Indeed, the proportion of cases that began

their case processing lives in Ontario bail court increased from 39% in 2001 to 50% in 2007. In fact, more accused persons are currently detained by police to await a determination of bail than are released into the community following arrest (Webster et al., 2009).

While the amount of time required for these bail cases to complete the entire criminal court process remained relatively stable between 2001 and 2007 in Ontario,⁶ the average number of appearances required to resolve them has increased from an average of 7.7 court appearances in 2001 to 9.4 appearances in 2007 (Webster et al., 2009). In addition to bail cases requiring more appearances to reach final disposition, the actual decision-making process about whether or not the accused is released or detained until trial is taking longer in Ontario. Cases required – on average – just over four days and 2.12 appearances to resolve the question of bail in 2001, compared to almost six days and 2.55 appearances in 2007 (Webster et al., 2009).

Increasing case processing time in the bail courts has had an important impact on the accused (Friedland, 1965; Hagan & Morden, 1981; Manns, 2005; NCW, 2000; Ombudsman Saskatchewan, 2002; Trotter, 1999) and the criminal justice system (Friedland, 1965; Manns, 2005, OAG, 2008a, 2008b; Webster 2007, 2009). Beyond these pragmatic concerns, it also raises a host of theoretical issues related to the principles of justice (Ashworth, 1994; Friedland, 1965).

Most obviously, lengthy case processing time is particularly concerning when it occurs during the bail process because accused persons must be remanded in custody while they await a decision of whether they will be released or detained until trial. Friedland (1965) and the Ouimet Commission (Canadian Committee on Corrections, 1969) discussed this issue in their critical reviews of the bail system in the 1960s. Among other concerns, they recognized that remand facilities were old and poorly equipped, sanitation and living conditions were primitive,

⁶ The number of days required to complete a bail case fluctuated around 160 days from 2001 to 2007 (Webster et al., 2009).

segregation of varying types of offenders was difficult and few programs were available. In fact, these conditions were causing a considerable amount of suffering for those accused persons who had yet to have been found guilty of any criminal offence. These reports motivated legislative changes to the bail system in the early 1970s (Hagan & Morden, 1981). The Bail Reform Act (1970-71-72) discouraged all unnecessary arrests and periods of incarceration prior to trial and put the onus on the state to justify why the accused should be held in custody.

Although these problems rooted in remand conditions were formally recognized more than forty years ago, they persist today (DOJ, 2007; Manns, 2005; Ombudsman Saskatchewan, 2002; Trotter, 1999). Since remand facilities are overcrowded, administrators often resort to double bunking and limiting visiting allowances (Ombudsman Saskatchewan, 2002). In addition, these facilities are designed for the short term. As such, rehabilitative, recreational and work programs are rarely made available (DOJ, 2007; Ombudsman Saskatchewan, 2002; Trotter, 1999). Symptomatically, time spent in remand is frequently referred to as “dead time” because of the inactivity of the inmates and the fact that time served before sentencing is not included in calculations for parole (DOJ, 2007; NCW, 2000).

Further, it is not uncommon for institutions to house sentenced and remand inmates together (Friedland, 1965; NCW, 2000; Ombudsman Saskatchewan, 2002). This is problematic as low-risk, and possibly innocent, remand inmates could come into contact with high-risk sentenced offenders (Friedland, 1965). It is not surprising that inmates have reported that it is easier to serve time as a sentenced inmate than as a remand inmate in Canadian institutions (Ombudsman Saskatchewan, 2002).

In addition to living in onerous conditions, accused persons awaiting a bail decision must make considerable sacrifices in their personal lives. They are separated from their family and

friends and risk the loss of employment while in custody (Manns, 2005; NCW, 2000; Trotter, 1999). The accused person and his/her family may also face social stigma and endure social ostracism in the community (Manns, 2005). This can be particularly difficult when the accused has children, as they may suffer from the absence of one parent as well as the neglect from other family members who are forced to spread their attention more widely to make ends meet (Manns, 2005).

Unreasonably long delays in resolving the question of bail may also negatively impact the accused's ability to defend him/herself. It is considerably more difficult for an accused who is detained to find and communicate with a lawyer and it is nearly impossible for him/her to contact witnesses or uncover evidence (Hagan & Morden, 1981; Friedland, 1965; NCW, 2000; Trotter, 1999). In addition, remanded accused cannot enhance their credibility by engaging in activities that may mitigate their sentence such as finding a job, compensating victims, or involving themselves in the community (Friedland, 1965; Manns, 2005; NCW, 2000).

Long delays in the bail process may also create the impression that the accused is guilty (Koza & Doob, 1975). Further, accused who are held in custody awaiting a bail decision are under much greater pressure to plead guilty than those who are released (Manns, 2005; NCW, 2000). While a free individual might see a false guilty plea as a loss, a detainee may sacrifice his or her innocence for the prospect of gaining freedom (Manns, 2005). Pleading guilty may be particularly tempting when the individual is accused of a minor offence that is likely to end in a lenient sentence without imprisonment (NCW, 2000).

Equally disconcerting, the impact of lengthy case processing time in the bail courts also extends to institutions within the criminal justice system. The pressure placed on the system is not just felt by the courts; both the police and the correctional system must deal with the

economic costs and the strain on resources created by these delays. The police must transport defendants to their court appearances, detain them at the courthouse and testify at bail hearings (OAG, 2008b). Correctional staff must accommodate a greater number of daily admissions and discharges from remand facilities and pay to house, feed and guard the inmates while they await a bail decision (OAG, 2008a). This population can be particularly difficult to manage due to the unpredictability in terms of their length of stay and the need to separate them from sentenced offenders (Webster, 2007, 2009).

In fact, the magnitude of these economic and administrative costs is highlighted by examining the current profile of adults in custody. The longer that it takes for the bail process to be completed, the longer the accused must remain in remand. This time is subsequently deducted from the sentence if the accused is found guilty and sentenced to custody. As a result of this practice, lengthy case processing time in the bail courts has contributed – to some extent - to the changing nature of Canada’s prison population (Webster et al., 2009). More specifically, people are spending more time in custody prior to sentencing and less time afterwards.⁷

Although Canada’s imprisonment rate has remained relatively stable over the last fifty years (Webster & Doob, 2007), the profile of adults entering provincial and territorial custody has drastically changed. While the sentenced population has shown a steady decline over the last thirty years, the remand population has increased threefold (Webster et al., 2009). Specifically, the remand population went from a rate of 12.6 per 100,000 in 1978 to 39.1 per 100,000 in

⁷ It is possible that this trend could change with the passage of Bill C-25 into law in 2010. Specifically, this new legislation restricts the amount of credit that offenders can receive toward a custodial sentence for the time spent in remand. The present difficulty resides in determining whether, in fact, the Bill will have an impact on the ratio of remand to sentenced inmates. While the 1:1 credit may arguably lead to longer sentences (with less pre-trial credit being applied to custodial sentences), it is equally possible that judges may adjust their sentences (read: propose more lenient sentences to counter-balance the lower pre-trial credit) or that counsel may increase the speed at which bail is determined and, by extension, reduce the amount of time that inmates spend in remand.

2007.⁸ Although lengthy case processing time cannot fully account for the changing nature of the prison population⁹, research suggests that it is a contributing factor (DOJ, 2007; Webster et al., 2009).

More broadly, the administration of justice risks falling into disrepute as a result of the current sentencing practices. Webster (2007, 2009) has highlighted the distortion in the sentencing process that exists as a result of accused persons spending longer in custody before sentencing than afterwards. Rather than serving their sentence of imprisonment after being convicted, offenders are increasingly being held in custody before being found guilty and are subsequently credited with 'time served' in the case that a custodial sanction is handed down. As a result, sentences appear shorter (and thus more lenient), increasing the perception of injustice on the part of the public.

Beyond the concerns raised by the growing remand population, there is also a host of theoretical issues to consider. As it currently stands, remand inmates outnumber sentenced inmates in provincial prisons (Webster et al., 2009; Weinrath, 2009) - a reality considered by Friedland (1965) to reflect a flagrant disregard for the principles of justice. To be clear, under the appropriate circumstances (i.e. those laid out in Section 515(10) of the Criminal Code, 1985), detaining an accused person awaiting a determination of bail is a legitimate criminal procedure. If it can be proven that detention is necessary to ensure that the accused appears in court, the

⁸ By 2007, 56% of all provincial inmates in Canada on an average night were remand inmates. When this overall proportion is disaggregated, however, it is clear that the percentage of remand prisoners varies considerably across the provinces and territories. For example, 16% of provincial counts in Prince Edward Island in 2007 constituted those being held in remand compared to 64% in Ontario and 69% in Manitoba (Webster et al., 2009).

⁹ While lengthy case processing time in the bail courts clearly contributes to the remand population, this problem is likely more attributable to delays in processing cases after the formal determination of bail has been made (prior to sentencing). In most cases, these individuals await trial for a much longer period of time than do people awaiting a bail decision. However, given the extent of this problem (i.e. more than half of provincial inmates are remand inmates), it seems reasonable to target all contributing factors. As well, it can be argued that lengthy case processing in the bail process may be more easily amenable to intervention given its clearly delineated nature in the criminal justice process. Equally important, this criminal procedure is the first stage in the court process. As such, any improvement in efficient case processing in bail court may set the example for subsequent court procedures.

public is protected, and/or confidence in the administration of justice is maintained, pre-sentence custody is justified under the law.

However, the law also guarantees the presumption of innocence. This means that the accused is considered innocent until he/she is proven to be guilty. Since those in remand have not yet been convicted, they are entitled to be presumed innocent until proven otherwise. When there are a greater number of people being held before – rather than after – trial, one begins to question whether the proper restraint in the use of detention is being exercised. By extension, the presumption of innocence may be strained.

Equally relevant, Ashworth (1994) has argued that, even when pre-trial detention can be justified, it should only be imposed under the least onerous conditions. Clearly, pre-trial detention imposes destructive consequences on the accused. However, custody should not constitute punishment without a finding of guilt. Therefore, the punitive element should be minimized as much as possible. This seems particularly important when one considers that some accused persons who spend time in remand are subsequently acquitted. Clearly, the punitive element of remand could be alleviated – at least to some extent - by reducing lengthy case processing times, lessening the time in which accused persons spend in custody awaiting trial/sentencing.

1.2.1 Explanations of Bail Inefficiency

Unfortunately, while there has been a substantial amount of research which has attempted to explain inefficiency in the criminal court process as a whole, considerably less research has specifically sought to explain lengthy case processing time in the bail process, particularly within the Canadian context (see, for example, Heath, 2010; Myers, 2009; Webster 2007, 2009; Webster et al., 2009). In Ontario, the limited research that has attempted to explain bail

inefficiency has mainly focused on procedural explanations related to the ways in which cases are processed in the bail courts (see, for example, Myers, 2009; Webster, 2009). For instance, one factor that has been shown to increase the time required to process cases through the bail system is the increasing use of sureties (Myers, 2009).

A surety is a person who guarantees that the accused will remain faithful to his/her recognizance by offering to pay a sum of money if the accused fails to appear in court or violates a condition of his/her release (Trotter, 1999). Under the Bail Reform Act (1972), the accused should be released on bail without conditions, a monetary component or a surety unless the Crown can prove that a more onerous type of release is warranted. Despite these guidelines, the use of sureties in bail cases has become the norm rather than the exception in many courts in Ontario (Myers, 2009).

Specifically, Myers (2009) investigated the use of sureties in eight different courthouses concentrated in southern Ontario. In seven out of the eight courts examined, sureties were required in over 60% of cases in which the Crown consented to the release of the accused on bail. This practice can increase the number of appearances required to complete the bail process because defence counsel regularly adjourn proceedings for reasons related to the surety (Myers, 2009). For example, defence lawyers may have to locate an adequate surety or adjourn until the surety is able to appear in court. In seven out of the eight courts examined, between 15% and 29% of adjournments were requested for surety-related reasons. In addition, many adjournments requested for the purpose of scheduling a 'show cause' hearing were made because the defence was unable to proceed in the absence of the surety.

Another procedural factor that has been shown to extend case processing times in the bail courts is the use of video remand court (Webster, 2009). Video remand court uses a video hook-

up to connect a courtroom (where the court practitioners are located) to a remand centre (where the accused is held). It was envisioned as a means of avoiding the transportation of the accused from the courthouse to the detention centre (Webster, 2009). Theoretically, this practice should increase efficiency by avoiding any delays related to the time required to transport the prisoner and move the accused through the courthouse from the holding cells. In reality, Webster (2009) found that video remand could actually be prejudicial to efficient case processing.

Webster (2009) investigated the use of video remand in a case study of one Eastern Ontario court. She found that defence counsel seemed to use video remand as a “long-term holding tank” for many accused in the bail process. On any given day in this court, an average of 82% of cases in video remand court were adjourned to another day. For the majority of those video remand cases, they seemed to be held in some sort of ‘limbo state’ with no evidence that there was any active engagement towards a resolution (Webster, 2009).

In fact, an adjournment request was often found to simply be followed by another request, suggesting that adjournments were not being used to ensure that the next court appearance would move the case toward resolution. In addition, these adjournments were often requested by duty counsel, signifying that the accused’s lawyer was not even present in court. Perhaps not surprisingly, cases that involved at least one video remand appearance took – on average – 5.6 appearances to complete the bail process. In comparison, cases with no appearances in video remand were completed in an average of 1.7 appearances (Webster, 2009).

While clearly focusing on different aspects of the bail process, the studies conducted by Myers (2009) and Webster (2009) have an intriguing commonality: They both call attention to the fact that cases are taking longer to complete the bail process as a result of adjournment requests. This has lead several academics to consider the relationship between adjournments and

lengthy case processing in bail courts (see, for example, Webster 2007, 2009; Webster et al., 2009). In fact, it has been suggested that a ‘culture of adjournments’, in which there are “generalized expectations that adjournments are somehow inevitable, acceptable or perhaps even desirable” (Webster, 2009, p. 122), has been embedded in the daily practices of many Ontario bail courts (Webster 2007, 2009; Webster et al., 2009).

In this culture, adjournments are readily granted and cases may take multiple appearances to reach a determination of bail. In fact, the detrimental impact of this type of culture on efficient case processing has been discussed in the wider court efficiency literature. Previous research has demonstrated a link between a passive attitude towards adjournments and lengthy case processing time in the broader court process (Church, 1982; Leverick & Duff, 2002).¹⁰

And, in fact, there is some empirical evidence to support the suggestion that a ‘culture of adjournments’ has permeated the Ontario bail process in recent years. For example, Webster (2007) reported that in 2006, the percentage of cases that resulted in adjournments in four bail courts in an Eastern Ontario courthouse ranged from 35% to 82% (Webster, 2007). Further, another study showed that the use of adjournments has increased in the last several decades (Webster et al., 2009). Finally, the proportion of cases simply adjourned to another day in a Toronto bail court rose from 15% in 1974 to 63% in 2006. In this latter bail court, Webster and her colleagues (2009) observed more recently that none of the court practitioners – the Justice of the Peace, Crown attorney, or defence – appeared to be particularly concerned with whether or not a decision was made to release or detain the accused. Rather, getting through the day’s docket seemed to be the predominant goal.

¹⁰ See page 19 (“Explanations for Criminal Court Efficiency”) for a broader discussion of the relationship between adjournments and lengthy case processing time in the broader court process.

Obviously, adjournments can only be considered to be detrimental to bail efficiency when they do not move the case towards the completion of the bail process. Borrowing from prior research (Doob, 2005; Webster, 2007, 2009), adjournments have traditionally been classified as either ‘productive’ or ‘unproductive’ in nature. Adjournments are considered ‘productive’ when they are requested with the purpose of ensuring that the next court appearance will advance the case towards resolution. For example, adjournments that are requested in order to secure an appropriate surety may add an appearance but are ultimately necessary because Justices of the Peace may require a surety as a condition to release.

In contrast, adjournments are ‘unproductive’ when they are not being used to advance the case towards the completion of the bail process. For example, cases that are adjourned repetitively in video remand court without any evidence of active engagement toward resolution are ‘unproductive’ in that they do not aid in the determination of bail. Rather, they are being requested for other reasons – potentially strategic or manipulative in nature – that have nothing to do with completing the case.

It is unclear to what extent adjournments are requested for ‘productive’ or ‘unproductive’ reasons during the bail process. In order to better understand this issue, researchers have begun to examine the explanations provided by court practitioners when they request adjournments in Ontario bail courts (Myers, 2009; Webster, 2007, 2009; Webster et al., 2009). From this limited research, it appears as though at least some of the adjournments are requested for ‘productive’ purposes. For example, some cases were adjourned in order to arrange a surety (Myers, 2009; Webster 2007), schedule a show cause hearing (Myers, 2009), or speak with a representative from a local bail program to prepare a bail plan (Webster, 2007).

However, there are also many instances in which either no reason is provided in open court for an adjournment or the explanation that is provided is ambiguous (Myers, 2009; Webster, 2007; Webster et al., 2009). For example, in 28% of cases in which an adjournment was requested in one Toronto bail court, no explanation was provided. In an additional 15% of requests, the defence simply stated that they were not ready to proceed (Webster et al., 2009). As such, it is unclear whether these adjournments were requested for ‘productive’ or ‘unproductive’ purposes.

A similar problem was encountered by Myers (2009). She found in her examination of eight Ontario bail courts that no reason was provided for adjournment requests in 8% - 27% of cases. Webster (2007) also found that a substantial proportion of cases in all four bail courts in her study of an Eastern Ontario courthouse were adjourned without an explanation being provided, because the case was simply not ready to proceed (i.e. more information is required), or because of defence-related issues (e.g. counsel not present, no message from counsel). Taken together, these three explanations describe the majority of adjournment requests across all four courts.

Moreover, further examination of this issue also demonstrates that defence counsel are the parties requesting the vast majority of adjournments in bail court (Myers, 2009; Webster, 2007; Webster et al., 2009). In one Toronto bail court (Webster et al., 2009), 72% of adjournments were requested by defence counsel. In another bail court in Eastern Ontario (Webster, 2007), adjournments were requested by the defence in 89% of cases. When one examines these figures alongside the vague explanations provided for adjournments, it is no surprise that attention has been recently focused on defence counsel and how they might be contributing to lengthy case processing time in bail court.

In fact, there have been repeated conjectures about whether defence counsel are using ‘unproductive’ adjournments, particularly for strategic purposes, in bail court. Both academics (Heath, 2010; Webster, 2007, 2009; Webster et al., 2009) and government officials (Library of Parliament, 2009) have offered potential explanations as to why defence counsel might want to request adjournments for reasons that are unrelated to the advancement of the case.

Academics have speculated that defence counsel may be inclined to adjourn proceedings with the intention of ‘judge shopping’ (Webster et al., 2009). This practice involves adjourning proceedings until a suitable Justice of the Peace - who is likely to be more lenient - is presiding over bail court. Further, in some jurisdictions, the accused person might request that his/her lawyer schedule appearances and then subsequently adjourn them to ensure that he/she can remain in a local detention centre (Heath, 2010). This is because some detention centres require accused persons without immediate court appearances to be transferred to a regional detention centre, often far away from their family and friends.

It has also been suggested that defence counsel may be inclined to draw out bail proceedings in order to enjoy the benefits of keeping their clients in custody (Webster, 2007, 2009; Webster et al., 2009). This strategy may be undertaken by defence counsel in order to ensure a better bargaining position with the Crown. For example, defence counsel can reduce the likelihood that their clients will violate the conditions of their bail or commit additional offences¹¹ by lengthening their period of detention before trial (Webster, 2007, 2009).

In addition, defence counsel can demonstrate that their clients have already spent a period of time in custody and request a more lenient sentence (Webster, 2009). It may also be beneficial for accused persons to remain in custody during the bail process for social welfare reasons. For

¹¹ There is also a chance that the accused person could reoffend while in custody, but clearly the opportunities would be more limited under these circumstances.

example, Webster (2009) has highlighted that accused persons with substance abuse problems who remain in custody have a chance to “dry out” or “de-tox” prior to appearing in court. Further, if the accused person is homeless and has nowhere to go, it is possible that they would benefit from the food and shelter provided in the detention centre (Webster, 2009).

While a number of explanations have been offered for why defence counsel might want to keep their clients in custody, the theory that has attracted the most attention relates to the former two-for-one sentencing convention. Persistent allegations by the Federal Government (Canada, 2009b; Library of Parliament, 2009) claiming that defence counsel purposefully extend court proceedings¹² in order to keep their clients in remand - accumulating two-for-one credit - eventually culminated in the coming into force of Bill C-25 in February 2009. The government proposed that “some lawyers deliberately delay proceedings so their clients will be given the two-for-one credit, and thus shorter terms of imprisonment automatically. Accordingly, the government believes that if the bill is enacted it will unclog the courts” (Library of Parliament, 2009, p. 7).

Interestingly, these claims were made with limited empirical evidence to support them. In fact, one of the only studies that (indirectly) investigated whether defence lawyers delay proceedings to accumulate credit found only partial support for this claim. Specifically, Weinrath (2009) surveyed a total of 226 remanded and sentenced persons at a Canadian Prairie correctional facility using open-ended questions. When asked for their views on why remand rates have increased, the two-for-one practice was the second most cited causal factor. However,

¹² Theoretically, this strategy could be employed at any point during the court process in which the accused person was detained in custody prior to sentencing. Therefore, it could be used during the bail process (as all accused persons who appear in bail court are held in custody until a determination of bail is made) or at any point following the bail process and up to final disposition (in cases in which the decision is made to detain the accused until the case is resolved).

this only accounted for 12% of answers (22/226), and no one response took overwhelming precedence.

Taken together, the conjectures by academics and government officials provide possible explanations for the numerous adjournments requested by defence counsel during the bail process. At a minimum, it would not seem inappropriate to question whether defence counsel really are the ‘villains’ in the story of lengthy case processing time in Ontario bail court. However, it would seem equally premature to draw any firm conclusions at this point.

Only a very limited amount of research has actually investigated the role of defence counsel in contributing to ‘unproductive’ adjournments. In fact, the only evidence that directly links these adjournments to strategies employed by defence counsel is either anecdotal in nature (see, for example, Heath, 2010; Webster, 2007, 2009; Webster et al., 2009) or does not confirm the relationship to any significant extent (see, for example, Weinrath, 2009). Second, the wider court efficiency research suggests a multitude of traditional explanations for lengthy case processing time which may be considerably more important than the any role that defence counsel might play in their use of ‘unproductive’ adjournments (see, for example, Church et al., 1978a, 1978b; Klemm, 1986; Leverick & Duff, 2002; Luskin & Luskin, 1986; Mahoney et al., 1981; Ostrom et al., 2005).

With these caveats in mind, the current study aims to partially fill this gap by examining explanations for lengthy case processing time in one bail court in Eastern Ontario. This research will explore the perspective of defence counsel as their voice has been almost entirely absent from the current debate. Both the traditional explanations for court inefficiency as well as the recent conjectures related to the role of defence counsel will be examined.

CHAPTER II: METHOD

2.1 Objective and Scope of the Study

2.1.1 Research Objective

The primary objective of this study is to identify explanations for inefficient case processing in bail court as perceived by defence counsel. Indeed, this research will focus exclusively on the perspective of criminal defence counsel when considering the factors that contribute to lengthy case processing time. Research has suggested that defence counsel play a significant role in extending bail proceedings through the use of adjournments (Myers, 2009; Webster, 2007; Webster et al., 2009). However, it is currently unclear whether defence counsel request these adjournments for ‘unproductive’ purposes and if - as many suspect - their intentions are (primarily) manipulative (Canada, 2009b; Library of Parliament, 2009; Webster, 2007, 2009; Webster et al., 2009). A better understanding of defence counsel’s role in the bail process is required in order to better assess (albeit not definitely) the legitimacy of current views of the defence as one of the central ‘villains’ in bail inefficiency. By identifying defence counsel’s explanations for lengthy case processing time in bail court, this study will: 1) shed light on the legitimacy of the current arguments linking defence counsel to inefficient case processing through their use of ‘unproductive’ adjournments, and 2) assess the convergence or divergence of their explanations with wider explanations for court inefficiency found in the literature.

2.1.2 Scope of the Research

In order to provide a focused account of the issues that lead to longer case processing time, this study will limit its scope to the examination of one bail court in Eastern Ontario.

Previous studies (Church, 1982; Church et al, 1978a, 1978b; Heath, 2010; Klemm, 1986; Leverick & Duff, 2002; Mahoney et al., 1981; Messick, 1999; Ostrom, et al., 2005; Ryan et al., 1981) have demonstrated that court efficiency is largely dictated by the culture of each individual court. As such, a factor that might contribute to lengthy case processing in one court may not be relevant in another court with different court practitioners, informal practices, and norms. It was decided that a rich, detailed account of one court's culture would be useful in helping to explain inefficient case processing.

Restricting the study to one jurisdiction will also allow an examination of the ways in which individual factors work together to extend case processing time. Previous studies (see, for example, Church et. al, 1978a; Luskin & Luskin, 1986; Webster & Doob, 2003) have selected several courts that vary in terms of court efficiency and compared these courts based on individual factors thought to contribute to delay (e.g. caseload, number of judges, or the court calendaring system). Although this type of research design enables researchers to determine those factors which are associated with the most/least efficient courts, it is less useful in explaining the ways in which these factors interact with each other within each individual court.

Instead of supplying explanations based on differences between courts, this study will provide a more holistic interpretation of court inefficiency by examining the inter-related reasons for inefficient case processing within one bail court. The results of this study will be of particular interest to criminal court practitioners within this Eastern Ontario courthouse as they will aid in the identification of potential areas for intervention specific to this court. However, they will also potentially shed light on avenues of inquiry on other Ontario courthouses as well. In particular, the findings of this study will – at a minimum – indicate a number of different

factors perceived to contribute to bail court inefficiency in one study site which may be important to examine (or at least constitute a starting point of examination) in other bail courts.

2.2 Research Context

2.2.1 The Bail Process in Canada

There are several ways in which an accused person can begin the criminal court process, not all of which require him/her to appear in bail court. Some accused persons start the criminal court process in custody and their first appearance is in bail court to determine whether or not they will be detained pending trial. Others are released by the police after charges are laid with the condition that they appear in court at a later date.

Indeed, instead of arresting an accused person, a peace officer may issue an “appearance notice” which requires the accused person to appear in court on a specified date (Criminal Code, 1985, s. 496). Alternatively, a peace officer can choose not to issue an appearance notice at the scene, but may subsequently serve the accused with a summons that compels him or her to attend court (Criminal Code, 1985, s. 497). When accused persons are released by way of an appearance notice, or receive a summons at a subsequent date, no further conditions are attached to their release besides the obligation to attend their court appearance and potentially to report to a police station to be fingerprinted and/or photographed (Trotter, 1999).

Alternatively, if a peace officer decides to keep the accused in custody, Section 498 of the Criminal Code (1985) gives an “officer in charge”¹³ or another peace officer the authority to release the accused from the police station. Assuming that the accused is not released from the station and compelled to appear by way of a summons, the two forms of release available at this

¹³ According to section 493 of the *Criminal Code* an “officer in charge means the officer for the time being in command of the police force responsible for the lock-up or other place to which an accused is taken after arrest or a peace officer designated by him for the purposes of this Part who is in charge of that place at the time an accused is taken to that place to be detained in custody.”

point are a “promise to appear” or a “recognizance.” Unlike the appearance notice and the summons, additional conditions may be attached to either of these forms of release by requiring the accused person to enter into an undertaking (Trotter, 1999). Some examples of these conditions include orders to remain within a specific jurisdiction, abstain from communicating with certain individuals, or refrain from using alcohol and/or drugs.

When neither the peace officer nor the officer in charge believes that an accused person should be released, he/she must be taken before a justice¹⁴ within twenty-four hours (or as soon as possible) to receive a determination of bail (Criminal Code, 1985, s. 503). The justice oversees the operations of the bail court and makes the ultimate decision as to whether the accused person will be released on bail or detained in custody pending the outcome of his or her case.¹⁵ The accused must be released on bail without conditions unless his or her detention is justified by one or more of the reasons laid out in Section 515(10) of the Criminal Code (1985). This section specifies that detention is necessary to ensure that the accused attends his or her court appearance (primary grounds), to protect the public (secondary grounds), and/or to maintain confidence in the administration of justice (tertiary grounds).

Accused persons are generally represented by defence counsel in bail court.¹⁶ Private defence counsel may be funded by the accused or, if the accused meets the financial requirements, paid for by Legal Aid Ontario (LAO). Alternatively, duty counsel are available on a short term basis for those who arrive at court without representation. It is the responsibility of the defence counsel to represent the interests of the accused in bail court. This includes

¹⁴ In the *Criminal Code* ‘Justice’ refers to both Provincial Court Judges and Justices of the Peace. In Canada, bail court can be presided over by either of these parties. Since it is common practice for Justices of the Peace to fulfill this role in most courthouses in Ontario, this is the term that will be used for the remainder of the study. See <http://www.ontariocourts.on.ca/jpaac/en/role.htm> for a more detailed description of the role of Justices of the Peace in Ontario.

¹⁵ In some cases, which are beyond the scope of the current study, the initial bail decision may be reviewed by a judge in a higher court.

¹⁶ In some cases, the accused will represent him/herself in bail court.

developing a plan for the accused person's release. The bail plan is individualized according to the personal details of the accused. It might, for example, involve arranging a surety, a place of residence, or counselling.

Crown Attorneys play an important role in the bail process as they make the initial recommendation as to whether the accused should be released on consent or detained pending a trial (Trotter, 1999). If it is decided that the accused should be detained, it is the Crown's responsibility to show cause as to why the detention is justified under the aforementioned primary, secondary, or tertiary grounds (Criminal Code, 1985, s. 515(1)).¹⁷ The Crown's argument is usually supported by information obtained from the police including their recommendation on release as well as any additional information that they might have regarding the offence and the accused person's criminal history (Ritchie, 2005).

If the Crown is consenting to the release of the accused, the Justice of the Peace will generally comply with this recommendation (Ritchie, 2005). Consent releases are typically the result of a negotiation between the Crown and the defence in which the most appropriate form of release is determined. Although there are multiple forms of release orders available under the Criminal Code, it is clearly outlined that the accused is to be released on an undertaking without conditions unless the Crown can show cause as to why a more stringent form of release is necessary (Criminal Code, 1985, s. 515(1)). An undertaking without conditions is simply a "written solemn promise by the accused to appear in court at a certain time and place" (Trotter, 1999, p. 246). If the circumstances justify it, the Crown may also place various conditions on the undertaking (e.g., imposing a curfew, restricting the use of firearms, requiring the accused to

¹⁷ There are certain offences ("reverse onus" offences) that require the accused, not the Crown, to satisfy the Justice that his or her detention is not justified. Sections 515(6) and 522(2) of the *Criminal Code* (1985) outline these reverse onus provisions.

deposit his/her passport). Although there are no monetary repercussions, failure to comply with these conditions may result in arrest, detention, or breach charges.

Alternatively, the accused may be required to enter into a “recognizance,” rather than an undertaking, if the court requires that his or her promise to attend court be accompanied by the threat of financial loss. Upon failure to comply with a recognizance, an accused is liable to arrest, detention, breach charges *and* forfeiture proceedings (Trotter, 1999). In some cases, the justice may direct that a surety or a deposit¹⁸ accompany the recognizance (Criminal Code, 1985, s. 515(2)).

In the case of a consent release, the accused person is generally released on the same day on which he/she appears in bail court (Ritchie, 2005). It is possible, however, that the case will be adjourned to another day if additional conditions must be met (i.e. the securing of an appropriate surety). Conversely, if the Crown is contesting the release of the accused, the bail process may be extended beyond one appearance if a formal bail hearing (also referred to as a “show-cause hearing”) cannot be held immediately.

2.2.2 The Bail Process in One Eastern Ontario Courthouse

Justification for the Court Selection

An examination of the characteristics of one Eastern Ontario courthouse demonstrates why this location is a good setting for the study. This particular court has been designated an “Action Site” in need of intervention as part of the Government of Ontario’s *Justice on Target* initiative to reduce ‘unproductive’ criminal court delays and appearances (OMAG, 2010). Between July 2009 and June 2010, criminal proceedings were taking an average of 235 days and 9.5 appearances to reach final disposition in this courthouse. These averages have increased

¹⁸ The Justice may direct that the accused deposit a sum of money or other valuable security upon entering into a recognizance.

since 2000, when proceedings took an average of 216 days and 7.2 appearances to complete (OMAG, 2010).¹⁹

The efficiency of the bail courts is of particular importance at this location given the numerous concerns expressed by the Ministry of Community Safety and Correctional Services (MCSCS) regarding the growing size of the local detention centre's remand population (Webster, 2007). Since many of these inmates would be awaiting a bail decision,²⁰ improving the speed with which they move through the bail process could aid in decreasing the number of people held at this facility.

Identifying problematic areas of intervention at this site is especially important as a result of the increasing number of charges being processed through the court and the growing population in the surrounding area. As of June 2010, this particular court had the busiest courthouse intake in Ontario, with Criminal Code charges having increased by 66% since 2000 (OMAG, 2010). In addition, the city in which the court is located has a projected population growth of approximately 1/4 of its current size over the next 20 years, potentially placing additional demands on the courthouse over the next decade (Department of Planning, Transit, and the Environment, 2007).

Description of the Bail Court

There are four different courtrooms in this Eastern Ontario courthouse that are designated for bail cases - each of which serves a different function. The first court is a 'first appearance' bail court, where accused persons appear when they are initially brought before a Justice of the

¹⁹ In comparison, criminal proceedings were taking an average of 211 days and 8.9 appearances across all Ontario Courts of Justice between July 2009 and June 2010. These averages have also increased since 2000, when proceedings took an average of 176 days and 6.7 appearances to complete (OMAG, 2010).

²⁰ This population would also include accused persons who have been refused bail and are detained in remand awaiting trial or sentencing.

Peace. The second bail court is reserved exclusively for scheduled show cause hearings. In this court, there are ten time slots available for hearings each day and the number of slots that each hearing will occupy is determined by the complexity of the case. These first two courts operate during business hours on weekdays and will assist each other on days in which there is difficulty getting through their respective dockets.

The third court is a video remand court, which connects the courthouse with the local remand centre using video conferencing technology. This court only operates for two hours a day during the week and deals with bail cases in addition to post-bail cases in which the accused has been formally detained in custody. Obviously for the purposes of this study, attention is restricted exclusively to the former type of cases. This court is used almost exclusively to set future appearances as bail hearings cannot be run without the physical presence of the accused in court. Finally, the fourth court only operates on weekends and statutory holidays and handles accused persons who are arrested over the weekend and must be brought before a Justice of the Peace within the legislated 24 hours following arrest.

A small group of Crown attorneys are assigned to work in the bail courts in this region. On weekdays, two Crowns are responsible for the first appearance bail court. One Crown works inside the courtroom dealing with the matters that are before the Justice of the Peace while the other Crown is available just outside the courtroom to discuss files with defence counsel. In addition, one of the John Howard Society of Ontario's Bail Verification and Supervision Programs runs out of this courthouse. This program is available to accused persons who have minimal financial and social supports. If accused persons are eligible, the staff can refer them to other community agencies (i.e. addiction counselling, educational institutions, employment

agencies) to satisfy the conditions of their release. In addition, accused persons may be released to a Bail Supervisor to whom they must report regularly while they are out on bail.

2.3 Data Source

2.3.1 Recruitment

Defence counsel (including duty counsel) who were knowledgeable about the bail process and practised in the region in which the Eastern Ontario courthouse was located were asked to participate in the study. They were recruited on a voluntary basis through individual e-mail requests. The initial contact list consisted of well-established defence counsel with links to the academic community of a local University. A letter of information²¹ (see Appendix A) was attached to these e-mails which outlined the purpose of the research and the requirements of the participants. This letter acted as a recruitment text as it set out all of the necessary information that the prospective participants would need when determining whether they would like to be involved with the study. Interested individuals replied to the request and interviews were scheduled based on their availability.

After several individuals volunteered to participate and their interviews were conducted, a snowball sampling method was used to recruit the remaining participants. The initial interviewees were asked to recommend additional defence counsel or duty counsel who might be appropriate for the study and to provide their contact information. These potential participants were subsequently contacted in the same manner as the initial interviewees. According to Berg (2009), “snowballing is sometimes the best way to locate subjects with certain attributes or characteristics necessary in the study” (p. 51). This method was particularly useful in this study

²¹ The letter of information was approved by the Research Ethics Board of the University of Ottawa.

as participants with a considerable knowledge of and experience with the bail process were required in order to obtain information that was rich in detail.

Although the snowball approach enabled one defence counsel to indicate another, there was some control exercised over the types of lawyers who were proposed. It was ensured that the sample of defence counsel who participated in the study was as representative as possible of the existing variability across lawyers within the Eastern Ontario jurisdiction under study, and defence counsel were asked to recommend colleagues from a variety of law firms as each law firm may have its own ‘culture’ in terms of dealing with bail. Interviewing defence counsel from many different law firms was designed to ensure a wide range of perspectives.

Further, defence counsel were also asked to recommend lawyers with varying legal backgrounds or levels of experience (i.e. junior lawyers, mid-level associates, senior partners). Lawyers with different levels of experience likely play different roles in bail court in terms of the types of cases that they manage and the degree of their involvement. Through the interviews, it was – in fact - discovered that junior lawyers often spend more time dealing with bail cases and thus have a better idea of the day-to-day operations of the bail court. In contrast, while senior lawyers spend less time handling bail cases, they have a better idea of how the bail process has evolved over the last several decades. As a result, junior lawyers were able to provide more detailed explanations for current lengthy case processing (e.g., bail court generally ends early in the day) while senior lawyers were better equipped to discuss changes over time (e.g., Crowns contest the release of the accused much more often today than they did twenty years ago).

Finally, varying types of defence counsel were also asked to participate in the interviews. This included duty counsel, private defence counsel who worked primarily with privately retained clients, and private defence counsel who worked primarily with legal aid cases. The

assumption was that each type of lawyer would have slightly different vested interests that might impact the strategies which they undertake in bail court (e.g. duty counsel are on salary and are thus not concerned about receiving compensation from their clients as is the case with private defence counsel). Arguably, each type of defence lawyer will also ‘attract’ different types of clients (e.g., from diverse socio-economic groups or with different types of offences). In sum, these various strategies were designed to ensure a sample that was as representative as possible within the confines of the snowball sampling approach.

2.3.2 Interviews

In total, interviews were conducted with 12 separate defence counsel. These interviews took place in the office of each respective lawyer. While it would have been possible to increase the number of participants, the limitations of the thesis restricted the number of possible interviews. Further, saturation became apparent by the end of the interviews as very little information was provided that had not already been discussed with previous participants. The length of the interviews ranged from 28 to 74 minutes, with an average length of 52 minutes. Prior to the interview, each participant was asked to sign a consent form acknowledging that he/she had read the letter of information and had agreed to have the interview recorded (see Appendix B).

The interview questions were asked in a semi-structured manner. In this type of interview, the questions are predetermined and asked in a systematic way, but “the interviewers are permitted (in fact, expected) to probe far beyond the answers to their prepared standardized questions” (Berg, 2009). As such, certain probes were added or removed in a manner that suited each interview. This format was intended to produce data that were rich in detail, while still ensuring some degree of consistency across participants. The initial set of questions was

composed of a combination of open-ended and targeted questions.²² The open-ended questions were intended to illicit explanations that may not necessarily have been covered in the literature while the targeted questions were meant to explore the validity of previous explanations for court inefficiency.²³

The interviews were divided into four sections, each intended to collect different types of information. The first section consisted of questions that ask about the participant's legal background (e.g., How many years have you been practising law?). The purpose of these initial questions was to create a friendly atmosphere as well as to obtain information which could be used to assess the representativeness of the sample. The second section asked specific questions about the characteristics of an average bail case - as experienced by each participant - as it progressed through the bail process. This section was intended to elicit unprompted explanations for court inefficiency (e.g., How many adjournments were requested? Was an explanation provided for the adjournment?).

The third section asked broad questions about the participant's experience with the bail process. In this section, open-ended questions were asked about inefficiency in the bail courts (e.g., what are the principal factors that you think contribute to delays in the bail process?). The fourth and final section addressed the participant's experience with the two-for-one sentencing convention (e.g., One of the justifications for Bill C-25 was the claim that awarding two-for-one credit encourages lawyers to intentionally delay bail in order to accumulate more credit for time spent in remand. Do you think there is any validity to this claim?). Since the current legislation no longer provides for two-for-one credit, it was assumed that participants would fail to discuss

²² Open-ended questions are unstructured questions in which potential answers are not suggested whereas targeted questions directly request specific information.

²³ The interview guide can be found in Appendix C.

this issue without being prompted to do so. Since this section contained targeted questions, it was presented last in order to acquire an unbiased perspective of the reasons for bail inefficiency obtained in the prior sections.²⁴ All of the interviews were initially recorded and subsequently transcribed into written format.

2.3.3 Participants

Legal Background

Of the 12 interviews which were conducted, 11 were with private defence counsel and 1 was with a duty counsel. The private defence counsel were employed at eight different law firms in the region and occupied a variety of positions: 2 were junior lawyers, 3 were mid-level associates, and 6 were senior partners. In addition, 2 of the private defence counsel were members of a local bail committee established to increase the efficiency of local bail courts. The duty counsel was employed by Legal Aid Ontario (LAO).

The number of years during which the participants had been practising law ranged from 1 to 30 years, with an average of 13 years. While most of the participants had practised in the same region for the entirety of their legal career, 4 out of 12 had practised in other regions. The amount of experience that each participant had in dealing with bail cases varied. When they were asked to indicate the percentage of their clients who appeared in bail court, defence counsel estimated anywhere from 5% to 66%. A detailed summary of the participants' legal experience as well as their degree of involvement with the bail process is outlined in Appendix D. While obtaining a sampling frame of all defence counsel in the jurisdiction was not possible, the sample appeared to include lawyers with a wide-range of positions, experience, and expertise.

²⁴ Specifically, any attempt to discuss the issue earlier in the interview could prompt the participants to neglect alternative reasons for delay and overemphasize the importance of the two-for-one sentencing convention. In addition, this line of questioning may be considered by the interviewees to be more sensitive in nature.

Validity Issues

The most obvious concern with a study focused exclusively on one criminal court player's perspective is the possibility that defence counsel may have altered their responses in order to appear in a more favourable light, particularly given the recent (damning) accusations of their intentional manipulation of the court system (see, for example, Canada, 2009b; Library of Parliament, 2009). As a result, various steps were taken in order to maximize the possibility that the findings accurately reflect defence counsel's actual explanations for inefficient case processing in the Eastern Ontario bail court under study.

First, a friendly environment involving comfortable surroundings and (mostly) neutral questions²⁵ was established for each interview to ensure that participants did not feel that they were being judged. This was intended to minimize any sense that they were being blamed for lengthy case processing times and to encourage them to speak freely. Second, various triangulation techniques were used to verify the validity of the information obtained in the interviews. For instance, several days of bail court observation were undertaken by the researcher prior to the interviews in order to evaluate the face validity of the responses (i.e. whether the answers provided by the participants corresponded with what can physically be observed in court). Responses which did not seem to correspond to the observations could be probed delicately during the interviews or simply noted and examined during the analysis. In addition, the ability of the researcher to make direct references to actual incidences occurring in bail court underlined to the interviewees that the researcher was an informed participant in the study, subtly suggesting that any obvious attempts at deception would not go unnoticed.

²⁵ Defence counsel were directly asked about the conjectures surrounding the two-for-one sentencing convention, but these questions were placed at the end of the interview in order to ensure that they did not bias the rest of the interview. In addition, they were not asked in a manner that insinuated personal blame.

Another triangulation technique involved comparing the responses given by the interviewees with data from other studies that examined the same bail court (i.e. Webster, 2007, 2009). The information contained in these studies allowed the researcher to probe any responses which appeared to differ from previous observations. Often, discrepancies resided in explanations given by defence counsel in this study which are specific to certain circumstances (e.g., particular types of offences or court personnel) and, as such, not representative of what was presented in other research.

A third step in strengthening the validity of the study findings involved allowing the participants to speak in terms of the collective as opposed to the personal. Specifically, the interviewees were encouraged to discuss the behaviour of ‘defence counsel’ generally. This ‘distancing’ technique allowed them to identify certain (strategic or manipulative) practices without taking personal responsibility for them. Finally, the last step involved selecting only participants with at least one year of bail court experience. This minimized the possibility that responses were simply a reflection of a lack of experience or understanding. It was assumed that participants who had been practising for at least one year would generally have a good sense of the bail court.

Several observations of the findings provided by the interviewees also strengthen the confidence in the study’s validity. For example, most participants had no difficulty admitting instances of inefficient case management or strategic practices by defence counsel. The fact that they were willing to divulge this information would seem to reduce the potential that they were lying about other issues of a similar nature.

In addition, most responses were consistent with the court observations and the findings from prior studies. Discrepancies that did arise generally disappeared when the participant

moved from the personal to the collective (e.g. “I never ask for adjournments but most defence counsel do”) or were specific to certain contexts (e.g. “an average case takes two weeks to complete the bail process, but I primarily deal with large scale drug trafficking cases”). Finally, similar explanations were provided across multiple interviews, strengthening confidence in the validity of the responses.

Despite the steps taken to reduce the possibility of deception, and the observations that provide at least some degree of confidence in the validity of the information obtained, there is always a risk that intentional manipulation occurred. Having said this, it would seem unlikely that this deception occurred at the individual level since deceptive responses would presumably have been inconsistent with the court observations, previous studies, or other interviews and therefore easy to identify. The more likely risk is that unintentional distortion occurred at the collective level.

This type of ‘inaccuracy’ might occur as a result of shared misconceptions or a narrow focus among the participants. For example, several participants assumed that video remand appearances are beneficial to bail efficiency because they liberate time in the regular weekday courts and limit the number of accused persons who must be transported to the courthouse each day. However, in reality, the use of video remand court can be detrimental to bail efficiency since cases with at least one video appearance are often adjourned multiple times in video remand court before they are resolved (Webster, 2009). Participants would be unlikely to identify this discrepancy since they would be unlikely to have knowledge of the operations of the bail court at an aggregate level.

While they may not correspond with objective reality, consistent misconceptions are still valuable to the present study as they provide a window into defence counsel’s behaviour and

motivations in bail court. The fact that they believe something to be true will likely impact their behaviour and possibly the strategies which they undertake. Using the aforementioned example of video remand, defence counsel might consistently adjourn these appearances since it is seen as a harmless practice, unknowingly contributing to lengthy case processing times. Indeed, the perspectives and perceptions of defence counsel form an important basis upon which interventions must reside.

2.4 Research Design/Analysis

2.4.1 Research Design

This thesis presents a case study that examines the reasons for inefficient case processing within one Eastern Ontario bail court as identified by defence counsel. Berg (2009) defines a case study as “a method involving systematically gathering enough information about a particular person, social setting, event, or group to permit the researcher to effectively understand how the subject operates or functions” (p. 317). There are several types of case studies, each of which is different in its intent. This research represents an “instrumental case study” in which “the researcher focuses on an issue or concern, and then selects one bounded case to illustrate this issue” (Creswell, 2007, p. 74). In this type of case study, the particular case being examined serves a supportive role, a background against which the actual research interests play out (Berg, 2009). The broader issue that is being examined in this particular study relates to the efficiency of the bail process in Ontario, while the case being used to illustrate this issue is an Eastern Ontario bail court.

Some researchers have expressed concerns over the difficulty in generalizing case study findings beyond the individual case (Berg, 2009; Creswell, 2007). However, Berg (2009) also points out that “when case studies are properly undertaken, they should not only fit the specific

individual, group, or event studies but also generally provide understanding about similar individuals, groups, and events” (p. 330). This is not to say that an explanation for why one bail court has lengthy case processing times directly informs us about why *all* bail courts experience lengthy case processing times. It does, however, suggest explanations as to why other bail courts are likely to face similar problems. In addition, this study could be used as a guide or starting point for future researchers who wish to investigate inefficient case processing times in other bail courts.

The case study method is beneficial to this research for several reasons. According to Berg (2009), “extremely rich, detailed and in-depth information characterize the type of information gathered in a case study” (p. 318). As such, case studies enable the researcher to capture various nuances and patterns that other approaches may fail to notice. Limiting the focus of the study to defence counsel practising within one bail court will allow for a detailed examination of their motivations and incentives which researchers using less in-depth approaches may overlook. Specifically, this approach can arguably shed light on defence counsel’s use of adjournments – an issue which has not only received limited examination to-date but is also often inaccessible to those simply observing bail court or even to many of the practitioners in bail court.

Further, various sources of lengthy case processing time will be identified that are specific to this Eastern Ontario bail court. This focused approach will be valuable in identifying areas of intervention in this particular jurisdiction. The case study method will also benefit future research in that it easily serves as a “breeding ground” for insights and hypotheses that may be pursued in subsequent studies (Berg, 2009). The findings of this study could potentially be corroborated by other principal players in the bail process or in other bail courts in the future.

2.4.2 Data Analysis

The interviews were analyzed through content analysis. This type of analysis requires a “careful, detailed, systematic examination and interpretation of a particular body of material in an effort to identify patterns, themes, biases, and meanings” (Berg, 2009, p. 338). This study took a qualitative, rather than quantitative, approach to content analysis. Although both approaches involve counting textual elements and organizing them into categories, quantitative content analysis uses the counting method for the purpose of reducing data into numerical form to produce more systematic, standardized descriptions of the phenomenon under study. In comparison, qualitative content analysis uses the same technique to identify, organize, and retrieve data, but provides a richer, more detailed description of the same phenomenon (Berg, 2009). Qualitative content analysis goes beyond simply counting words by examining meanings, themes and patterns found in the text.

A directed approach to qualitative content analysis was used in this study. Directed qualitative content analysis is employed when “existing theory or prior research exists about a phenomenon that is incomplete or would benefit from further description” (Hsieh & Shannon, 2005, p. 1281). It uses a combination of inductive and deductive reasoning to explain a phenomenon (Berg, 2009). Inductive reasoning involves building categories from the ‘bottom-up’ – categories emerge from the data (i.e. they are *grounded* in the data) rather than being generated from theory or previous studies (Creswell, 2007). This strategy is undertaken in order to “capture all possible occurrences of a phenomenon” (Hsieh & Shannon, 2005, p. 1282). In the case of the current study, using grounded category development ensured that all of the explanations for bail inefficiency were identified and explored in the analysis and not simply those already identified in prior research.

In comparison, deductive reasoning involves “top-down” category building in which an existing theory or body of knowledge guides the creation of analytic categories (Strauss & Corbin, 1998). This strategy was specifically used to investigate the legitimacy of the current conjectures offered by academics (Heath, 2010; Webster, 2007, 2009; Webster et al., 2009) and government officials (Canada, 2009b; Library of Parliament, 2009) which implicate defence counsel as significant contributors to bail inefficiency.

The goal of the content analysis was to identify the explanations provided for inefficient case processing. To this end, a broad reading of the transcripts was undertaken with the purpose of opening inquiry widely (Berg, 2009). This phase encompassed the inductive portion of the analysis. During the initial review of each transcript, any text that provided an explanation for court inefficiency was highlighted. After every transcript had been reviewed, a second examination of the highlighted segments was undertaken.

During this phase of the analysis, the ‘productive’/‘unproductive’ classification system that has been employed in previous literature (Doob, 2005; Webster, 2007, 2009) was used as a framework to identify explanations for bail inefficiency that are specifically attributable to defence counsel. More specifically, explanations for adjournments which were intended to advance the case towards the resolution of the bail process were categorized as ‘productive’ while those which were not intended to move the case forward were categorized as ‘unproductive’. Obviously, these operational definitions are drawn from the traditional classification scheme which exclusively reflects the interests of the court and the central importance of case processing efficiency as a fundamental principle.

This dichotomous classification of all highlighted segments in the interviews encompassed the deductive portion of the analysis. At this point, each highlighted explanation was given a

code based on its underlying ‘theme’. For the purpose of the analysis, a theme was made up of “a simple sentence, a string of words with a subject and a predicate” (Berg, 2009, p. 348).

After every transcript had been reviewed twice, explanations containing reoccurring themes were extracted and grouped together. If multiple themes were found within the same text, the excerpt was assigned to multiple groups. As additional text was extracted from the transcripts, these groups were frequently reformulated and text was re-sorted to ensure that the data were represented accurately.

After the data were sorted according to their respective themes, the groups were organized into two major categories and six minor categories. The major categories constituted those explanations related to the role of defence counsel and those other explanations that were unrelated to their role, while the minor categories represented various sub-categories within these broader groups (e.g. ‘productive’ explanations, ‘unproductive’ explanations, structural explanations, cultural explanations). During this process, the categories and themes continued to be reformulated and reorganized until the explanations in each category bore a clear relationship to each other. To ensure that this process was as objective as possible, the categories were developed according to various decision rules. These rules provided guidelines and rationale for sorting the text into each theme group and category. In order to organize the text during this process, each major category was represented by a coding frame²⁶ which arranged the excerpts according to their minor categories and themes. Finally, each transcript was subsequently reviewed to ensure that all of the relevant information had been extracted.

²⁶ A sample of one of the coding frames can be found in Appendix F.

CHAPTER III: ANALYSIS

This analysis was undertaken with the aim of identifying and explaining factors which defence counsel perceive to contribute to inefficient case processing in an Eastern Ontario bail court. For the purposes of the analysis, any factor that contributed to an *increase* in the amount of time or number of appearances required to complete the bail process was considered - at least apriori - to *decrease* bail efficiency.²⁷ These factors were extracted from the interviews and subsequently divided into groups based on common themes. First, the role of defence counsel in contributing to bail (in)efficiency is presented. This category is divided into explanations rooted in ‘productive’ adjournments (i.e. adjournments which are used to advance the case towards the completion of the bail process) and ‘unproductive’ adjournments (i.e. adjournments which are not used to advance the case towards the completion of the bail process). Second, other factors not directly related to the role of defence counsel but which were also thought to increase case processing time are outlined. This category is divided into structural explanations, cultural explanations, and administrative explanations. Each group is made up of factors which defence counsel perceived to contribute to bail inefficiency in the jurisdiction in Eastern Ontario in which they practised.

4.1 Explanations for Bail Inefficiency Related to the Role of Defence Counsel

The subsequent explanations for bail inefficiency relate exclusively to the role that defence counsel play in contributing to lengthy case processing. This criminal court ‘player’ might extend bail proceedings though the (frequent) use of adjournments or by setting

²⁷ It is important to note that not all increases in case processing times are necessarily a detriment to court efficiency in particular, and the justice system more generally. This issue will be discussed in greater detail in the discussion portion of the study.

subsequent appearances further into the future. Both ‘productive’ and ‘unproductive’ reasons for which a defence counsel might extend bail proceedings are discussed.

4.1.1 ‘Productive’ Explanations for Extending Bail Proceedings

The following reasons for which a defence counsel may extend bail proceedings are intended to facilitate the completion of the bail process. While the strategies discussed may delay the proceedings temporarily, they are ultimately employed to ensure that the next appearance will move the case closer to the completion of the bail process.

*The defence extends the bail process for the purpose of obtaining disclosure*²⁸

A defence counsel may request an adjournment to obtain more details about the Crown’s position and the circumstances surrounding the offence. This information is important as it often plays a role in the Crown and the Justice of the Peace’s decision regarding an accused person’s release. As one defence counsel suggested, there is often very little information available on the first day in which the accused is brought into court:

When they’re initially brought into court, you just have a front sheet, which is a three paragraph synopsis of the allegation. So, especially in more serious cases, you need to adjourn it to see the disclosure. (DEF 012 Pg 3, Ln 86)

A similar explanation was provided by another defence counsel who explained that obtaining disclosure can be particularly important in more serious cases as it can dictate whether the accused is likely to be released or detained. He noted that it can take several days to obtain disclosure from the Crown:

²⁸ Under the *Canadian Charter of Rights and Freedoms* (1982), accused persons have the right to the disclosure of all of the relevant information regarding their case in the possession of the Crown, with the exception of privileged information.

Sometimes the issue of whether they are going to get bail is dependent on the Crown's case and potential weaknesses in that case. So sometimes we want to see full disclosure before we have the bail hearing, particularly in more serious cases. Usually on an overnight hearing all you'll get is a copy of the police summary and a client's criminal record, if he or she has one. So, if you need more detailed disclosure before having the bail hearing that will take a few days for the Crown to get together. (DEF 010 Pg 4, Ln 140)

One defence counsel also noted that the Crown must provide more information now than in the past. Consequently, he felt that the time that it takes for the defence to obtain the disclosure is correspondingly getting longer. He commented that he often needs to adjourn the case while he waits to receive and examine the disclosure:

The Crown's disclosure obligations have also increased the number of [adjournments] because they have an obligation to disclose more. There's also often a delay in the preparation of that disclosure and the disclosure of that material, which increases the number of appearances [required to complete the bail process]. (DEF 012 Pg 10, Ln 366)

The defence delays proceedings in order to put a bail plan in place

Defence counsel explained that in order to facilitate the release of their clients from custody, they often must put bail plans in place. This is because Justices of the Peace and Crown attorneys generally require that a suitable bail plan be established before they will agree to release accused persons on bail. The vast majority of defence counsel claimed that they frequently adjourn proceedings for this purpose. Putting a bail plan in place includes tasks such as arranging a surety, obtaining proof of employment, or organizing alcohol or drug rehabilitation. In addition, defence counsel might have their clients sign up for the John Howard

Bail Supervision program in circumstances in which they lack community support. One defence counsel commented that this often requires an adjournment:

You get a sense after awhile of what you are going to need in order to have a decent chance for your client to get released. A lot of clients are poor and don't have very much, and have limited family support, and don't have sureties. We might ask for an adjournment to have them assessed by the John Howard Society. They run a bail supervision program that has been up and running for a couple of years now but they have to screen people and determine whether they're suitable candidates. (DEF 010 Pg 5, Ln 165)

Since it can take a substantial amount of time to put a bail plan in place, a defence counsel may need days or even weeks to prepare for a bail hearing. One defence counsel explained that "very often we'll have the bail hearing within three days, but if it's a question of trying to get a more complicated plan in place, it could be a couple of weeks" (DEF 003 Pg 5, Ln 155).

While some accused persons have their bail hearings on their second appearances, others are scheduled to appear in video remand court until their lawyers are ready to proceed. One defence counsel explained that he often schedules his clients in video remand court while he prepares for the bail hearing:

Some of [the clients] will go to video remand only if the plan is taking a while to get together. For example, if someone needs treatment or they couldn't get a surety right away... they would have one or two video remands and then [I would] set the bail hearing. (DEF 009 Pg 144, Ln 144)

In fact, many defence counsel claimed to have their clients appear in video remand court while they organize their bail plans. One counsel explained that this strategy ensured he did not set a bail hearing before he was ready to proceed:

I wouldn't bring someone in the [show cause] bail court unless I have a plan ready because I would be just wasting everyone's time. [Rather], I would end up adjourning it [to video remand court]. (DEF 009 Pg 8, Ln 362)

Even though a bail hearing may be scheduled several weeks after the accused person's first appearance, it is still possible that it will have to be adjourned at the last minute. Defence counsel claimed that this is especially common when a surety is required. Since sureties are almost always required when the Crown is contesting release, defence counsel must find individuals who are willing to take on the required responsibility and whom the court will deem to be reliable. Once a surety is found, the defence counsel must schedule the bail hearing around the availability of this individual. Often, adjournments are requested because of problems related to the surety. For example, one defence counsel described a situation in which an adjournment might be requested because of a surety-related issue:

A defence request [for an adjournment is common] because one of the sureties or a witness that you want to speak to or have come to court just doesn't make it on the day that you set the bail hearing. For instance, if I show up on a Monday, they [might] give me a bail hearing on Wednesday. I then call the surety and say "okay his bail's on Wednesday" and they say "I'm having an operation on Wednesday." We're kind of stuck with that. (DEF 007 Pg 4, Ln 152)

Defence counsel explained that an adjournment may be requested initially for the purpose of putting together a bail plan and then again if there are scheduling conflicts. It was mentioned

that it is common for sureties to fail to appear at scheduled appearances. In those instances, the matter must be adjourned again in order to find another surety.

In sum, delays rooted in the organization of a bail plan are perceived as unavoidable given the importance of taking all the necessary steps in putting the bail plan in place. For example, one defence counsel discussed the benefits of having a strong bail plan:

The accused can always get up there and testify that he's got a job, but it means more when you have a letter from the employer. Or, the accused can say that he's been in treatment or been going to AA [Alcoholics Anonymous], and routinely that's just disregarded. But, if there's a letter from a treatment centre saying the accused has been there or a letter from a psychiatrist saying you've scheduled an appointment for him to come in and see [him/her], that drastically increases the chance of release. (DEF 012 Pg10, Ln 337)

Indeed, as one defence counsel noted, "You only really get one bail hearing so you want to put your best foot forward" (DEF 002 Pg 6, Ln 151).

4.1.2 'Unproductive' Explanations for Extending Bail Proceedings

The subsequent reasons for which a defence counsel may extend bail proceedings are not intended to advance the case towards the resolution of the bail process. They may be strategic in nature, but they are not requested for the purpose of ensuring that the next appearance moves the case closer to a determination of bail.

Defence counsel are unprepared to run bail hearings at the time at which they are scheduled

In some cases in which bail hearings are delayed, defence counsel may adjourn the appearance simply because they are not ready to proceed. For instance, one defence counsel

believed that some lawyers are unprepared to run bail hearings at the time when the appearances are scheduled:

The reality is there's a lot of defence counsel who schedule bail hearings and then don't proceed on them because they're scheduling [them] without plans in place, hoping to get plans in place, and [then] they don't. (DEF 008 Pg 7, Ln 248)

Under these circumstances, an appearance is 'wasted' and the case is no closer to reaching a resolution. Rather, the bail hearing must be rescheduled and the case remains in the bail process. Not only would this practice contribute to the increasing number of appearances required for these cases to complete the bail process, it might also prevent other bail hearings from moving forward (i.e. these cases are taking up slots in the schedule that could be filled by other bail hearings).

Video remand is used as a 'holding tank' while defence counsel decide how to proceed

Some defence counsel claimed that accused persons are scheduled to appear in video remand court for no purpose other than because their lawyers are unsure how they are going to proceed at the time that they must schedule their next appearance. In these situations, defence counsel are not working towards a resolution by putting a bail plan in place or negotiating with the Crown. Rather, they are simply 'buying time' while they decide their next steps. Instead of determining how to move the case towards the completion of the bail process, they use video remand as a 'holding tank', putting off making a decision. One defence counsel explained that this is especially common on weekends:

People are arrested on Fridays and Saturdays and brought [in] on Saturday and Sunday in front of the Justice. Rather than set a bail hearing, what they do is just plunk them into video. So there's another appearance, another delay in their bail because they're just

pushed off into video. Then they can try and set a bail hearing from video ... it's the dumping place. When nobody knows what to do with the person, that's where they go ... almost like they're out of sight. (DEF 006 Pg 13, Ln 502)

In some instances, defence counsel might make a decision regarding how to proceed after the first video appearance, resulting in only one 'wasted' appearance. However, in many other instances, cases are adjourned repetitively before they return to the regular weekday court to receive a determination of bail. Defence counsel argued that this practice of repeated adjournments in video remand court is often rooted in the format or organization of this court. Specifically, video remand court functions in a way in which accused persons easily become forgotten or lost in the system. Indeed, the very structure and organization of this court would appear to permit – if not encourage – defence counsel to neglect their clients so that their cases do not move forward.

For instance, many defence counsel noted that cases are lost in the 'video remand stream' because it is uncommon for private defence counsel to attend these appearances. Precisely because they are unable to predict the order in which accused persons will appear on the video screen, it is believed to be a 'waste of time' for them to attend this court. For example, one defence counsel mentioned that he does not typically attend video remand court because he is unsure how long he will have to wait for his clients:

Most of the lawyers don't go to it because ... you'd have to be, I want to say insane to go to it ... that's a bit extreme. But ... you have no control over when your client comes up on the video screen. So, you go there at one-thirty when it starts; you might be out of there in ten minutes if your client's one of the first ones up, or you could be sitting there two hours later because your client still hasn't come up. Nobody's got that kind of time to

waste. You do it once in a while ... but as a general rule you would have no practice left [if you attended all the time.] (DEF 006 Pg 12, Ln 476)

Since many private defence counsel choose not to attend these appearances, they are often mediated by duty counsel. Defence counsel mentioned that duty counsel often request an adjournment and schedule an additional video remand appearance when they have poor instructions from private counsel or do not have all the details about the case. One defence counsel noted that cases can spend a considerable amount of time in the 'video remand stream' when duty counsel are handling a private defence counsel's case:

When I'm there I notice that a lot of people end up being adjourned, three or four days, constantly, over and over again, and nothing is getting done. It's more difficult to deal with someone in video remand - to get a Crown position, to get the disclosure, to get the file. [This is] because a lot of counsel don't actually go to the court appearance; duty counsel does it for them. (DEF 002 Pg 10, Ln 286)

Further, defence counsel explained that the failure of most lawyers to attend video remand appearances limits the face-to-face contact that they have with their clients. One defence counsel believed that it is much more likely for cases to be adjourned when accused persons cannot encourage their lawyers to move their cases forward:

What we know in the court system is that it's face-to-face meetings where things happen ... when it's video, and all they have to say is "well your lawyer's not here and he left instructions for it to be adjourned for two days or a week," nothing can happen. The accused is sitting there on video defeated, sitting in jail, and it becomes self-fulfilling. [He'll respond,] "oh ok, let's just adjourn it." Whereas if the accused was there [physically in court] he might say "I don't want an adjournment for two days, I want my

bail hearing right now” or “I want to go plead guilty.” But on video they can’t do anything. (DEF 001 Pg 9, Ln 344)

There are additional problems faced by duty counsel and private defence counsel who actually attend video remand appearances. They claimed to have a very difficult time moving their cases forward as a result of strained communication with their clients. Accused persons who appear in the regular weekday courts can discuss their cases with their counsel in person at the courthouse. In contrast, accused persons appearing in video remand court can only talk to their counsel over the phone for a limited period of time. One duty counsel described the difficulties that she faced when communicating with her clients in video remand court:

From a duty counsel perspective, we can’t go to the jail to interview clients. We don’t get paid to do that ... although they say there’s a little interview booth [that enables you to talk to the person on video] in [video remand court] ... That is not meaningful communication ... You can’t communicate in there while an entire courtroom of people are waiting for you to come out of the interview booth ... there’s a bell that they ring if you’re there for too long ... So it’s not a substitute for us being able to ... have a meaningful interview with the client. (DEF 011 Pg 11, Ln 363)

Defence counsel explained that since the communication between lawyers and their clients is both limited and strained when cases are in the ‘video remand stream’, it is common for these cases to be adjourned multiple times, significantly impacting case processing time.

Defence counsel moved their cases through the bail process at a slightly slower pace when the two-for-one sentencing convention was in use

Explanations for bail inefficiency related to the two-for-one sentencing convention address the government’s allegation that defence counsel purposely delayed proceedings to accumulate two-for-one credit at sentencing. The government has claimed that the elimination of

this convention (through Bill C-25) will increase the efficiency of the criminal court system (Library of Parliament, 2009).

A few of the defence counsel speculated that some individuals might delay proceedings in order to accumulate credit for their clients, but this behaviour was deemed to be the exception rather than the rule. Not one defence counsel claimed that this was ever a strategy that he or she had used. Many of the defence counsel noted that their clients were anxious to leave custody during the bail process. For example, one defence counsel commented that accused persons would be unlikely to want to extend their time in remand given the onerous conditions at the detention centre:

There is an impression in some quarters that people choose to sit in remand courts to build up their dead time because they get two-for-one credit. If you've ever spent any time in these remand centres you would know that nobody in their right mind would want to spend one extra day there. (DEF 007 Pg 9, Ln 333)

Many of the defence counsel believed that this might have been a strategy employed by some lawyers, but maintained that it was a fairly limited problem. They asserted that their clients were more interested in having a swift resolution to their charges than accumulating credit. For example, one defence counsel explained why accused persons would be reluctant to delay the bail process:

There always will be individual cases where people will try to play the system, but they are the exception and not the rule. The general rule is that people want their matters adjudicated in a timely fashion and they want their liberty and they want closure on their files. (DEF 004 Pg 12, Ln 372)

Since there is still a possibility that an accused person will be released given that the Justice of the Peace has not yet made a decision regarding bail, some defence counsel noted that it would be especially unlikely that a client would want to delay the bail process to accumulate credit. One defence counsel argued that in the rare circumstances that clients would want to delay the proceedings, it would be when they were detained in custody after the bail decision had been made:

I don't think they're delaying bail to accumulate credit because if they think their client's going to get out on bail they're going to just get their client out on bail as soon as they can. They may, in a case where the client is not likely to get bail, delay sentencing [and] plea ... to get more time in custody... [But] if you have a client come in and you say, "you're going to likely get released but let's have you have some dead time before we get you out," it's not going to happen. The client's just going to say "get me out now. I don't want to do dead time on the basis that I may need it down the road." (DEF 002 Pg 15, Ln 467)

Finally, although all of the defence counsel denied that they took advantage of the two-for-one sentencing convention, several maintained that they have been organizing their cases slightly faster since it was eliminated. One duty counsel felt that Bill C-25 has impacted the efficiency with which cases move through the bail process:

Nothing changed a lot since then [Bill C-25]. It's just that things are done a little more quickly ... I think it has had an influence on bail, though ... I don't think it has had a huge impact, but it's had a little impact, anyway. (DEF 011 Pg 9, Ln 284)

All of the defence counsel who claimed that they were working at a slightly quicker pace maintained that this was not due to any strategic incentive - before the Bill came into force - to

accumulate pre-sentence credit. Rather, it reflected the increased pressure that they felt to move their clients through the court process because they were no longer earning credit to compensate for their loss of remission in remand.²⁹ One defence counsel explained that her clients have become more anxious to move the case forward as a result of this loss:

Now, [the client is] like, “what do you mean you’re not available till next week? I’m only getting one-for-one credit. Isn’t there anyone else in your office that can do it?” So now it’s just more pressure on their part. (DEF 005 Pg 33, Ln 1306)

Private defence counsel extend the bail process in order to maintain their legal practices

Many of the private defence counsel noted that representing a client includes a business component that may also dictate their behaviour. For example, they must ensure that they are paid. Further, they need to prioritize commitments to different clients. Indeed, several of the explanations defence counsel provided for lengthy case processing are rooted in strategies intended to successfully maintain their legal practices.

In some cases, defence counsel claimed that they may delay the resolution of bail until they receive their retainers.³⁰ A few defence counsel claimed that they might be hesitant to resolve the issue of bail before they receive their retainers because they are afraid that they might not get paid once their clients are released on bail. For example, one defence counsel explained that:

²⁹ Remission refers to the time that is deducted from accused persons’ custodial sentence after they are sentenced by the court. It is calculated based on the amount of time that they spent in custody. Under the Prison and Reformatories Act (1985), provincial inmates can be expected to earn remission equalling at least one-third of their sentence (i.e. they are released at the two-thirds point of their sentence, serving the remaining third in the community). Under the Corrections and Conditional Release Act (1992), federal inmates could earn up to two-thirds of their sentence in remission if they are released on parole. Since no remission mechanisms apply to time spent in remand, the two-for-one credit was partially given to compensate for this loss (*R. v. Wust*, 2000).

³⁰ The retainer is a deposit paid by the client to the defence counsel which commits the defence counsel to the case.

If it's a private retainer, then sometimes I will try and make sure there's money there because I've been burned. They get out - and they would have been willing to pay a retainer while they're in, because they want to get out - but once they're out they don't really see the need [for the lawyer anymore]. Or they might go off and get another lawyer. So, for private paying clients, often there will be an adjournment for that purpose. (DEF 003 Pg 4 Ln 123)

While some cases are paid by private retainers, others are funded by Legal Aid Ontario (LAO). If a client is eligible for legal aid, LAO will pay his or her legal fees. Although this method of payment is considered to be slightly more reliable, defence counsel still might wait for a legal aid application to be processed to ensure that their client is eligible and they will be paid. One defence counsel claimed that "if you wanted to make sure that you had legal aid before you ran the bail hearing, that would require a number of adjournments" (DEF 002 Pg 6, Ln 155).

Further, a few defence counsel felt that it is taking longer to have legal aid applications processed now than it had in the past. One defence counsel discussed the increasing delays and how it impacted the way in which she dealt with the bail process:

They take the application in the cell block sometimes. It used to be the same day we'd get the confirmation that we were covered by Legal Aid for the next bail hearing. Lately, the application's taken here [in court] and three days later we get confirmation [that] the person's actually been accepted for Legal Aid. So, and it's sad to say, that there's only so much work you can do without getting paid. (DEF 005 Pg 22, Ln 843)

Securing payment for their services is not the only business-related explanation for defence counsel to extend bail proceedings. In order to maintain a successful practice, they explained that they must also prioritize their business commitments accordingly. Even if there is

an available slot for a bail hearing the next day, the defence counsel may already have something else scheduled. This is especially possible in bail court because, as one defence counsel commented, “the nature of the practice is that the lawyers that are in bail court are also the busiest lawyers” (DEF 001 Pg 5, Ln 157).

Defence counsel claim that they must work around the bail court’s schedule as well as their own, which means bail hearings have to be scheduled further in the future. If a matter is being dealt with that is considered to be more important than the bail case, it is possible that a defence counsel may not prioritize the bail hearing in his/her schedule. This reality is acknowledged by one duty counsel who commented that:

There’s a business side to it and so a lot of defence lawyers will have a number of hearings set overlapping in their schedules and they may put the bail hearing down the list in priority. (DEF 009 Pg 5, Ln 229)

The case is adjourned periodically so the client can stay in the local detention centre

A few defence counsel mentioned that they are sometimes asked by their clients to schedule an appearance and then to adjourn the matter when the appearance takes place. These requests are made for the purpose of remaining in the jurisdiction close to their homes. One defence counsel explained how he uses video remand to keep his clients detained in the local detention centre:

In order to stay in [the local detention centre in this jurisdiction,³¹ accused persons] need to have a court appearance every couple of weeks. If it’s longer than that they get shipped off to [another location]. So, some of these guys will adjourn and adjourn, not

³¹ To preserve the anonymity of this particular jurisdiction, all references to the location have been replaced by a more general description.

just their bail hearings, but their actual trial. They'll just try to have it on video remand every couple of weeks so that they can stay local. (DEF 003 Pg 8, Ln 260)

The interviews revealed that it is not uncommon for clients to make this request of their lawyer. Another defence counsel explained why he might agree to schedule appearances that are unrelated to the advancement of the case:

[Being transferred out of the jurisdiction] has very dramatic consequences for the accused. His family can't come and visit him, he can't see his lawyer, he can't go through his disclosure with his lawyer, the collect calls back home are more expensive ... so I might remand him on a weekly basis in video court just so he's not removed from the jurisdiction. (DEF 012 Pg 11, Ln 404)

4.1.3 Ambiguous Explanations for Extending Bail Proceedings

The more problematic explanation provided by defence counsel for inefficient case processing is rooted in their management of either their client or the Crown attorney vis-à-vis a final resolution of the question of bail. This justification does not fall neatly into either the 'productive' or 'unproductive' classifications. More specifically, it is ambiguous in the sense that it can be argued to be both 'productive' - in the sense that it moves the case towards final disposition - and 'unproductive' - in the sense that it adds an (arguably) unnecessary appearance to the bail process. Within this context, it has been placed in a separate category.

The defence adjourns a bail hearing for the purpose of advancing the case towards final disposition

Several defence counsel claimed that it was common for lawyers to schedule an appearance in 'show cause' court and then subsequently decide not to run a bail hearing. Unlike in cases in which bail hearings collapse because the defence counsel is unprepared, these bail

hearings are adjourned because defence counsel have opted to bypass the bail hearing and resolve the bail process in another manner. One duty counsel perceived this to be a common practice:

Lawyers will set dates for bail hearings with no intention of proceeding with those bail hearings ... I don't know that they have no intention of proceeding, I suppose, but I think that - for whatever reason - things end up getting adjourned on the day that they're supposed to proceed. (DEF 011 Pg 8, Ln 246).

Defence counsel commented that this practice extends the bail process by adding an additional appearance in bail court and 'wastes' an appearance that could have been occupied by another case. However, it was also noted that this strategy was used to move the case towards final disposition.

A number of explanations were given to justify this practice. For example, some defence counsel explained that they adjourn bail hearings when Crown attorneys who initially decided to detain their clients change their positions between court appearances. For example, one defence counsel mentioned that he adjourns bail hearings if he can "convince the Crown to consent to release [his clients] in the interim [before the bail hearing]" (DEF 008 Pg 7, Ln 262). In these cases, the bail hearing is adjourned in favour of a consent release, bringing an end to the bail process.

Other defence counsel explained that they allow bail hearings to collapse in cases in which their client (subsequent to the decision to hold a formal bail hearing) chooses to consent to detention. In these circumstances, a determination of bail is circumvented and the case moves toward final disposition. For example, one defence counsel explained that she often encourages clients to waive their right to a bail hearing and move on to the next stage of the court process if

she feels strongly that they will ultimately be detained. In some cases, they will initially refuse this advice and then change their minds at the last minute:

At the end of the day the client is entitled to have a bail hearing so you can only tell them so many times what you think their chances are going to be and how hopeless it is. But if they want to have a bail hearing they can. So sometimes people will want one set and then you go see them in the cell block the morning it's supposed to proceed and they'll just be like "okay never mind." (DEF 005 Pg12, Ln 452)

In addition, in the time between bail appearances, some accused persons choose to bring about a final resolution of their case by deciding to bypass a bail determination and plead guilty. One defence counsel noted that this was very common in this jurisdiction:

It does happen that you set a bail hearing and then on the day of the bail hearing I'll speak to a Crown about release and [he/she] will start re-directing the conversation towards resolution. If it's a good resolution then the client might decide to plead guilty without having a bail hearing ... that happens fairly often. (DEF 006 Pg 8, Ln 287)

4.2 Other Explanations for Bail Inefficiency

The following explanations for lengthy case processing are provided from the perspective of defence counsel but are not directly related to their role in the bail process. Rather, these explanations relate to structural factors that shape the formal organization of the court, cultural factors driven by the conduct of other court practitioners, and administrative factors that dictate the court's day-to-day operations.

4.2.1 Structural Explanations

Structural factors that contribute to inefficient case processing are related to the nature and volume of the cases entering the court and the resources available to accommodate these

cases. It was reported that cases entering the court which involve certain types of offences require more effort on the part of the defence counsel, increasing the amount of time that it will take for these cases to move through the bail process. In addition, there is an impression among defence counsel that backlog is contributing to inefficient case processing in the bail courts. In other words, there are more cases entering the bail system than there are resources to accommodate them. Backlog is thought to reduce the amount of available court time and cause appearances to be set further in the future than what is perceived to be necessary or desirable.

Serious cases require more time and appearances to complete the bail process

Serious cases were thought to require additional time and appearances to resolve the bail process compared to cases that were more minor in nature. These cases were perceived to be more severe or complicated, such as large scale drug trafficking cases or cases with multiple charges, accused persons, or victims. One duty counsel claimed that:

[The number of adjournments requested] would really depend [on] the complexity of the case. [Serious cases] would take many more adjournments because a plan would have to be put together, the lawyer would have to have conferences with the client... and so forth.

The less serious the case, the less appearances would be required. (DEF 011 Pg 6, Ln 183)

As was noted by the duty counsel, serious cases are thought to take longer to move through the bail process because defence counsel must examine these cases more closely before a bail hearing can be run. One defence counsel described the steps that must be taken before he can run a bail hearing for a case involving a serious offence:

If it's going to be a serious matter where it's going to be a day in court, you definitely need to secure your retainer beforehand, you definitely need to look at the disclosure, and

you definitely need to put together a serious plan. It takes longer, so the bail hearing's set a bit further away. (DEF 012 Pg 6, Ln 208)

Cases involving particular offences take more time and appearances to complete the bail process

Defence counsel pointed out specific types of offences that require additional time to move through the bail process. As with serious offences generally, these cases were believed to require additional preparation before a bail hearing can be scheduled. One defence counsel mentioned the increased amount of effort required when the case includes a breach:

People are breached all the time... and once you're breached, the onus is so high... because when you go in on a breach, the onus of bail is reversed. You must show cause as to why you [should be] released. (DEF 008 Pg 18, Ln 678)

Cases involving charges of breaches were consistently argued to require additional preparation on the part of the defence. Precisely because the onus is reversed for these cases, defence counsel stated that more time is needed to prepare bail plans. For example, one duty counsel claimed that when an accused person is charged with a breach, in most cases "there has to be a plan, and there has to be sureties, and there has to be cash." (DEF 011 Pg 9, Ln 302)

Domestic assault was also widely recognized as an offence that prolongs the bail process. One defence counsel mentioned that Crowns are extremely reluctant to release accused persons charged with domestic assault regardless of the severity of the offence:

Domestic charges in particular... are a huge problem... Anecdotally, a young man, no record, here on a visitor's visa from a foreign country, two children with a Canadian... [He is] eventually released, but [spends] five days in custody before [being] released on a contested [bail hearing]. No records, no previous dealings... (DEF 008 Pg 15, Ln 587)

Given the perception that Crowns rarely consent to the release of accused persons charged with this offence, defence counsel explained that they would require additional time and appearances to prepare bail plans (e.g. finding a suitable surety, arranging for alternative accommodations, and preparing a cash deposit). One duty counsel felt that Crown attorneys are reluctant to release an individual charged with a domestic offence because they are afraid of being held accountable if the accused person reoffends while out on bail:

People are scared to release people charged with domestic assault. That's just the way it is. They're scared they're going to go out and do the unspeakable and it's going to come back on them. (DEF 011 Pg 10, Ln 326)

Additional resources are required in order for court time to be available

Some defence counsel felt that there are inadequate resources (e.g. courtrooms, Justices of the Peace, court staff) being devoted to this Eastern Ontario courthouse. For example, one defence counsel argued that additional resources are warranted given the large population in this jurisdiction:

Resources [are a problem] because here, we're sitting in [an Eastern Ontario jurisdiction], which is now considered a major metropolitan area, with a [large] population... On any given day, we'll have one bail court going, possibly two or three as backup. We manage and we do well, but you have to wonder about the amount of resources that the government contributes to the judicial system. (DEF 004 Pg 6, Ln 183)

Defence counsel explained that there are not enough resources to accommodate the volume of cases entering the bail court. This insufficiency creates difficulties in scheduling bail appearances. One defence counsel argued that the calendar was so busy that she had to wait to

schedule bail hearings. She stated that “sometimes the courts are just overbooked and you can’t get a bail hearing for four or five days, and that’s problematic” (DEF 002 Pg 7, Ln 210).

A reduction in the volume of cases beginning the court process by way of the bail court is required in order for the bail process to run more efficiently

A related argument is linked to the number of cases that enter the criminal court system by way of the bail process. This volume is largely controlled by the police. Following an arrest, the police can release the accused into the community to await a court appearance as opposed to sending him/her to bail court. Some defence counsel claimed that a reduction in the number of cases that end up in bail court would make space in the calendar and enable counsel to schedule bail hearings when they are prepared rather than waiting for a slot to become available.

These defence counsel argued that the police fail to exercise their discretion to release accused persons into the community following their arrests. For instance, police have the option of releasing accused persons from the station on their own recognizance. One defence counsel argued that if police exercised this option more often, it would reduce the number of cases in the bail courts:

More people should be released from the station ... get a lot of the...what I call the “junk” that shouldn’t be [in bail court] released from the station. I mean, these police officers have the experience. They can release them on conditions with recognizance. (DEF 008 Pg 14, Ln 742)

Another defence counsel added that only serious cases should be sent to bail court. He claimed that police officers often choose to detain accused persons who commit minor offences:

I think over the years, since the Ouimet report and a bunch of the bail reports, there’s been a return to... a reliance on over-incarceration for very minor offences. For example, someone with a long record with breaches and lots of thefts on their record, and shoplifts

- a five dollar food item from a store - that person is very likely to be detained even though it's a very minor offence. (DEF 012 Pg 10, Ln 361)

Many defence counsel also mentioned that police are much more likely to detain people who commit particular offences. One defence counsel claimed that individuals charged with domestic violence are likely to be detained by the police:

I don't know what the percentage is, but I suspect a significant number of the people in [bail court] are in on a domestic violence case. It seems to be [that] I go out [to the detention centre] and the jail is full of husbands. So, there is something there and that's a societal interest. There may not be much you can do about that, but there is a significant number of them. (DEF 001 Pg 6, Ln 239)

Defence counsel also agreed that many people end up in bail court as a result of breaching the conditions of their bail. One duty counsel commented that the "the police bring a lot of people into custody on breach charges" (DEF 011 Pg 9, Ln 298).

While some defence counsel felt that police contributed to the large volume of cases in bail court, not all of them shared this opinion. A few defence counsel claimed that the police refrain from sending many accused persons to bail court. For example, one defence counsel argued that "the average client tends to be released either by the police at the scene or ... at the police station" (DEF 005 Pg 23, Ln 905).

4.2.2 Cultural Explanations

According to many defence counsel, a risk averse mentality is embedded in the culture of the bail process, and it is becoming increasingly difficult for accused persons to be released on bail. Crown attorneys were thought to err on the side of detaining accused persons and Justices of the Peace were perceived to favour strict release procedures and lengthy bail hearings. It was

widely believed that this behaviour contributed to lengthy case processing times by increasing the number of steps that defence counsel must complete before a determination of bail can be made. This mentality was also thought to impact case processing times because it is believed to influence both of these practitioners' decisions about the day-to-day operations of the court (e.g., the way in which adjournment requests are handled).

Crown attorneys consistently err on the side of detaining accused persons

Defence counsel were in strong agreement that the bail courts would be considerably more efficient if the Crowns agreed to release more people. They explained that cases in which the Crown wishes to detain an accused person occupy much more time in the bail courts than cases in which the Crown is consenting to a release. Cases which involve a consent release from the outset are often dealt with on the first day in which the accused person appears in bail court while contested releases require a bail hearing. Since bail hearings are rarely run on the first court appearance in this particular court, every case in which the Crown is opposing the release of the accused requires at least one adjournment and two appearances to be resolved. Consequently, the greater the number of people whom the Crown wishes to detain, the busier bail courts get and the fewer slots become available to schedule bail hearings.

Those who had been practising for longer periods of time said that Crowns are more reluctant to release people now than they were in the past. One defence counsel, who has been practising in this jurisdiction for over 20 years, described this shift and discussed how it has affected the efficiency of the bail court:

The Crown, in my view, has become overly cautious in terms of consent releases. I find that to protect themselves, in case somebody gets out and commits another crime, they are taking, almost automatically, a detain position where not that many years ago they

would have agreed to release. So, if the Crown is objecting to release more and more often then you're running more and more bail hearings and the bail courts are filling up and you get backlog ... We used to - even though crime figures have gone down - get along fine with the one bail court and still have people running their bail hearings the same day they were brought in. Now we need two bail courts and we still have to set a date sometime in the future. (DEF 003 Pg 6, Ln 194)

Defence counsel felt that 'detain positions' were being taken automatically as a result of an aversion to risk on the part of the Crown attorneys. One defence counsel noted that this was part of a 'pass the buck' mentality:

I think there are too many cases where release is being challenged unnecessarily and too many cases where the Crown just takes a [detain position] - everyone sort of passes the buck. The police say well, "I don't want to release them, but if someone else does then that is fine," and the Crown looks at it and says "I'm not going to consent to this release but if a Justice of the Peace wants to release then that's fine." Then ... the buck just gets passed down the line and it can get frustrating when you've got a case that clearly calls out for release, and you've got a bail plan and lined up sureties... And you are sort of running into this wall where the Crown just won't consent when they probably should. (DEF 010 Pg 7, Ln 228)

This defence counsel emphasized that no one wants to be the party who releases an accused person who subsequently reoffends in the community while out on bail. As a result, they defer responsibility to the next person in the line of decision makers. In the case of the Crown, 'passing the buck' to the Justice of the Peace means that additional time and appearances will be

required in bail court before the decision is made as to whether the accused will be released or detained.

Justices of the Peace favour the most onerous forms of release

When Justices of the Peace agree to release accused persons, they are thought to prefer the most onerous forms of release available in the Criminal Code. There is a general impression that these forms of release are beyond what is necessary to fulfill the laws of bail and that their use contributes to lengthy case processing times. For example, one defence counsel felt that cases could move through the bail process more efficiently if Justices of the Peace were more willing to release accused persons on undertakings:

I've seen one in seven years ... one of my clients released by a Justice of the Peace on an undertaking ... An undertaking should be the norm, a recognizance should be a step up, and the rare cases should involve a recognizance with a surety or a recognizance with a cash deposit. These are important things that could be done to change the bail process to make it function smoother. (DEF 008 Pg 19, Ln 743)

Defence counsel claimed that the more onerous the release, the more effort that must be put into their bail plan and the longer the bail hearing will take to run.³²

Accused persons are released by Justices of the Peace with multiple conditions

The forms of release offered by Justices of the Peace were also perceived to involve an excessive number of conditions.³³ One defence counsel discussed the inevitable cycle that is created when unrealistic bail conditions are imposed on accused persons:

³²For example, organizing a bail plan for a client requiring a surety would take longer than organizing a bail plan for a client who is released on his/her own recognizance simply because the surety would have to be secured and the appearances would have to be scheduled around his/her schedule.

We see more and more people ... like the homeless panhandler who gets arrested and charged criminally for aggressive panhandling. Then the police will release him and impose conditions not to go back into the market because that is where he is panhandling. Of course, he'll live in shelters, and probably has a drug problem, and can't stay away from the market. So he breaches and gets picked up and eventually comes in front of a JP. (DEF 010 Pg 8, 266)

Like onerous forms of release, multiple conditions were perceived to add steps to the formation of the bail plan.³⁴ In addition, it was felt that unrealistic bail conditions ultimately resulted in accused persons returning to bail court as a result of a breach, contributing to the backlog in this jurisdiction.

Justices of the Peace expect bail hearings to be long and drawn out

The vast majority of defence counsel expressed concerns that Justices of the Peace have come to expect extremely lengthy bail hearings in which a specific list of procedures must be followed. They claimed that they must abide by these expectations if they wish for their clients to be released. Many defence counsel argued that, as a result of the Justice of the Peace's expectations, bail hearings are too long and drawn out in this jurisdiction. For example, one defence counsel stated that:

The principal and fundamental problem in this jurisdiction is the length of time it takes to run a contested hearing. A contested hearing, for 95% of cases, should be able to be done

³³ While Justices of the Peace are responsible for imposing conditions on accused persons brought to bail court, police can also place conditions on those who are released from the police station. As such, this issue could also be discussed in terms of the role of the Police.

³⁴ For example, if an accused person charged with domestic assault is required to remain a certain distance away from his or her live-in partner, the defence counsel would have to arrange for different living accommodations.

in 40 minutes or less... The sad reality of [this] courthouse is it takes an hour and a half, probably on average, to run a bail hearing. It's preposterous. (DEF 008 Pg 14, Ln 521)

Another defence counsel compared the length of a bail hearing in this jurisdiction to that of a criminal trial, commenting that "our bail [hearings] are often connected like little mini-trials, and they often take hours, if not days. Sometimes they are as long as an actual criminal trial" (DEF 004 Pg 6, Ln 189).

Defence counsel explained that the expectations of the Justice of the Peace have increased as bail hearings have become more drawn out. One duty counsel commented that "the more we have these long protracted hearings, the more they're expected and the more the Justices of the Peaces want in order to release someone" (DEF 011 Pg 9, Ln 320). According to this individual, the practice of running long bail hearings appears to have become self-perpetuating in this jurisdiction.

Both the Crown and the Justice of the Peace take a passive attitude towards defence adjournment requests

Defence counsel explained that the general impression among bail court practitioners in this jurisdiction is that adjournments are necessary and unavoidable. The majority of them claimed that Crown attorneys rarely oppose adjournments and that Justices of the Peace almost always grant them. For example, one defence counsel noted that "the Crown usually doesn't contest an adjournment request" and that he'd "never had ... an adjournment request of [his] own denied [by the Justice of the Peace]" (DEF 012 Pg 5, Ln 153).

Several defence counsel believed that the general acceptance of defence adjournment requests is a reflection of both the Crown and the Justice of the Peace's desire to keep the accused person in custody. For example, one defence counsel commented that "it's pretty rare that the Crown would oppose a defence adjournment because the accused is in custody while the

adjournment's taking place, which is the end result that the Crown wants" (DEF 006 Pg 5, Ln 175). Since accused persons do not pose a risk to the community while they are in detention, it was felt that there is a limited incentive for either the Crown or the Justice of the Peace to oppose an adjournment request that will keep them in custody.

Further, some defence counsel felt that the passive attitude towards adjournments was rooted in an incentive for all parties in the courtroom to get through the daily docket. For example, one defence counsel mentioned that adjournments are not merely tolerated, but actually embraced in bail court:

Usually when something's set for a bail hearing and it's not proceeding, everyone's just so happy not to do the work, that they're just like "oh good." They're happy to put it over without really making too much of an issue ... they're just happy to get that person off of the list [so] they don't have to [deal with the appearance] ... A bail hearing is going to take a lot longer and require a lot more court time and staff than an adjournment to some other day. (DEF 011 Pg 5, Ln 158)

However, not all Justices of the Peace share this passive mentality when there is a request to adjourn a scheduled bail hearing. As one defence counsel explained, "if you show up for a scheduled bail hearing and you don't run it, Justices of the Peace understandably get annoyed with that because the time could have been used for another case" (DEF 003 Pg 4, Ln 136).

4.2.3. Administrative Explanations

Explanations based on administrative procedures relate to the informal manner in which cases are scheduled and court time is used during the bail process. Defence counsel argued that the way in which appearances are scheduled in bail court impedes the accused from getting a bail hearing in a reasonable amount of time. These problems are often exacerbated by an inadequate

use of available court time, which is thought to be insufficient and used poorly, making fewer slots available to deal with bail cases.

Bail hearings are very rarely run on the first day in which the accused is brought into court

The vast majority of defence counsel complained that they were unable to run a bail hearing on the first day in which the accused is brought into court. While this is not a mandated policy, it is definitely widely understood to be the norm among court practitioners in this region. Although some cases require extensive bail plans or the release of disclosure, many defence counsel prefer to deal with simple matters in one appearance. Unfortunately, there is a perception that this is almost impossible in this region if the Crown is contesting the release of the accused. One defence counsel commented that, as a result of this practice, contested releases almost always include at least one adjournment:

There's at least one adjournment because when they [accused persons] show up in bail court initially, unless the Crown's going to consent, you can't have a bail hearing on the same day ... There's normally at least one adjournment to schedule a bail hearing ... So, unless they're going to be released or the Justice of the Peace and the Crown are feeling very nice and want to spend their afternoon running it - which they're supposed to but don't always do - it'll at least get put over once for a bail hearing. (DEF 002 Pg 3, Ln 65)

Defence counsel claimed that this generalized expectation has not always been the norm in this region, nor is it common practice in other jurisdictions. This was noted by one defence counsel who has been practising in this region for over 20 years and also commonly practises in other districts:

It used to be that if you got arrested on Monday night, if you wanted you could have your bail hearing on Tuesday. But now, if you're arrested on Monday night you'll be brought

to bail court Tuesday; if the Crown is objecting to your release you'll have to schedule a bail hearing. You'll be lucky if you can get it the next day. Although the backlog has gotten better ... typically you're setting it for a couple of days away. In other jurisdictions you do get your bail hearing the same day. In many you're brought normally within the day. (DEF 003 Pg 2, Ln 56)

This defence counsel estimated that "... In the 90s you could get bail hearings pretty quickly, but sometime maybe in the early 2000s [you had to start scheduling bail hearings further away]" (DEF 003 Pg 7, Ln 221). In fact, one defence counsel questioned whether this practice was in line with the intention of Section 503 of the Criminal Code (1985):

The Criminal Code says you have to be brought in front of a Justice within 24 hours. I don't think the Criminal Code means you have to be brought in front of a Justice and then adjourned to have your bail hearing several days down the road. (DEF 006 Pg 8, Ln 314)

Scheduling practices in this region are mismanaged

While the occasional bail hearing is run in the 'first appearance bail court', the majority of them are scheduled in the 'show cause hearing' bail court. The daily calendar or schedule in the latter bail court is broken down into 'slots' and the number of slots that each bail hearing occupies is determined by the complexity of the case. Several defence counsel felt that the court overestimates how many slots each bail hearing requires. As a result, they explained that they must wait for those days in which multiples slots are available in the calendar to schedule their bail hearings. One defence counsel claimed that – since there is limited immediate availability in the daily calendar - this often resulted in him scheduling bail hearings further into the future than what he perceives to be necessary:

We have a slot system where they look at the matter and they say “the matter is X amount complicated” or “there’s X amount of witnesses” or “these are the allegations.” So, each slot is supposed to be 15 minutes or something... or half an hour. I don’t even know what the time is because it’s so amorphous. The Crown says “this bail hearing is going to take half a day to complete” and I say “no, no, it’s a simple bail hearing it should only take an hour to complete.” And that, of course, determines how soon you can get a bail hearing. A half day hearing, you might have to wait a week for it, whereas if you can get it done within an hour you might be able to get it tomorrow. (DEF 012 Pg 5, Ln 160)

Another defence counsel agreed that the Crown overestimated the number of slots required to run a bail hearing. She argued that bail hearings could be scheduled sooner if the court would allow them to occupy fewer slots:

The Crown writes on their file “three slots” as soon as there’s six charges or something, just randomly. So when the Crown says we need three slots, even though we’re saying it’s a two-slot bail hearing, the court’s going to err on the side of caution and say okay it’s got to be three which means it has to go into [the bail court with scheduled appearances]. (DEF 005 Pg 19, Ln 740)

Scheduled bail hearings do not get reached because the court is overbooked

Bail courts are overbooked with the assumption that many of the cases scheduled each day will be adjourned at the last minute. One defence counsel explained why overbooking is practised in this region:

We know from experience that not every scheduled bail hearing ends up going. Probably about half of them [proceed]. Whether they turn into consent releases, or if the defence isn’t ready to go because sureties haven’t shown up, or you reach a resolution with the

Crown and there is a plea. The theory was always supposed to be that you overbook the courts and some cases wouldn't go but you would have time to have a full court date. (DEF 010 Pg 4, Ln 121)

Although defence counsel said that there are some days in which the number of people who request adjournments and the number of people who are ready to proceed balance each other out, there are also days when there is not enough time for the court to hear all of the scheduled bail hearings. This could be because fewer people adjourned than was originally anticipated or because a matter took up a greater number of slots than was specified in the schedule. As one defence counsel stated, "if you set a bail hearing in two days you might be the last one on the list and you might not get reached" (DEF 003 Pg 3, Ln 93).

One defence counsel commented that this is particularly frustrating when a surety has come to court on behalf of the accused. He explained that "it's often we are ready, the surety is sitting there, and the court doesn't have time to hear it" (DEF 009 Pg 3, Ln 116). Defence counsel explained that there might be a considerable delay in rescheduling these bail hearings as they must accommodate the schedule of the bail court, their own schedule and the schedule of the surety.

Bail court ends too early in the day

A daily docket or list of accused persons to appear in bail court defines the workload of each bail court for the day. However, defence counsel stated that it is common for the Justice of the Peace to adjourn cases which are scheduled at the end of the docket because he or she does not feel as though there is enough time left in the day to deal with them. Several defence counsel argued that a greater number of cases could be dealt with on a daily basis if some Justices of the

Peace sat longer each day. For example, one defence counsel discussed his frustrations with the time at which bail court ends:

I've seen in the past outrageous refusals to take transfers [from the other bail court] at 3:00 in the afternoon. Where there's an extra bail court, where you're trying to run a bail hearing, you're not being reached. They say "we're transferring you to the other court." In the other court you go in and the Justice of Peace says "well, I'm not taking a contested bail hearing at this time in the afternoon." For those of us who work a normal day, 3:00 o'clock in the afternoon is not the end of the day, but in the rarefied era of the criminal courts and the bail courts, for some, not all, it's an annoyance to suggest that you would be running another bail hearing at that time. I've been actively stopped from running a bail hearing at 3:30 in the afternoon. (DEF 008 Pg 12, Ln 438)

A similar complaint was raised by another defence counsel when she commented on how accused persons are affected by the court ending so early:

People are brought over from the court or from the police station twice a day: once in the morning and once at lunch time. For the people who are brought over in the morning, you have a lot of time to speak to the Crown and try and resolve the case to try and get the person out on consent. You have time to get sureties down, you have time to do all of this because they've got the day to deal with it. Those people [who are] brought over at lunch, the Crown may say "I'd release them if there was a plan, or if John Howard would see them, or if you could get a surety." Sometimes I find that the court ends early so you don't have the time to organize your plan. So it has to go over to the next day to see John Howard or to get your surety there. (DEF 002 Pg 7, Ln 180)

A considerable amount of time is wasted bringing accused persons up from the cellblock

A few defence counsel commented that additional cases could be heard each day if there was less time wasted moving accused persons from the cellblock (in the basement of the courthouse) to the bail court. One defence counsel argued that the seemingly small amount of time that it takes to bring each accused person up from the basement is actually quite substantial when it is applied to every person heard that day:

The police are very cautious and they'll only bring one person up at a time. So you bring one person up, you wait five minutes, he adjourns, bring him downstairs, bring another person up ... You multiply that by the 20 or 30 people who have to go through [and] it just takes forever ... There's a lot of wasted time just waiting for prisoners to be brought up. I bet easily in a day you lose an hour to two hours just waiting for people. There's enough time for another bail hearing. (DEF 003 Pg 9, Ln 295)

Another defence counsel mentioned that this method was not practised in other jurisdictions. He compared this Eastern Ontario courthouse to another courthouse which he felt was much more efficient:

In [this jurisdiction] they bring them up one at a time ... In [another jurisdiction], they bring three or four or five people up at the same time. So you've got to deal with them all and then bring them down, which actually reduces the amount of time the court spends on these adjournments [and] increases the amount of time the court has to actually do the bail hearings. (DEF 012 Pg12, Ln 428)

Evidence is admitted inefficiently during bail hearings

Defence counsel argued that a considerable amount of evidence that is provided at bail hearings is irrelevant to the issue of bail (e.g., prior convictions that are irrelevant to the current

offence). However, it can be admitted at the bail hearing because the evidentiary rules are more relaxed than at trial. One defence counsel described the volume of information that is addressed, and commented that bail hearings were run very differently in other regions in Ontario:

In [another jurisdiction], they would read in the two paragraph synopsis and say “the complainant made allegation X.” In [this jurisdiction], they read in the three paragraph synopsis about the allegation and they’ll read in the entirety of the complainant’s written statement - which is the basis of what that three paragraph synopsis is prepared from; and they’ll read in the officer’s notes who took that statement; and then if the complainant made a videotaped statement, they’d read in that statement as well. And so there’s a duplicity of information that’s read in that elongates the process. (DEF 012 Pg 5, Ln 181)

One duty counsel suggested that even if the Justice of the Peace requires a large volume of information, there are more efficient ways for him or her to obtain it:

They could have sureties sign an affidavit, they could interview sureties at the intake office upstairs instead of having them testify, they could introduce a lot of the evidence that they needed simply by way of admitting it ... So, those sorts of things would definitely shorten the hearings themselves, which I think would shorten the entire delay, or the bail process. (DEF 011 Pg 10, Ln 347)

Defence counsel argued that the current manner in which evidence is admitted is inefficient and ultimately contributes to lengthy bail hearings. It was felt that the longer that each individual case takes to be resolved, the less time there is for other cases to run that day. Consequently, these latter cases will have to be adjourned and rescheduled.

CHAPTER IV: DISCUSSION

From the perspective of criminal defence counsel, there are numerous explanations for inefficient case processing in this Eastern Ontario bail court. The findings suggest that defence counsel contribute to lengthy case processing times through their use of both ‘productive’ and ‘unproductive’ adjournments. However, the findings also reveal that focusing exclusively on the role of defence counsel provides a very limited understanding of the reasons for inefficient case processing in bail court. Indeed, a host of structural, cultural, and administrative factors which are not directly related to the conduct of defence counsel are also perceived to work together to extend bail proceedings.

This study has important practical and theoretical implications for this Eastern Ontario bail court as well as the broader bail process in Ontario. Indeed, these findings have contributed to: (1) providing a more thorough understanding of the role that defence counsel play in contributing to bail inefficiency; (2) corroborating that the traditional factors associated with lengthy case processing time in the broader court process also contribute to inefficient case processing in bail court; (3) identifying potential avenues for intervention in this Eastern Ontario bail court.

4.1 The Role of Defence Counsel

This study sought to explore the hypothesis that defence counsel are the principal ‘villains’ in inefficient case processing in bail court. As a window into this question, this study examined those adjournments requested by defence counsel during the bail process. More specifically, the focus was on assessing whether these adjournments are primarily ‘productive’ or alternatively, ‘unproductive’ in nature. This dichotomous typology borrows from the

classification system generally used in the literature which is clearly rooted in the perspective of the court (Doob, 2005; Webster, 2007, 2009). From the interviews with defence counsel, a number of explanations were put forward to justify the use of adjournments by defence. These explanations are summarized in Table 4.1.

Table 4.1: Explanations for Defence Adjournments Provided by Defence Counsel

Nature of Adjournment	Explanations
‘Productive’	<ul style="list-style-type: none"> • The defence extends the bail process for the purpose of obtaining disclosure • The defence delays proceedings in order to put a bail plan in place
‘Unproductive’	<ul style="list-style-type: none"> • Defence counsel are unprepared to run bail hearings at the time at which they are scheduled • Video remand is used as a ‘holding tank’ while defence counsel decide how to proceed • Defence counsel moved their cases through the bail process at a slightly slower pace when the two-for-one sentencing convention was in use • Private defence counsel extend the bail process in order to maintain their legal practices • The case is adjourned periodically so the client can stay in the local detention centre
Ambiguous	<ul style="list-style-type: none"> • The defence adjourns a bail hearing for the purpose of advancing the case towards final disposition

A simple quantitative count of the number of ‘productive’ and ‘unproductive’ uses of adjournments would suggest that not all of them are ‘unproductive’ in nature. In fact, two of the justifications proposed by defence counsel for their recourse to adjournments reflected ‘productive’ uses. Further, one justification was ambiguous in nature as it could be argued to be

both ‘productive’ and ‘unproductive’ in nature. Having said this, it is equally notable that five ‘unproductive’ uses of adjournments were also identified. At least from a purely quantitative or nominal perspective, the vilification of defence counsel in this bail efficiency story may be partially justified.

However, one might also argue that the weight or strength of each of these uses of adjournments as ‘productive’ or ‘unproductive’ contributors of case processing efficiency (relative to each other) is not equivalent. Equally important, the single ambiguous contributor already suggests that the simple ‘productive’/‘unproductive’ categorization may not prove to be as useful as one might assume. Indeed, the ‘black and white’ nature of this classification as used in the literature may hide significant ambiguities. As such, a more in-depth analysis would also seem useful in order to shed additional light on the role of defence counsel in bail court (in)efficiency.

4.1.1 Types of Adjournments

‘Productive’ Adjournments

According to defence counsel, many of the adjournments requested by defence in bail court are ‘productive’ in nature. Most obviously, adjournments used to obtain disclosure or put a bail plan in place are requested for the purpose of advancing the case towards the completion of the bail process. Adjournments requested for ‘productive’ purposes would only be thought to threaten the efficiency of the bail process when the steps required are not carried out in a timely manner and additional (unnecessary) adjournments are required. For example, cases which are adjourned repetitively because defence counsel are putting off examining disclosure or completing a bail plan would be considered detrimental to efficient case processing. Having said

this, multiple requests for adjournments do not necessarily signal neglect or mismanagement on the part of defence.

Indeed, while it may seem obvious to fault defence counsel when repeated adjournments are requested in a case, these requests need to be looked at carefully. Specifically, a closer examination of repeated adjournments for cases in which disclosure is not available at the first appearance or for which a bail plan needs to be put in place may reveal that the amount of time that it takes to obtain disclosure or organize the bail plan is largely controlled by other parties such as the Crown – who releases disclosure – or individuals involved with the bail plan (e.g., the surety, representatives from the John Howard Society) who must agree to certain terms before a bail plan can be put in place. In other words, repeated delays may not be the fault of defence counsel, despite the fact that they are the ones who request the adjournments.

More broadly, delays associated with obtaining disclosure and putting a bail plan into place may be reflective of wider, more systemic problems within the bail process. Illustratively, former Minister of Justice Irwin Cotler recently deemed the speed at which disclosure is released to be problematic (Department of Justice, 2004). Similarly, expectations related to the breadth of accused persons' bail plans have increased as a result of an expanding list of obstacles to obtaining bail (Doob & Webster, 2011).

'Unproductive' Adjournments

There are also reasons for which defence counsel and their clients may extend the bail process that are not related to the advancement of the case. Indeed, defence counsel admitted to a number of situations in which they use adjournments for 'unproductive' purposes. Most obviously, defence counsel will use adjournments when they are unprepared to proceed with bail hearings. In these cases, the appearance is simply rescheduled and the case does not move closer

to a resolution. This practice adds unnecessary appearances to the bail process and ‘wastes’ slots that could be used to hold other bail hearings.³⁵

A variation of this same theme emerges in video remand court. Defence counsel (or duty counsel, in the absence of defence counsel) will place their clients in video remand while they decide how to proceed with their cases. Unlike cases in which accused persons appear in video remand while their lawyers work towards a resolution, defence counsel in these circumstances are simply putting off making decisions about the case. Obviously, case processing time can be positively impacted when video remand is used as a preparatory stage in the bail process. Indeed, the fact that the accused person is in video remand while defence counsel is preparing his/her bail plan eliminates the extra time required to transport the accused person to court and bring him/her up from the courthouse cellblocks. In fact, one defence counsel argued that “in part it is improving the efficiency [of the bail court] ... [Prior to the use of video remand], the Justices of the Peace in the bail court were spending all day adjourning people and maybe doing one bail hearing” (DEF 010 Pg 10, Ln 330).

In contrast, the use of video remand as a delay tactic is ‘unproductive’ on several different levels. Most obviously, defence counsel uses adjournments to simply ‘buy time’ to decide how to proceed. Precisely because the accused person is ‘out of sight’, defence counsel argued that it is often easier to obtain adjournments. Indeed, it was felt that no harm is being done as there are no additional costs of transporting the accused to court simply to be adjourned. However, video remand can also be detrimental to case processing efficiency because of the inherent danger that the accused person becomes lost in the system.

³⁵ It should be noted that on some days the courts will be overbooked, allowing for the substitution of a collapsed bail hearing by one which is ready to proceed but which had not been scheduled. However, this is not always possible as the structure of the docket changes from day to day.

Specifically, the very format of video remand encourages the removal of accused persons from the eyes of the court and reduces their access to defence counsel who are necessary in resolving the question of bail. If accused persons are unable to communicate with their lawyers or the nature of this communication is strained, it becomes difficult to make decisions about how to proceed with the bail process. In fact, it would appear in many cases that defence counsel do not even appear in video remand court but rather have duty counsel handle cases for them. As such, it is not surprising that cases in video remand are often adjourned multiples times before a determination of bail is made.

Finally, the admission that defence counsel worked at a slightly slower pace when their clients were accumulating two-for-one credit indicates that the former sentencing convention had some minor influence over the efficiency with which cases were processed through the bail courts. The findings suggest that defence counsel were using the convention as a ‘security blanket’ prior to the coming into force of Bill C-25. More specifically, the fact that their clients were earning credit to account for lost remission provided defence counsel with reassurance that their client would not be at a disadvantage at sentencing as a result of slight delays in getting to their cases in bail court. Consequently, they did not feel as anxious or pressured to move the case forward as they do now that the convention has been eliminated. While – to some extent - this behaviour is understandable, it still suggests some unproductive behaviour by slowing the determination of bail.

Although defence counsel admitted that the two-for-one sentencing convention had some impact over the pace at which they moved their cases through the bail process, they were adamant that its influence was much less pronounced than what the government speculated (Canada, 2009b; Library of Parliament, 2009). Indeed, there was limited support for the

conjecture that defence counsel were intentionally drawing out the bail process for the purpose of accumulating two-for-one credit. While there may have been some lawyers who used this strategy, defence counsel unanimously agreed that this was a limited problem based on rare cases of abuse.

In fact, it would seem that - in accordance with Weinrath (2009) - accused persons were more concerned with having their cases adjudicated in a timely manner than accumulating credit. Further, they were thought unlikely to be willing to remain in custody given the onerous conditions in the local detention centre. This argument is in line with a wealth of research that has condemned the harsh conditions of custody in Canadian remand facilities (DOJ, 2007; Manns, 2005; Ombudsman Saskatchewan, 2002; Trotter, 1999).

Further, the findings suggest that in the rare cases in which defence counsel would take advantage of the two-for-one legislation to accumulate pre-trial credit at sentencing, it would occur only following a formal detention as the outcome of bail and while awaiting the outcome of the case in custody. Prior to a formal detention, accused persons would be much less likely to take advantage of the two-for-one credit precisely because the possibility still exists that the accused person could be released on bail. This interpretation would also appear to shed light on the lack of empirical evidence corroborating other conjectures found in the literature (see, for example, Webster 2007, 2009; Webster et al., 2009) which proposed reasons as to why defence counsel might want to extend bail court proceedings in the benefits of keeping their clients in custody (e.g., to obtain a better bargaining position with the Crown, for social welfare reasons).

In sum, one can easily argue that these explanations for adjournments are ‘unproductive’ in nature and constitute failings on the part of defence counsel in promoting efficient case processing in bail court. In contrast, several other justifications proposed by defence counsel and

labelled as ‘unproductive’ in this study emerged as considerably less straightforward or clear-cut. While ‘unproductive’ in the strict sense of moving the case toward resolution, these additional explanations may be more aptly labelled as ‘unproductive, but reasonable’. In this sense, they do not necessarily implicate defence counsel as the ‘villains’ in lengthy case processing in bail court.

Perhaps the most obvious case in point resides in the explanation provided by defence counsel for their use of adjournments rooted in the maintenance of their legal practices. Defence counsel will occasionally adjourn bail proceedings until they are confident that they will receive payment for their services or to accommodate their commitments to other clients. This use of adjournments is arguably difficult to avoid and does not reflect either neglect on the part of defence counsel or any obvious strategic or manipulative use of the bail court process.

Indeed, this use of ‘unproductive’ (but reasonable or justifiable) adjournments is most likely a reflection of the nature of defence counsel’s profession. Defence counsel work in the private sector, and their income is often dependent on hourly wages supplied by clients. As a result, their use of time and their relationships with their clients may dictate the success of their legal practice. Working on a bail case without getting paid or failing to honour commitments to important clients could be detrimental to a defence counsel’s income. Consequently, when the efficiency of the bail process comes into conflict with the maintenance of their practice, it is perhaps not surprising (or arguably unethical) that their professional interests tend to take priority in some cases. Indeed, one is faced with conflicting values or priorities, requiring the balancing of various competing interests.

A similar argument might be made for the explanation provided by defence counsel for their ‘unproductive’ use of adjournments as it relates to the interests of their clients.

Corroborating previous research (Heath, 2010), defence counsel in this study also highlighted the incentive for accused persons to periodically schedule court appearances (usually in video remand court) and subsequently adjourn them in order to remain in the local detention centre. It could easily be argued that by agreeing to this practice, defence counsel are simply performing their role as the defender of the best interests of their clients. Not only can accused persons who remain in the local detention centre receive visits from their friends and family (maintaining social relations), they can also communicate with their lawyers more effectively (better preparing their legal cases).

Similar to defence counsel's professional incentives, competing interests appear to also be at the root of this use of adjournments. On one hand, defence counsel are expected to defend the interests of their clients. On the other hand, they are also one of the principal players in the criminal court process and, as such, are also expected to uphold the legal principles guiding the bail process – one of which is efficiency (Trotter, 1999). While one cannot minimize the central importance of case processing efficiency in ensuring (the perception of) justice, the primary responsibility for upholding this principle may not fall – at least to the same degree as other state representatives – on defence counsel.

According to the Law Society of Upper Canada's *Rules of Professional Conduct* (2000), lawyers acting as advocates represent their clients while lawyers acting as prosecutors act for the public and the administration of justice. Although both parties are responsible for treating the court system with fairness and respect, defence counsel and Crowns understandably have different priorities in the bail process. Indeed, the role of defending the wider interests of the criminal court system may arguably fall much heavier on the Crown and the Justice of the Peace than on defence counsel, whose primary responsibility is to their clients.

Ambiguous Adjournments

There is a final explanation for defence adjournments which does not fall neatly into the traditional ‘productive’/‘unproductive’ classification system. This ambiguous explanation emerges in cases in which adjournments are requested for the purpose of circumventing a bail hearing and moving the case towards final disposition (i.e. the client consents to detention or pleads, the Crown consents to release the accused). In a vernacular sense, this use of adjournments would appear to be a means of ‘forcing the hand’ of either the accused or the Crown.

Specifically, it would appear that the initial request for a bail hearing (and scheduled court appearance) acts as an important catalyst, encouraging the various ‘players’ in the bail court process to better assess their position and make decisions. In the case of the accused, the actual scheduling of the bail hearing may encourage him/her to better assess his/her position and, by extension, his/her likelihood of success. In some cases, this more thoughtful examination of his/her case leads to his/her consent to detention or decision to plead. In a similar fashion, an upcoming bail hearing may also promote a more detailed examination of the case by the Crown and consideration of potential alternative avenues of resolution (e.g., consent release under specific conditions).

On the one hand, this strategy of managing specific players involved in the bail process might be labelled as ‘productive’ in nature. Indeed, the adjournment of the actual bail hearing (precisely because an alternative resolution was found) results in a final determination of bail. Although this approach may add an extra appearance, ultimately the final outcome avoids a (time-consuming) bail hearing and represents the completion of the bail process which may otherwise have been extended for other reasons (e.g., to prepare a bail plan).

On the other hand, one could also argue that this strategy might be legitimately considered ‘unproductive’ in nature. Most obviously, it adds an additional appearance in bail court which might have been avoided. Further, it ‘wastes’ a possible bail hearing which could have been used by another case which was ready to proceed but which was unable because all of the slots for that day had already been taken up in the ‘show cause’ court. While it may be necessary in some cases to ‘force the hand’ of one of the principal players in the bail process in order to advance the case toward final determination of bail, one could argue that this practice would be better accomplished without recourse to adjournments.

4.1.2 Theoretical Implications

The findings of this study suggest that there are multiple reasons for which defence counsel request adjournments in bail court. However, the vast majority of these explanations are not in line with the explanations proposed by academics and government officials (Library of Parliament, 2009; Canada, 2009b) which argue that defence adjournments are typically requested for strategic or manipulative reasons.

Most notably, there is limited evidence to support the conjecture offered by the government (Library of Parliament, 2009; Canada, 2009b) and the media (MacCharles & Tyler, 2009) that - prior to the coming into force of Bill C-25 - defence adjournments were primarily rooted in strategic incentives related to the two-for-one sentencing convention. Rather, this study showed that defence counsel very rarely request adjournments in bail court with the intention of accumulating credit at sentencing. This finding, in particular, demonstrates the importance of regarding government and media accusations with a certain degree of scepticism.

Further, defence adjournments are not simply ‘unproductive’ in nature. In fact, several of the explanations for defence adjournments are ‘productive’ and, as such, advance the case

towards the completion of the bail process. This demonstrates the need to move beyond a superficial examination of this issue in which the party who requests the greatest number of adjournments is simply assumed to be the primary contributor to bail inefficiency. A more thorough assessment of the reasons behind these adjournments has revealed that although defence counsel request the vast majority of adjournments in bail court, these adjournments do not necessarily compromise the efficiency of the bail process.

Finally, although five ‘unproductive’ uses of adjournments were noted, only three of them might be categorized as unambiguously damning in terms of the role which defence counsel plays in the (in)efficiency of the bail process. This is especially the case when defence counsel request adjournments because they are unprepared to run a bail hearing or simply leave their clients in video remand to delay making decisions about how to proceed. There was also a third explanation for the ‘unproductive’ use of adjournments associated with the ‘security blanket’ quality of the former two-for-one sentencing convention. It is notable, however, that this particular use of adjournments was argued to have a relatively minor impact on case processing times. Nonetheless, all three of these explanations demonstrate that there is clearly reason to fault defence counsel for their use of adjournments.

However, the other ‘unproductive’ explanations are not as straightforward. For example, the two ‘unproductive’ uses of adjournments related to business incentives and keeping clients in the local detention centre can be at least partially justified as unavoidable or – at a minimum – understandable. While detrimental to case processing efficiency, they (arguably) serve other important purposes.

In sum, the findings of this study provide limited support for explanations which implicate defence counsel as the ‘villain’ in inefficient case processing in bail court. It appears

that these explanations simplify a complex problem and overlook the context underlying many of the adjournments requested by defence during the bail process. Nonetheless, it is perhaps unsurprising that defence counsel – as one group of individuals involved in the bail process - have been targeted in attempts to explain bail inefficiency. Borrowing from Douglas (1992), this vilification process may simply reflect the fact that society has become caught up in a ‘blame system.’ In this system, someone must be found culpable for every problem. Defence counsel would be a likely group of individuals to fall victim to this mentality given that members of the public already appear to distrust lawyers (Galanter, 1998). Further, this ‘player’ in the bail court process also requests the vast majority of all adjournments which – at least on the surface – increases the perception of their culpability.

Attempts to hold defence lawyers accountable for lengthy case processing times in bail court may be rooted in this tendency to find someone at fault for every problem. This practice provides individuals with someone to blame and simplifies the problem of bail inefficiency in the eyes of the public. In fact, Weinrath (2009) has speculated that by implicating defence counsel and their clients in the abuse of the two-for-one credit, the government has successfully distracted attention from the broader problems with the efficiency of the court process and shifted the blame to parties that are outside of their control. This strategy obfuscates the responsibility of the state to offer a speedy resolution to accused persons’ cases. Indeed, it appears as though defence counsel may be – to a large extent - the ‘scapegoats’ in government attempts to explain lengthy case processing.

4.1.3 Methodological Implications

The findings also reveal that the ‘productive’/‘unproductive’ dichotomy used in previous literature (see, for example, Doob, 2005; Webster, 2007, 2009) may not be the most useful way

to categorize the reasons for which defence counsel request adjournments. Indeed, using this ‘black and white’ classification for all types of defence adjournments fails to recognize several types which fall into less rigid or ‘grey’ areas. First, some explanations for defence adjournments are ambiguous since they could be argued to be either ‘productive’ or ‘unproductive’ in nature. For example, adjournments which are intended to collapse bail hearings in favour of completing the bail process in other ways ‘waste’ an adjournment in bail court but still work towards the resolution of the case.

Second, although some adjournments are categorized as ‘unproductive’ because they do not advance the case towards a resolution, their use may still be considered reasonable as they (arguably) serve other purposes which are not related to the efficiency of the bail court. For example, in the case of adjournments requested to keep the accused person in a local detention centre, defence counsel may simply be prioritizing the interests of their clients over the efficiency of the bail court.

The inability of the ‘productive’/‘unproductive’ classification system to capture these more nuanced types of adjournments demonstrates the need to look beneath the surface when examining the explanations for defence adjournment requests. This is because what might appear ‘productive’ or, for that matter, ‘unproductive’ at first glance may not be quite as clear as one might initially think. Illustratively, frequent recourse to adjournments is not necessarily synonymous with unproductivity. Indeed, adjournments used in order to obtain disclosure constitute a necessary and valuable part of the criminal process and may require a series of adjournments to obtain and carefully examine.

Further, this limitation also highlights the need to assess the perspective from which these explanations are being evaluated. A defence adjournment that might seem ‘productive’ to one

party in bail court may appear ‘unproductive’ to another party. Indeed, one is reminded that case processing efficiency – while a fundamental value in criminal court – is not the only one which needs to be upheld. Rather, criminal law is replete with examples of diverse values which conflict with each other in particular situations. Certainly in cases in which adjournments are being used to ensure a successful business or maintain a client in a local detention centre, the ‘best interests’ of the accused or defence counsel may clash with those of the court more broadly. From the latter perspective, adjournments for these purposes are unambiguously ‘unproductive’. From the former perspective, they constitute unavoidable or justified practices in the defence of other interests.

In sum, an assessment of ‘productive’ and ‘unproductive’ uses of adjournments in bail court would appear to be more complex than a simple glance at the bail process might suggest. Everything is not always as it appears; not only does context matter, but so does one’s perspective when assessing the extent to which adjournments may be considered ‘productive’ or ‘unproductive’.

4.2 Other Contributing Factors

The numerous additional explanations for lengthy case processing times in bail court which are not directly related to the role of defence counsel suggest that this group of court practitioners are being held accountable for a phenomenon that – in reality – has a diverse range of contributing factors. The findings indicate that several of the traditional factors associated with court efficiency in the broader court process also contribute to inefficient case processing in bail court. Further, there are additional factors that impact case processing times which are unique to the bail process.

4.2.1 Structural Factors

Explanations for bail inefficiency proposed by defence counsel related to structural factors - such as the nature and number of cases entering the court and the resources available to accommodate these cases - are in line with many of the formal explanations that have been provided for inefficiency in the broader court process. For instance, the findings suggest that serious cases, complicated cases, and cases involving certain offences (i.e. those involving breaches and domestic violence) take more time and appearances to complete the bail process. This is in accordance with some of the broader court efficiency literature which has shown that high maximum penalties and numerous charges are associated with longer case processing times (Doob, 2005; Luskin & Luskin, 1986; Webster & Doob, 2004). Further, Klemm (1986) found that cases involving certain types of offences took longer to process in specific courthouses.³⁶

The primary reason that these cases are thought to take more time and appearances to complete the bail process is because Crown attorneys are perceived to be reluctant to release accused persons. Consequently, defence counsel must complete additional steps before a determination of bail can be made. For example, unlike with more minor cases, they are likely to review disclosure, put an extensive bail plan in place, and have conferences with clients. That is to say that these cases take longer to move through the bail process because they involve additional (informal) procedures.

A similar trend can be observed in the broader court process. Previous research has shown that cases that involve additional (formal) procedures, such as preliminary inquiries and trials, take longer to move through the court process than cases that do not involve these procedures (Klemm, 1986; Luskin & Luskin, 1986; Neubauer & Ryan, 1982). Despite the fact

³⁶ Notably though, Klemm (1986) found no pattern of variation between courts in different jurisdictions. As such, it appears that delays associated with offence type are rooted in responses to certain offences within specific courthouses, suggesting explanations rooted largely in local culture.

that these are formal procedures related to cases processing, rather than informal procedures associated with case preparation, the same principle applies. Indeed, if the nature of a case is such that additional procedures – of either a formal or informal nature – are required to reach a resolution, the amount of time/appearances that it will take to complete the case will naturally be extended.

An additional structural factor that was reported to contribute to lengthy case processing relates to the balance of case volume to available resources in bail court. More specifically, there was thought to be too many cases entering the court and not enough resources to accommodate them (i.e. backlog). Some defence counsel attributed this problem to a deficiency in available resources. In accordance with several studies that have investigated efficiency in the broader court process (Church, 1978a; Mahoney, 1981), defence counsel recommended that additional courtrooms, Judges/Justices of the Peace and court staff be added to alleviate the problem.

Concerns surrounding case volume, however, took on a different form when they were applied to bail court. Specifically, the source of this problem is perceived differently. In the broader court process, the volume of cases entering the court is generally considered to be outside of the control of criminal justice practitioners and largely a result of the level of crime in the surrounding jurisdiction (see, for example, Church, 1978a; Mahoney, 1981). Interestingly, the perception of case volume as a formal explanation for court inefficiency - which is to be mediated through the distribution of court resources - persists despite the fact that police can control this factor through the extent to which they lay charges.

In comparison, the findings of this study suggest that defence counsel primarily attribute increases in case volume in the bail courts to the conduct of police. In the case of bail court, police not only decide whether they will lay a charge (causing individuals to appear in court

generally). Rather, they also decide whether they will detain these accused persons following an arrest (causing them to begin the court process by way of the bail process). Defence counsel felt that police are contributing to bail inefficiency by causing increasing numbers of accused persons to enter court by way of the bail process and to the complexity of the cases entering the court through the excessive laying of breach charges.

As such, it was felt that problems surrounding backlog could be targeted not only with an influx of resources, but with changes to police charging and release practices. Indeed, it would seem that case volume – which is traditionally regarded as a formal explanation for court inefficiency – contains a much more informal element when it is applied to bail court. This is presumably a result of the increased level of discretion on the part of police, whose attitudes and informal practices are thought to dictate the number of cases entering the bail courts.

Although the source of court backlog was perceived differently in the broader court process than it was in the bail process, there was agreement on the impact of this problem on court efficiency. More specifically, resource constraints combined with an increased volume of cases is thought to ‘clog’ the courts and create difficulties in scheduling cases. In fact, the imbalance of court resources to caseload was the most commonly cited cause of delayed case processing in several of the broader court efficiency studies (see, for example, Church 1978a; Mahoney, 1981).

Despite this widely shared perception though, research consistently shows that the size of a court’s caseload does not dictate the amount of time that it takes for its cases to reach final disposition (Church et al., 1978a, 1978b; Doob, 2005; Klemm, 1986; Luskin & Luskin, 1986; Neubauer & Ryan, 1982). However, this is not to say that caseload has no bearing over the efficiency with which cases moves through the court process. In fact, previous research

maintains that formal factors - such as caseload - can have an effect on court operation. However, these factors simply operate through informal relationships, norms, and practices of court practitioners that are considerably more important to case processing efficiency (Church, 1982).

Specifically, both the number of procedures required to complete the bail process and the volume of cases entering the bail courts is thought to be dependent on police and Crown responses to specific types of offences. The findings suggest that court practitioners in this Eastern Ontario jurisdiction respond very cautiously to cases involving domestic violence and breaches regardless of the circumstances surrounding each individual case. Specifically, accused persons charged with these offences are frequently detained by police and rarely released by Crown attorneys without a bail hearing. Consequently, an influx in these types of cases contributes to the caseload of the bail court and requires additional effort on the part of defence counsel, increasing the number of appearances required to resolve the question of bail.

The cautious treatment of cases involving domestic violence and breaches in this Eastern Ontario jurisdiction may be reflective of institutional responses towards these offences in recent years. For instance, there appears to be a widespread trend among police in Ontario to detain accused persons charged with administration of justice offences (i.e. failure to appear, failure to comply with a bail condition, breach of probation). Indeed, more than half of the cases entering the bail court in Ontario involve an administration of justice charge compared to only a quarter in which the accused is released by the police on bail (Webster, et al., 2009). Further, efforts to combat domestic violence were ramped up in most provinces and territories (including Ontario) in the early 2000s after Federal, Provincial, and Territorial Ministers jointly produced a document condemning the criminal justice response to this problem (Johnson, 2006).

It is important to note that there are degrees of severity associated with cases involving domestic violence and breaches. Consequently, applying uniform responses to all of these cases fails to take their individual differences into account and neglects to ensure that the criminal justice response is proportionate to the offence. This is a reality considered by lawyers' groups which have argued that institutional responses to domestic violence tend to reduce the complexity of this crime to a "one-fits-all" philosophy, indiscriminately grouping small-time and serious offenders in the same category (Pigg, 2009; Makin, 2009). Indeed, it would seem that by taking an indiscriminately cautious response to minor cases and serious cases simply because they fall under the same category of offences, police and Crowns not only risk jeopardizing the principle of proportionality but also contribute to lengthy case processing in bail court.

4.2.2 Cultural Factors

As is consistent with much of the broader court efficiency literature (see, for example, Church et al., 1978a, 1978b; Doob, 2005), informal factors related to the culture of the court were considered to be more important to case processing than formal, structural factors. This finding suggests that the relationship between court culture and lengthy case processing extends from the court process generally, to the bail process specifically. It would seem that - like many other bail courts in Ontario (Myers, 2009; Webster et al., 2009) - this Eastern Ontario bail court is characterized by a culture of risk aversion which contributes to increased elapsed time and number of appearances required to reach a determination of bail.

This risk aversive culture is not exclusive to the bail system, but is rather a product of what Beck (1992) has named the 'risk society.' According to Giddens (1999), our society is "increasingly preoccupied with the future (and also with safety)" (p. 3). This society anticipates problems that are threatening but have not yet happened. The elusive yet menacing nature of risk

creates uncertainty, anxiety, and fear which we attempt to reduce through “risk management.” This involves trying to control the future, or more specifically, unwanted outcomes (Beck, 1992).

This phenomenon seems to have also permeated the bail process in this Eastern Ontario bail court. Specifically, criminal justice officials have attempted to attenuate the potential consequences of releasing an offender on bail (particularly relative to the commission of (serious) crimes while in the community) by making release procedures increasingly stringent. While government officials have been quick to blame lengthy case processing on defence counsel and their clients (Canada, 2009b; Library of Parliament, 2009), these findings suggest that Crown attorneys and Justices of the Peace also contribute to lengthy case processing through risk aversive behaviour.³⁷

This risk aversive mentality appears to be prominent with the Crown attorneys in this Eastern Ontario jurisdiction. Specifically, Crown attorneys were perceived to contribute to bail inefficiency by excessively contesting the release of accused persons. In fact, ten out of the twelve defence counsel provided this as an explanation for bail inefficiency. This reluctance on the part of the Crown means that defence counsel must take additional – often time consuming – steps to strengthen their clients’ position before the Justice of the Peace. These steps include (but are not limited to) carefully evaluating the disclosure, arranging an extensive bail plan, finding an acceptable surety, and running a lengthy bail hearing. This pattern of behaviour was deemed to be especially frustrating given that - in many instances - similar cases in the past were granted bail without the need for these additional steps. As a result, many defence counsel felt that the

³⁷ It is important to note, however, that although the perception that Crown attorneys and Justices of the Peace have become more risk aversive in recent years is consistent with previous research (see, for example, Myers, 2009; Webster et al., 2009), explanations for this behaviour remain unclear. Since this study focuses exclusively on the perception of defence counsel, it was not possible to obtain information from other court practitioners which might provide additional context or justification for this risk aversive behaviour. As a result, additional research should be conducted before interventions are taken in relation to this issue.

efficiency of the bail process could be improved if Crown attorneys made a less cautious assessment of bail cases at the outset of the bail process.

This pattern of behaviour is perceived to be rooted in an attempt to avoid the potential consequences of releasing an accused person into the community. This is consistent with the research by Webster and her colleagues (2009) and Myers (2009) which suggests that decisions are continuously passed along to someone else in an attempt to absolve oneself of responsibility in the case that the accused person reoffends while he/she is on bail. For instance, the Crown might contest the release of an accused person, deflecting any blame onto the Justice of the Peace.

The Justices of the Peace in this Eastern Ontario jurisdiction were also perceived to exhibit a risk aversive mentality. These court practitioners were thought to impose onerous release plans on accused persons and to favour multiple bail conditions. For instance, accused persons almost always require a surety in order to be released in this jurisdiction. This demands additional effort on the part of defence counsel, contributing to increased case processing time. Further, the numerous conditions placed on accused persons is thought to be unrealistic to the point that they cannot easily adhere to them (e.g. staying out of the neighbourhood in which they grew up, having a daily curfew of 6:00 PM for the six months in which they await trial).

As a result, it was felt that many people return to bail court on breach charges, further contributing to the caseload. This conduct appears to be consistent with that of Justices of the Peace elsewhere in Ontario. Indeed, previous research has shown that accused persons who are released on bail in this province almost always require sureties and frequently have numerous conditions attached to their release (Doob & Webster, 2011; Myers, 2009).

Similar to Crown attorneys, it appears that Justices of the Peace have developed these tendencies as a result of an increasing aversion to risk. However, since the Justice of the Peace is the final person to make a decision regarding bail, he/she is unable to ‘pass the buck’ and deflect responsibility for the bail decision to another party. Rather, he/she will impose onerous forms of release and as many conditions as possible. It would seem likely that these steps are taken to ensure that if the accused person reoffends, the Justice of the Peace can argue that he/she took every available precaution to prevent it from happening.

In addition to their strict release practices, Justices of the Peace were also thought to permit (if not encourage) lengthy bail hearings. The findings reveal that they are cautious about limiting questioning and submissions, resulting in bail hearings that are commonly referred to as “mini-trials” because they are so drawn out. Similar to their response to releasing accused persons, this practice is arguably rooted in an aversion to risk. Justices of the Peace are reluctant to limit Crown attorney and defence counsel’s ability to complete procedures such as cross-examining sureties and introducing evidence in order to ensure that every precaution has been taken before an offender is released into the community. Further, the multiple opportunities for the Crown to justify the detention of the accused may also allow the deflection (or, at least, the mutual sharing) of ‘blame’ by both the Crown and the Justice of the Peace in the case that the accused person commits a crime while in the community on bail. In fact, some defence counsel felt that it has come to be expected that Justices of the Peace will require unnecessary procedures before agreeing to release accused persons on bail.

It is perhaps surprising that the findings of this study did not reveal that the risk averse attitude exhibited by Justices of the Peace extend to their decisions regarding the question of bail. Although there were some mixed opinions on this issue, defence counsel were generally

unconcerned about the number of accused persons whom Justices of the Peace detain at the completion of the bail process. In fact, many defence counsel felt that Justices of the Peace were relatively fair when making the ultimate decision as to whether the accused person would be released or detained. The disjuncture between their typically cautious attitude and their willingness to release accused persons on bail might indicate that Justices of the Peace in this Eastern Ontario jurisdiction use some restraint in their decision-making. However, they still appear to require a considerable amount of reassurance (i.e. onerous forms of release, numerous bail conditions, thorough bail hearings) before they will exercise this restraint.

Despite this exception, the risk aversive mentality that is exhibited by both Crown attorneys and Justices of the Peace can be shown to form the basis of much of their conduct in bail court. For instance, both of these parties show little to no resistance to defence adjournment requests. In fact, the findings suggest that the ‘culture of adjournments’ that has permeated the Ontario bail process (Webster 2007, 2009; Webster et al., 2009) is also embedded in this Eastern Ontario bail court. Although adjournments might seem harmless to most court practitioners, the broader court efficiency literature has shown that a passive attitude towards adjournments can be detrimental to the efficiency with which cases move through the court process (Church, 1982; Leverick & Duff, 2002). More specifically, court cultures in which adjournments are rarely opposed and seldom questioned have been shown to have high rates of adjournments and longer case processing times (Heath, 2010; Leverick & Duff, 2002).

Several defence counsel noted that Crown attorneys and Justices of the Peace are unlikely to contest adjournments in this Eastern Ontario jurisdiction because accused persons are in custody as long as these adjournments persist, unable to reoffend in the community. This explanation is in accordance with Webster (2009), who speculated that recourse to adjournments

is rooted in the vested interests of the principal stakeholders involved in the bail process. She argues that it is unlikely that adjournments would be contested by the Crown or the Justice of the Peace because the institutional risk associated with releasing the accused into the community is eliminated as long as the accused person remains in custody. However, this is likely only a partial explanation for the passive attitude towards adjournments in this bail court. Indeed, Webster and her colleagues (2009) have shown that bail practitioners are also quick to grant adjournments when their primary focus is getting through the day's docket. This attitude might result in an efficient day in court, but it might not contribute to the overall efficiency of the bail process.

Further, the broader court efficiency literature indicates that there are additional (cultural) reasons for which court practitioners fail to oppose adjournments that could also apply to the bail courts. First, Church (1982) has noted that Crown attorneys may neglect to oppose adjournments in order to maintain a "professional courtesy" with defence counsel. It is assumed that they will return the favour the next time that the Crown is in need of an adjournment. Second, Judges may consistently grant adjournments when they have a passive attitude towards the court process generally. Research has shown that judges who demonstrate poor leadership abilities and allow lawyers to set the pace of litigation often preside over courts with high rates of adjournments (Messick, 1999; Ostrom et al., 2005; Sipes et. al, 1982).

More broadly, Myers (2009) has argued that this mentality is detrimental to the fairness of the bail process because it is inconsistent with Canadian bail legislation. The Bail Reform Act (1972) provides a guiding philosophy that encourages the release of the accused into the community pending trial unless one of the Criminal Code Section 515(10) criteria is fulfilled. Further, the Criminal Code clearly specifies that accused persons are to be released in the least

onerous manner as possible. A ‘ladder approach’ is to be undertaken in which the Crown demonstrates why each form of release is inappropriate before he/she moves onto a stricter level (Trotter, 1999).

Despite these guidelines, Crown attorneys appear to be contesting the release of accused persons to a considerable extent and Justices of the Peace almost always require accused persons to have extensive bail plans which include sureties. A release order involving a recognizance with a surety is the second most onerous form of release (following a recognizance with a surety and a deposit), yet it seems to be the norm rather than the exception. Indeed, when this legislation is taken into account, it would seem that the intention of the bail legislation is arguably not being fulfilled in this Eastern Ontario jurisdiction.

4.2.3 Administrative Factors

In addition to contributing to lengthy case processing through their aversion to risk, court practitioners also impact bail efficiency through their use of administrative procedures. More specifically, scheduling practices and the use of court time were thought to have a significant impact on the pace with which cases move through the bail process in this Eastern Ontario bail court. However, unlike many of the traditional predictive factors which have been raised in the broader court efficiency literature (e.g. type of calendaring systems, presence of case monitoring), the explanatory factors related to administrative procedures which emerge in this bail court are almost entirely informal – rather than formal – in nature.

One of the most widely criticized scheduling conventions in this Eastern Ontario jurisdiction is the informal practice of scheduling bail hearings (imposing a second court appearance) as opposed to running them on the first appearance. Although this expectation is not rooted in any formal policy, defence counsel considered it to be standard practice in this

jurisdiction. As a result, any case in which the Crown is contesting the release of the accused person cannot be resolved on the first day in which he/she is brought into court and must occupy at least two appearances in bail court.

Further, there was some concern that this practice is not in line with the intention of the Criminal Code. Specifically, Section 503 stipulates that accused persons are to be brought before a Justice within 24 hours of being arrested (or as soon as possible). As one defence counsel noted, this would seem to suggest that one's determination of bail should be made at the first appearance if one is able to proceed, *not* that one must wait several days for a bail hearing. This argument seems compelling when one considers that Section 503 appears to imply that accused persons should not be detained without justification for an unreasonable amount of time. While it is stipulated that the wait can go beyond 24 hours under some circumstances, it would seem that this time period should be the norm. Indeed, the fact that it is the norm to schedule bail hearings in this Eastern Ontario jurisdiction and, by extension, delay a bail hearing which could be run immediately, might seem to be incongruent with the intention of the Criminal Code.

The practice of running bail hearings only after the first appearance is further complicated by several additional scheduling issues in this jurisdiction. First, defence counsel argued that the court frequently overestimates the amount of time required to run bail hearings, resulting in appearances being set further into the future even when there are enough slots available in the daily calendar of a closer date to accommodate them. This practice is thought to increase the amount of time required for cases to move through the bail process. This concern is in line with the broader court efficiency literature which has found that mismanaged schedules can be detrimental to court efficiency. This research has emphasized the importance of acquiring accurate estimates of how long certain cases will take to be processed (Mahoney et al., 1981).

Second, the practice of overbooking the calendar in this jurisdiction is thought to result in frequent adjournments – and additional appearances - since scheduled bail hearings will often not be reached and must be put over to another day. This conforms to the traditional explanations for court inefficiency which suggest that overbooking the court calendar is not an effective means of promoting court efficiency (Sipes et al., 1982). Indeed, these scheduling problems appear to mirror the traditional predictors of court inefficiency faced in the broader court process.

Bail inefficiency rooted in scheduling practices is undoubtedly exacerbated by poor use of court time in this Eastern Ontario jurisdiction. In accordance with the broader court efficiency literature (Mahoney et. al, 1981), these findings suggest that the amount of time that Justices of the Peace spend sitting in court has a significant impact on case processing times. Defence counsel claimed that it is not uncommon for court to end as early as 2:30 or 3:00 in the afternoon in this jurisdiction. This is especially problematic for accused persons transported to court in the afternoon, as they have a limited amount of time to discuss their cases with their lawyers and prepare for their court appearance.

Further, there were concerns that a considerable amount of time was wasted each day bringing accused persons up from the cellblocks. As accused persons are brought up one-by-one, court practitioners must simply wait for court to proceed. It is not surprising that these practices – which reduce the amount of available court time – further limit the number of cases that are heard each day. Although they may not seem problematic when they occur on any given day, these practices likely have a considerable impact on bail efficiency when they are taken together over time.

An additional way in which court time is used inefficiently in this jurisdiction relates to the manner in which evidence is entered. For example, many defence counsel noted not only that the same information is provided repetitively through different forms of evidence (e.g., the witness's statement is provided on video and through police notes) but also that information is discussed in open court as opposed to being admitted informally (e.g., sureties interviewed in an intake office instead of testifying in open court). These practices seem incongruent with the intention of the bail process which, unlike trial, was conceived as a summary or relatively speedy process (Webster, 2009). Despite this fact, it has become standard for a specific set of procedures to be followed in bail court regardless of any pragmatic use that they may serve. Indeed, it appears that it has become the norm in this jurisdiction to impose a rigid, formal structure on what was intended to be a less formal court procedure.

In addition to being entered in a formal manner, evidence is perceived to be entered in bail court that is irrelevant to the question of bail (e.g., prior convictions unrelated to the offence). This may be a response to the relaxed evidentiary rules in bail court. More specifically, evidence can be entered during the bail process that would be inadmissible at trial (Trotter, 1999). It was felt by some defence counsel that Crown attorneys take advantage of this increased flexibility by entering evidence that pertains to the accused person's culpability. Although this information is technically not relevant to the question of bail, it is largely at the discretion of the Justice of the Peace whether he/she will allow the Crown to enter it as evidence. This strategy might portray the accused person more negatively, increasing the chances that he/she will be detained. Further, it allows judges to have access to evidence that would otherwise not be admitted until later in the court process.

4.3 Practical Implications

Multiple explanations for inefficient case processing in this Eastern Ontario bail court emerged in the findings. Although some of these explanations are rooted in the conduct of defence counsel, there are also many reasons for bail inefficiency which are not attributable to this group of court practitioners. According to defence counsel, a host of structural, cultural, and administrative factors also contribute to lengthy case processing times. This suggests that the problem of bail inefficiency may be much broader in nature and scope than current conjectures would suggest. Further, while some of the explanations were unique to bail court, many others have already been identified in the broader court efficiency literature. This indicates that many of the explanations for lengthy case processing times in bail court may not be exclusive to the bail process. Rather, problems are likely to be more systemic in nature.

Finally, it is important to note that although numerous explanations for inefficient case processing were identified in this Eastern Ontario Bail court, they are not necessarily mutually exclusive. In fact, a close examination of the findings reveals that the explanations do not act independently of each other. Rather, these factors interrelate, creating a system of inefficiency which reflects the intersection of multiple contributing factors. Illustratively, court time can be increased whereby Justices of the Peace would sit longer in the afternoons or eventually in the evenings. Arguably, this additional amount of time in which to run bail court will have some impact on case processing efficiency. Most obviously, a greater number of cases could be dealt with in bail court each day, reducing some of the (perceived) backlog. Further, defence counsel would have a greater amount of time to prepare their cases before their court appearance.

However, without an accompanying change in the expectations and the current practices in bail court, any additional efficiency in case processing rooted in this administrative modification will likely be limited. Indeed, while court time is extended, the ways in which it is

used is unlikely to change. For instance, Crowns will continue to require ‘show cause’ hearings for a substantial number of cases. Further, Justices of the Peace will continue to require ‘mini trials’, as well as additional release requirements (e.g., sureties, letters from employers, confirmation of admission in a treatment program) which extend the preparation time of a bail plan by defence counsel. In other words, this administrative change in court use is likely to be less effective in reducing bail court inefficiency unless it is part of broader reforms in court culture which govern the actual operations within the court - no matter how long it is in session each day.

These findings have several implications for strategies of intervention in this Eastern Ontario bail court. First, attempts to increase the efficiency of the bail court should extend beyond the conduct of defence counsel if they wish to have a widespread influence on case processing. This indicates that interventions directed exclusively at this group of criminal court practitioners (such as Bill C-25) will likely have a limited impact on the overall efficiency of the bail court.

Second, strategies of intervention targeted at the broader court system are likely to work at individual court stages as well (e.g. bail, trial, preliminary inquiry). This suggests that interventions that have been shown to be effective in the broader court process could be successfully applied to this bail process. Third, tackling an individual factor which contributes to bail inefficiency in isolation of others might have a limited impact on the overall efficiency of the court. Interventions that target the system as a whole, rather than individual factors, will likely be more successful. Taken together, these suggestions form an important foundation from which more targeted strategies for intervention should be developed in this Eastern Ontario bail court.

CHAPTER V: CONCLUSION

The findings of this study suggest that the vilification of defence counsel may be an oversimplification by academics and government officials of their role in (in)efficient case processing in bail court. Obviously, one cannot fail to note that the vast majority of reasons for which defence counsel request adjournments in bail court are ‘unproductive’ in nature. For instance, adjournments that are requested simply because defence counsel are unprepared or because they are putting off making a decision about the case clearly compromise the efficiency of the bail process. Further, even though adjournments that were requested for reasons related to the former two-for-one sentencing convention allegedly had only a minor impact on the overall efficiency of the bail court, they still show some evidence of unproductivity on the part of defence counsel. Similarly, while adjournments that are requested for the purpose of maintaining a legal practice or keeping an accused person in a local detention centre are (arguably) reasonable or understandable, they are still not intended to move the case forward.

However, it also becomes evident that this observation is only part of the story. Although this group of court practitioners admittedly requests the vast majority of adjournments in bail court, not all of these adjournments are requested for manipulative or ‘unproductive’ purposes. In fact, several of the explanations for defence adjournments were found to be ‘productive’ in nature. Specifically, adjournments that are requested for the purpose of obtaining disclosure or putting a bail plan in place are intended to advance the case towards the resolution of the bail process.

Further, even this simple quantitative count of the number of ‘productive’ and ‘unproductive’ adjournments in bail court provides only a superficial assessment of a problem that is clearly more complex in nature. Specifically, the distinction between ‘unproductive’ and

‘productive’ adjournments may not be the most accurate way of describing adjournment requests. To begin, at least one explanation that emerged in this study could be arguably placed in either category. Further, several of the explanations were only ‘unproductive’ by virtue of the perspective which shapes the ‘productive’/‘unproductive’ classification scheme. Indeed, in several cases in which adjournments were considered to be ‘unproductive’ from the perspective of the court, defence counsel considered them to be ‘productive’ in that they served (arguably) other – equally important – purposes in terms of their individual and collective roles in defending their clients’ best interests. Clearly, the role of defence counsel in bail court efficiency is not as straightforward as one might have initially thought.

Moreover, the multiple explanations which defence counsel perceive to contribute to bail inefficiency that are unrelated to their own role further underline the complex nature of this issue. Specifically, the findings suggest that there are multiple structural and administrative explanations for inefficient case processing in bail court which are independent of any contribution made by defence counsel. Further, these additional factors are perceived to be shaped by overarching cultural explanations which are primarily rooted in a risk adverse mentality. In fact, although some of these additional explanations are exclusive to bail court, the vast majority of them mirror problems that have been found in the broader court process, suggesting that the problem of bail inefficiency is partly systemic in nature.

In sum, these findings demonstrate that while defence clearly contribute to inefficient case processing in bail court, their role is less straightforward than it appears at first glance. Further, while they can be faulted to some extent, defence counsel do not perceive themselves to be the only (or even necessarily the principal) ‘villain’ in this story. Rather, in the wider context

of bail inefficiency, defence counsel appear to be only one contributor among many other explanations.

5.1 Potential Solutions

The findings of this study highlight multiple areas for potential intervention in this Eastern Ontario bail court. However, before any changes are seriously considered, it would be advisable to consult with the other principal court players (i.e. Justices of the Peace, Crown attorneys, court staff). This consultation could provide some confirmation of the accuracy of the perceptions of defence counsel as well as ensure that these other central players in bail court also ‘buy into’ any new intervention. Such commitment to any attempts to decrease lengthy case processing times would likely strengthen their impact, particularly given the interrelated nature of those factors affecting bail efficiency as suggested by this study

Even with this caveat in mind, the results of this study have provided a useful starting point for addressing the issues raised by defence counsel. Most obviously, a number of strategies can be proposed which might target those factors identified by defence counsel themselves as contributing to their role in bail inefficiency through their recourse to adjournments. For instance, faster release of disclosure and processing of legal aid certificates would enable defence counsel to proceed with bail cases earlier in the bail process. Further, allowing duty-counsel a greater role in the completion of cases – particularly non-contested cases in which defence counsel are unable to attend – would arguably allow a resolution of bail at the earliest opportunity rather than on a subsequent day when private defence counsel are available. Finally, an agreement could be made with the local detention centre whereby accused persons would not be moved to another facility until the question of bail has been decided. This practice would eliminate the need for adjournments that are requested for the sole purpose of keeping the accused in the local detention centre.

Equally, one might argue that interventions aimed at reducing defence adjournments should focus – in particular - on video remand given that this court was shown to be the source of multiple problems. For example, it might be beneficial to establish an order in which the accused persons appear in video remand as a means of encouraging defence counsel to attend this court. In those circumstances in which defence counsel cannot attend video remand court, attempts should also be made to improve the communication between these individuals and duty counsel so that defence instructions are clear and can be carried out accordingly.

In addition, communication between lawyers and accused persons in video remand might be better facilitated. The current system whereby lawyers communicate with their clients over the telephone while court is in process appears to be insufficient. Finally, the number of consecutive appearances that accused persons have in video remand might be monitored and possibly limited in order to minimize the risk that they are forgotten or lost in the system.

Beyond these strategies specifically related to defence counsel's role in bail court inefficiency, one can add several other areas in need of intervention related to scheduling and use of court time. For instance, there could potentially be more control on the part of the court (rather than the Justice of the Peace) in terms of the number of hours each day in which bail court is in session. For example, Justices of the Peace could be compelled to stay until 5:00 PM or night court could be established, creating greater flexibility for sureties to attend court (outside of normal working hours) as well as greater opportunities for defence to resolve scheduling conflicts. Further, allowing bail hearings to be run on the first day in which the accused person appears in court may avoid an unnecessary second appearance for cases which are ready to proceed.

Of course, the problem with these piecemeal strategies is that although they may have some impact on bail efficiency, the broader court efficiency literature would suggest that they will be less effective when they are not accompanied by wider, systemic change (see, for example, Church, 1982; Messick, 1999; Sipes et al., 1982). This is because the individual factors which contribute to lengthy case processing times do not operate in a vacuum. Rather, they are interactive and function through broader issues associated with the overarching culture of the court.

As such, individual changes will have less of an impact on bail efficiency when carried out in a culture which still accepts (if not encourages) delay as a risk-averse tactic. Consequently, the broader culture of the court must also change to promote (as well as reinforce) any individual changes. While broad, systemic cultural change may not be an easy task, research has shown that can have a considerable impact on the efficiency with which cases are processed in bail court (see, for example, Webster, 2007). As such, it might very well be worth the effort.

5.2 Avenues for Future Research

In order to better understand the reasons for inefficient case processing in bail court, future research could expand the scope of the current study. First, the views of other court ‘players’ (e.g., Justices of the Peace, Crown attorneys, accused persons) could be examined to provide not only a broader perspective of the reasons for bail inefficiency but also a better sense of the interactive nature of the factors that contribute to the problem. Equally important, additional points of view will arguably also be important in identifying strategies of intervention that will be accepted and embraced by all of the key players in the bail process.

Second, expanding the study to other bail courts might shed light on explanations for bail inefficiency which are specific to other jurisdictions. It is conceivable that each bail court has its

own local culture which contributes to inefficient case processing in slightly different ways. Within this context, effective strategies for intervention would need to be adapted to the individual cultures of each court.

Third, a different research design could also be employed to better understand the factors that contribute to lengthy case processing. This study relied on interviews and was thus limited by the nature and scope of the information provided by defence counsel. By also conducting court observations, this alternative methodology might shed additional light on the difficulties surrounding other aspects of the bail process. Notably, defence counsel – in discussing explanations for delay in bail court – focused largely on those factors related to ‘show cause’ hearings (e.g., the unnecessary length of bail hearings, the inability to run bail hearings on the first appearance, overestimating the number of slots required for bail hearings, and admitting evidence inefficiently at bail hearings). While this type of bail appearances is obviously important when thinking about lengthy case processing, very few bail cases actually have formal ‘show cause’ hearings (Webster, 2007).

Finally, the role of defence counsel in contributing to court inefficiency could also be examined outside of the bail process. There was some suggestion that defence counsel (at least under the former two-for-one sentencing convention) were less likely to be as concerned about ‘unproductive’ adjournments when the accused person had already been formally detained following a bail hearing. This observation calls attention to the possibility that defence counsel may have other priorities or motivations vis-à-vis adjournment requests during other stages of the court process.

The findings of this study suggest that the reasons for inefficient case processing are not as straightforward as they might appear at first glance. As such, attempts were made to move

beyond simplistic explanations for court inefficiency by providing a more nuanced account of the reasons that courts are experiencing lengthy case processing times. It is hoped that future research will take a similar approach, widening the scope of the information obtained in this study and providing additional suggestions as to how the efficiency of criminal court system can be improved.

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APPENDIX A

Letter of Information for Prospective Participants
Semi-Structured Interview

Explaining Inefficiency in an Ontario Bail Court: Perspectives of Criminal Defence Lawyers

Principal Researcher:

Diana Grech, Masters Student
Department of Criminology
Faculty of Social Sciences
University of Ottawa
Cell: ***-***-****
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Supervisor:

Dr. Cheryl M. Webster, Associate Professor
Department of Criminology
Faculty of Social Sciences
University of Ottawa
Tel: ***-***-**** ext. ****
Email: *****

Invitation to Participate: You are invited to participate in the abovementioned research study conducted by Diana Grech and Dr. Cheryl M. Webster. In order to participate, you must be a criminal defence lawyer practicing in the Ottawa region. To ensure the anonymity of the participants, we ask that you only contact Ms. Grech or Dr. Webster if you require further information.

Purpose of the Study: The purpose of the study is to understand how criminal defence lawyers explain current delays in Ottawa bail courts which have been contributing to our growing remand population. The study focuses on the perspective of defence lawyers because in discussions surrounding court delay, their voice is not often heard. The aim of this study is to determine which factors contribute to delays in the bail process and what changes to the current bail system could increase efficient case processing.

Participation: Should you agree to participate in the study, your participation will consist of one semi-structured interview with the principal researcher for a maximum of 60 minutes. During the interview you will be asked about your experience with the Canadian bail system and your perspective on the reasons for delays in the current bail process. The interviews will be scheduled for a time and location of your choice and, with your consent, will be electronically recorded and transcribed into written format.

Risks and Benefits: There are no known risks or inconveniences associated with participation in this study. The interview will provide a greater understanding of the factors that contribute to delay in the bail process. This information could potentially be used to suggest ways to increase the efficiency of the Ottawa bail courts. Further, your participation in this study will help to better understand the unique perspective of the defence lawyer. Understanding explanations for delay from the perspective of all criminal justice participants is important in order to get a holistic interpretation of the problem.

Confidentiality and Anonymity: The information you share in the interview will remain strictly confidential. It will be used only for research purposes and all identifying information will be kept secure by the researchers. It is possible that comments made during the interview will be anonymously quoted in the final research report. However, the results of the study will be

reported in a way that guarantees the anonymity of participants and their clients by identifying them by their generic job title and removing all personally identifying information.

Conservation of data: All data collected, including notes, tape recordings and transcripts, will be stored in a secure manner in a locked cabinet and password enabled computer in the office of the thesis supervisor for 10 years after the results of the study are published or presented.

Voluntary Participation: You are under no obligation to participate and if you choose to participate, you can withdraw from the study at any time and/or refuse to answer any questions, without suffering any negative consequences. If you choose to withdraw, all data gathered until the time of withdrawal will be destroyed.

Next Steps: If you agree to participate in an interview for this research study or if you would like to request further information, you can contact Diana Grech or Cheryl M. Webster at the email addresses or phone numbers provided above. At this point, we can answer any questions you may have or schedule an interview at your earliest convenience.

APPENDIX B

Consent Form for Prospective Participants
Semi-Structured Interview

I have read the letter of information, have had the nature of the study explained to me, and agree to participate in an interview for the above research study conducted by Diana Grech of the Criminology Department in the Faculty of Social Sciences at the University of Ottawa, under the supervision of Dr. Cheryl Webster.

If I have any questions about the study, I may contact the researcher or her supervisor.

Principal Researcher:
Diana Grech, M.A. Candidate
Department of Criminology
Faculty of Social Sciences
University of Ottawa
P: ***_***_****
E: *****

Supervisor:
Cheryl Webster, Associate Professor
Department of Criminology
Faculty of Social Sciences
University of Ottawa
P: ***_***_**** ext. ****

If I have any questions regarding the ethical conduct of this study, I may contact:

The Protocol Officer for Ethics in Research
University of Ottawa
Tabaret Hall, 550 Cumberland Street, Room 159
Ottawa, ON K1N 6N5
Tel.: *** _ ***_****
Email: *****

There are two copies of the consent form, one of which is mine to keep.

Participant's Name

Participant's Signature

Date

Researcher's Name

Researcher's Signature

Date



I also give my permission for the interview to be recorded electronically.

Participant's Signature

Date

APPENDIX C

Interview Guide

You understand that the interview is being recorded. If at any time you would prefer that a portion is not recorded, please inform me and I will turn off the tape recorder.

The intention of this study is to better understand current delays in Ottawa bail courts. I am going to ask you a series of questions about the 'bail process' and 'bail cases'. For the purpose of this interview the 'bail process' refers to the period from the first appearance in bail court to either the initial determination of whether the accused will be released on bail or detained until trial or, when no formal decision is made, to the final outcome of the bail case (ex. accused is sentenced, charges withdrawn, etc). A 'bail case' is a case in which the accused begins the criminal court process in custody such that the first court appearance is in bail court to determine whether he or she should be released on bail or detained until trial.

Part 1: Legal Background

In the first part of the interview I will ask you a few short questions about your background as a defence lawyer.

1. How many years have you been practising law?
2. How many years have you been practising law in Ottawa?
3. Approximately what proportion of your caseload in the last six months has involved bail cases?

Part 2: An Average Bail Case

In the second part of the interview I am trying to get an idea of what happens in an average bail case. The questions are designed to walk me through the process step by step. Please think of a specific client that you have defended in the last six months that was involved in what you consider to be a typical bail case. If you cannot remember the specifics of a particular case, please answer in terms of what you consider to be an average bail case. Please do not provide any information that could reveal the identity of your client.

4. Was your client brought before a Justice for a bail hearing within 24 hours of being arrested?

If NO:

- 1.B. How long did it take for your client to have his or her first bail hearing?

5. Were there any adjournments requested during the bail process?

If YES:

- 2.B. How many adjournments were requested?

I am going to ask you a few questions regarding each adjournment. Note that I will go through the same list of questions (2.C. to 2.F.) for each adjournment individually. Please answer to the best of your ability.

2.C. Who requested the adjournment?

2.D. Was an explanation provided for the adjournment?

If YES:

2.D.i. What was the explanation?

2.E. Was the adjournment contested by any other party?

If YES:

2.E.i. Why was the adjournment contested?

2.F. Was the adjournment allowed?

If NO:

2.F.i. Why was the adjournment refused?

6. How many court appearances, including video remand court, did it take to complete the bail process?

7. How much time did it take to complete the bail process?

8. Was a formal decision made to either release or detain your client?

If YES:

5.A. Was the accused released *or* detained?

If NO:

5.B. What was the final outcome of the bail case?

Part 3: The Bail Process Generally

In the third portion of the interview I will ask you more general questions about the bail process. Please base your answers on your experience with bail cases and the criminal justice system as a whole.

9. What are the principal factors that you think contribute to delays in the bail process?

10. Are there any advantages for you or your client to delay the bail process?

11. How would you explain the rise in remand rates over the last 30 years?

12. What changes do you think should be made to the current bail system to increase efficient case processing?

Part 4: The Two-for-One Sentencing Convention

The fourth part of this interview will focus on your experience with pre-sentencing custody credits. The Canadian government has recently expressed concern over the practice of awarding double credit for time spent in remand. Bill C-25 has already been passed and came into effect this year, eliminating the two-for-one convention in favour of a one-for-one ratio (up to a maximum of 1.5 to 1). Please answer the questions based on your knowledge of pre-sentencing custody credits and your experience with the criminal justice system.

13. How did you explain pre-sentencing custody credits to your client prior to the implementation of Bill C-25 compared to now?
14. Prior to the implementation of Bill C-25, how was the two-for-one credit used as a bargaining tool, either by prosecution or defence, during plea bargaining?
 - 14.A. How has this practice changed following the implementation of the Bill?
15. Prior to the implementation of Bill C-25, what arguments did you generally make at sentencing regarding the two-for-one convention?
 - 15.A. How has this practice changed following the implementation of the Bill?
16. One of the justifications for Bill C-25 was the claim that awarding two for one credit encourages lawyers to intentionally delay bail in order to accumulate more credit for time spent in remand. Do you think there is validity to this claim?
17. How will the amendments made by Bill C-25 impact both the way you handle the bail process and the criminal justice system generally?

APPENDIX D

Table 6.D - Participants' Legal Background

QUESTION	PARTICIPANTS' ANSWERS											
	1	2	3	4	5	6	7	8	9	10	11	12
How many years have you been practicing law?	30	5	21.5	16	1	15	20	9	9	14	13	5
How many years have you been practicing law in this region?	30	5	21.5 (also works in other, close regions)	16	1 (also worked in Toronto during law school)	15	20	8 (one year in London, England)	9	14	13	5 (articled in Toronto)
Do you spend a lot of time dealing with the bail process personally?	I did for years, but in recent history not so much.	Yes, probably at least once a week.	Not as much as I used to, but still quite a bit.	Less than before, but still several times a week.	Yes. The person in the office that spends the most time in bail court.	Less now than I used to, but yes, I do.	Not as much as I used to, but i'm still involved regularly.	About 1.5 days/week (used to be every day in first few years of practice)	Yes (every week).	Yeah, all the time.	Yes. At least two days per week.	Recently not so much, but definitely in the first 2-3 years.
Approximately what percentage of your clients are detained by the police and end up in bail court?	5% (warns this is not representative)	30-40% (closer to 30)	20-25%	15%	Two thirds (66%; deals with a lot of repeat offenders)	A third.	30-40%	More than 50% in last month.	50%	1/3	N/A	50%

APPENDIX E

Table 6.E - Participants' Description of an "Average Bail Case"

QUESTION	PARTICIPANT NUMBER											
	1*	2	3	4	5	6	7	8	9	10	11	12**
Were there adjournments requested during the bail process?	--	Yes	Yes	Yes	N/A***	Yes	Yes	Yes	Yes	Yes	Yes	Yes
How many adjournments were requested?	--	2	2	2-3	N/A	1	2	1	1	Depends	Depends	3-4
Who requested the adjournment(s)?	--	Defence	Defence	N/A	Defence	Defence	Defence	Defence	N/A	Defence	Defence	Defence
Was an explanation provided for the adjournment(s)?	--	Yes	N/A	Yes	N/A	N/A	Yes	N/A	N/A	Yes	No	Yes
Was the adjournment(s) contested by any other party?	--	No	No, unless it was a scheduled bail hearing.	If defence, no. If Crown, yes.	No	No	Yes	N/A	No	No	No	If defence, no. If Crown, yes.
Was the adjournment (s) allowed?	--	Yes	Yes	N/A	Yes	Yes	Yes	Yes	Yes	N/A	Yes	Yes
How many court appearances did it take to complete the bail process?	--	3	2-4 (contested release only).	N/A	2-3	2-3	3-5	2	No more than 3.	2-3	Depends	2-4
How much time was required to complete the bail process?	--	4 days	3 days to a couple weeks	Days	N/A	4-5 days	3 working days (up to 2 weeks)	3 days	N/A	2-3 days	Depends	2 weeks
Was the client released or detained?	--	Released	N/A	Released	Depends	Released	Depends	Released	Released	Released	Released (60/40 in favour of release).	Depends

* This defence counsel did not participate in this portion of the interview as he did not feel as though he attended bail court enough to describe an average case in detail. Instead, he provided a considerable amount of information about the way in which the bail process had changed in the thirty years he had been practicing.

** This defence counsel warned that his bail cases were not typical as he deals with a lot of complicated drug-related cases.

***Responses were recorded as “N/A” when the participant’s answer was unclear or when the participant did not answer the question.

APPENDIX F

Table 6.F - Coding Frame Template

Major Category: Other Explanations for Bail Inefficiency

Participant	Minor Category	Theme	Quotations
3	Administrative Explanations	Scheduled bail hearings do not get reached because the court is overbooked	<u>Pg 3, Ln 93</u> <i>“if you set a bail hearing in two days you might be the last one on the list and you might not get reached.”</i>
8	Cultural Explanations	Justices of the Peace favour the most onerous forms of release	<u>Pg 19, Ln 743</u> <i>“What I find is this – if they’re not released essentially unconditionally from the station, their held for show cause. Or they have to show cause...there seems to be an insistence...they’ll be released either with a large cash deposit or the surety. I’ve never seen anyone...I’ve seen one in seven years, one of my clients released by a Justice of the Peace of an undertaking. One in seven years. An undertaking should be the norm...a recognizance should be a step up and the rare cases should involve recognizance with surety or recognizance with cash deposit. These are important things that could be done to change the bail process to make it function smoother.”</i>
12	Structural Explanations	Serious cases require more time and appearances to complete the bail process	<u>Pg 6, Ln 208</u> <i>“if it’s going to be a serious matter where it’s going to be a day in court you definitely need to secure your retainer beforehand, you definitely need to look at the disclosure, and you definitely need to put together a serious plan. And it takes longer, so the bail hearing’s set a bit farther away.”</i>