Red Zones and other Spatial Conditions of Release Imposed on Marginalized People in Vancouver

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October 25, 2017

Social Sciences and Humanities Research Council of Canada
Conseil de recherches en sciences humaines du Canada
Canada

Acknowledgments

This report would not have been possible without the participation and collaboration of numerous partners and stakeholders in Vancouver.

We first want to thank the Court Services Branch (CSB) of the Ministry of Justice of British Columbia for their help and assistance in providing access to court record data and for their analysis. In particular, we thank Kathryn Thomson, Legal Policy and Technology Advisor, Mike Scarrow, Senior Business Information and Project Analyst, and Caroline Shandley, Business Information and Project Analyst at the CSB. We also thank the Provincial Court Judiciary for supporting this request.

We thank the Vancouver Downtown Community Court (DCC), the Public Prosecution Service of Canada (PPSC – Headquarter and B.C. Regional Office), the Vancouver Area Network of Drug Users (VANDU), HUSTLE at HiM and PIVOT Legal Society for their participation and support throughout our study.

We also express our gratitude to all the anonymous participants to this study, who committed time and provided invaluable information and insights for this project.

We also acknowledge the excellent work of William Damon, who assisted with the interviews and analysis, and is a co-author of this report. Will completed his M.A. during our study and he provided additional interview data from his own MA thesis: William G. Damon, "Spatial Tactics in Vancouver's Judicial System", Unpublished Thesis at the Department of Geography, Faculty of Environment, Simon Fraser University, 2014: http://summit.sfu.ca/item/14152.

We thank our research assistants Jacob Lavoie, Sean Spinney and Kristine Gagnon Lafond for their analysis of the quantitative data.

Finally, we are grateful to the Social Sciences and Humanities Research Council (SSHRC) and the University of Ottawa for financial and administrative support.

EXECUTIVE SUMMARY

This report provides findings on a research project focused on conditions of release with spatial dimensions, such as area restrictions or 'red zones', no go orders, no contact, non-association and residential conditions, and curfews, imposed at the bail or at sentencing stages to marginalized groups of people, including the homeless, street-level drug users and sex workers and political protesters, who use public spaces in four Canadian cities (Montreal, Ottawa, Toronto and Vancouver). We focus here on the Vancouver findings.

We conducted fieldwork from November 2012 to April 2014 in Vancouver, drawing from both qualitative and quantitative data. We conducted an analysis of criminal cases dealing with conditions of release associated with bail or probation between 1982 and 2015, and interviewed 18 people subject to such conditions through individual interviews or focus groups. We also draw from additional interviews with 18 people conducted by William Damon as part of his 2014 SFU M.A. We obtained the full court records of 10 of these interviewees. We also interviewed six legal actors involved in imposing or negotiating conditions of release. Finally, we obtained extensive data from the justice information system (JUSTIN) administered by the Court Services Branch of the Ministry of Justice of B.C. for all adult criminal court cases either sentenced to probation or a conditional sentence, or cases not necessarily sentenced, but granted bail, between 2005-2012 in the Vancouver Provincial Court (including the Drug Court) or Downtown Community Court.

We aimed at understanding the significance of the use of red zones and other spatial conditions of release in criminal courts; the effects of these conditions on marginalized people's rights and lives; the objectives or rationale pursued by legal actors who issue or negotiate these orders; and the impact of these orders on the administration of justice in B.C.

Our main findings include:

- Conditions of release associated with bail and sentencing conditions have become increasingly pervasive, in line with an increase in community supervision more generally in B.C.

- Simultaneously, there has been a significant increase in offences related to such conditions, such that failure to comply with conditions and breach of probation represented 79% of all police-reported offences against the administration of justice committed in 2014. Such trends are evident in Vancouver, particularly in relation to the Downtown Eastside.

- Policy makers in B.C. have expressed concern at this phenomenon, pointing to the urgent need for more sustained analysis.

- Data from the JUSTIN database reveal the following:
    - Red zones and no go orders represent 20% of all conditions imposed throughout criminal proceedings (from bail to conditional sentence)
    - Red zones are mostly imposed in the context of drug (33.5%) and violent (34%) offences
    - Conditional orders including red zones generate numerous breaches. In turn, breached orders generated on average between 1.5 to 2 additional breaches.
    - Contrary to the prescriptions of the Criminal Code requiring unconditional release, 97% of all bail orders in Vancouver included conditions of release
    - 53% of all bail orders issued in drug offences included a red zone
    - In Vancouver, red zones are concentrated in the Downtown Eastside
    - The number of conditions (4+) and the length of court orders (more than 190 days) have a statistically significant positive impact on the likelihood that someone will breach his or her court order. Residential treatment and curfews tend to decrease the likelihood of breaching a court order. While at bail, the number of conditions and the length of the court order are the main factors, in a probation order, the imposition of red zones conditions and curfews significantly increase the likelihood of breach. Breaches of probation orders are also higher in the case of drug offenses.

- There is a significant disjuncture between the attitudes and assumptions of legal actors, and those subject to conditions of release, including the application of red zones
    - For the former, conditions of release are useful regulatory weapons that reduce crime and promote rehabilitation. For the latter, they do little to address crime, and may in fact promote further offences, due to the likelihood of breaches, and the increased risk of negative police encounters and detention
    - For the former, conditions of release are reasonably crafted. For the latter, they are often punitive, ambiguous, and arbitrary.
    - For the former, conditions of release are responsive to individual needs. For the latter, they threaten valued access to personal connections and valued resources.
    - For the former, the frequency of breaches is often unavoidable. For the latter, it is a predictable outcome of the 'revolving door' effect of such conditions.

- Red zones and other conditions of release lead to multiple rights violations yet they are rarely challenged. There are multiple obstacles to formulating rights claims, including the power imbalance that individuals have to negotiate from

remand centers and the ritualized, bureaucratic, and often routinized nature of the criminal justice system.

- We conclude that there is a pressing need for reform to our bail system. First, the current law of bail should be strictly followed. Unconditional release must be the norm for granting release and it should represent a real alternative to remand. The Criminal Code should also be amended to make sure that conditions are primarily imposed if there is a substantial likelihood that, if released, the accused will commit an offence involving serious harm. Secondly, conditions imposed to ensure that the accused will appear in court should be proportionate to the gravity of the alleged offense. As a result, conditions should be strictly limited, non-punitive and not focused towards rehabilitation. The police and justices of the peace should be required to justify their decision to impose conditions of release. Diversion and the use of "appropriate measures" should become the norm with respect to dealing with minor offences such as breaches, drug offences, and crimes against property. Legal aid programs should be adequately funded to make sure that the right to reasonable bail is respected.
- At the sentencing stage, probation conditions imposed to facilitate offenders' rehabilitation should be properly tailored and imposed in partnership with appropriate community groups as well as health and social services. The number of conditions should be strictly limited. Moreover, red zone conditions should be avoided and harm reduction programs favoured. The same principles should apply to conditional sentences, with necessary adjustments, in light of the fact that they are incarceration sentences.

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Introduction

On April 12, 2013, the police arrested Paul[1] on East Hastings Street, in the Downtown Eastside of Vancouver (DTES).

Paul had lived on and off the Downtown Eastside for about twenty years. When we last checked in the B.C. court services system for criminal and traffic offences under his name, we hit 54 different entries, some going back as far as 1996 (Paul also had 46 entries in civil and family courts). Paul had had encounters with the criminal justice system for most of his adult life, having been charged for several offences including drug possession, drug trafficking, possession and trafficking of illegally obtained property under $5000, theft under $5000, driving while his drivers licence was suspended, driving under the influence of drugs, and multiple breaches of bail, probation and parole orders, for which he was consistently found guilty and typically sentenced to a few months of jail time followed by a probation period.

In 2013, when we first met him, Paul had lived in Vancouver for the last seven years in the Lower Mainland, including the Downtown Eastside. He was regularly using opiates and on a typical day, he spent most of his time at the intersection of Hastings and Main Street, living in front of InSite, the first supervised drug injection site in North America. He frequently visited VANDU, the Vancouver Area Network of Drug Users, a local grassroots organization of drug users and former users committed to give their members a political voice and to make sure they live healthy and meaningful lives[2]. He also sometimes stayed overnight at the New Fountain shelter near Cordova Street.

For Paul, a typical cycle of his many interactions with the police and the criminal justice system goes as follows. One day in April 2013, he was charged with one count of possessing a controlled drug/substance for the purpose of trafficking and two counts of carrying a concealed weapon, prohibited device or any ammunition. The police officer decided to detain Paul in custody overnight and he was released on bail the following day by a justice of the peace under a recognizance of $500 and a requirement to comply with the following six conditions, including a red zone (condition #2), which encompassed InSite and VANDU's offices[3].

1. *Keep the peace and be of good behaviour*
2. *Not to be within the 300 block of E Hastings St in the City of Vancouver*
3. *Not to possess any weapons*
4. *Not to possess any knives except for the preparation or consumption of food*

[1] All names are altered to ensure anonymity.
[2] http://www.vandu.org/. See Travis Lupick, *Fighting for Space: How a group of drug users transformed one city struggle's with addiction*, Arsenal Pulp Press, 2017 (forthcoming)
[3] VANDU's offices are located at 380 E Hastings

5. *Not to possess any firearm or ammunition*
6. *Not to possess any cellular phones, pagers, Blackberries or other wireless handheld devices*

Later the same day, Paul was rearrested in his red zone and charged with two counts of breach of recognizance. After spending the night in remand, he was released on bail under a renewed recognizance of $500 and with the same six conditions plus another:

7. *You will upon reasonable request of a police officer submit to a pat down search when found in any public place to determine that you are in compliance with the previous conditions.*

Two weeks later on May 1, 2013, Paul was arrested, detained in custody and charged with two additional counts of breach and one more count of possession of drug/controlled substance. The justice of the peace renewed his seven conditions and added a curfew:

8. *You are to be inside your residence between the hours of 9pm and 6 am, seven days per week.*
9. *You are to present yourself at the door or your residence when any police officer or staff member of the correctional branch is checking up on you for your curfew.*

Five days later, Paul was arrested again and charged with two additional counts of breach. By then, Paul resided at Insite[4] *and the justice of the peace changed his conditions to include house arrest and compliance with the rules and regulations of the treatment facility:*

6. *You are to be inside your residence at all times unless you are accompanied by a member of InSite or such other residence as you may move to.*
7. *Should you not be at InSite or any other treatment facility, you must be inside your residence between the hours of 9PM and 6AM, seven days a week.*
9. *You are to reside at InSite, 2nd floor, or such other treatment facility that may be approved by your bail supervisor and obey all the rules of that residence.*

Finally, in June 2013 he was arrested and charged with his seventh breach of recognizance. By mid-July, Paul finally plead guilty to six counts of breach and one count of possession for the purpose of trafficking and he was sentenced to 17 months and 10 days in jail and a lifetime prohibition to carry any weapon. The Crown stayed the remaining five charges.

[4] InSite has a a detox facility on the second floor (called OnSite) and a transitional recovery housing facility on the third floor.

Two years later, Paul was released from custody. On October 15, 2015, he was rearrested in the Downtown Eastside.

We met with Paul in the spring of 2013 while he was on bail and red zoned from his living quarters at Main and Hastings. We asked him why he kept coming back to his red zone and he simply replied that it was "because [he] was wired on drugs". "Someone like me, he said, if you tell me I can't do anything, I'm gonna do it". Living with a red zone meant always being fearful that the police could stop you: "You're not so free, you constantly got to wonder if you're going to be arrested that day, if they are going to call you in…" and while the police sometimes let him go, at other times, they brought him back in custody and to court, making him sick as a result of withdrawal: "Sometimes the cops just take my dope and let me go, but sometimes they hold me overnight or for a couple of days to… I don't know… to make me sick or something." Four years before, he told us, the guards beat him while he was in remand: "They pulled me off the top bunk and broke my five, six, seven and eight [ribs]. I had to go in for surgery. I have a rod and screws in my neck. I had to relearn my walk. It's pretty harsh. I have a lawsuit pending with them. But that doesn't look good on my file because when the cops read that I'm suing them it hurts my situations with everything else."

During one of his numerous bail hearings, Paul's lawyer had tried to prevent the imposition of a red zone given that he was living in the area and needed to have access to important resources. The judge, as Paul remembered it, was unforgiving, suggesting that "I guess he's going to have to move". But what if someone told the judge he had to move, Paul mused, on similarly arbitrary grounds: "Your BMW is the wrong colour, you have to move, or whatever".

Yet moving was not such an easy task for Paul, even when putting aside all the drug-related issues. As it turned out, the Vancouver red zone was not the only one on his record. In the past, Paul had also been red zoned from downtown Kelowna and downtown Kamloops, two B.C. cities located within 350 and 400 km of Vancouver respectively. More recently, he had been banned from going to any Money Marts in the province of British Columbia as a result of a theft charge. In the past 20 years, Paul had transited through more than ten cities and fourteen courthouses in Vancouver and its surroundings, including Victoria, Abbotsford, Surrey, Port Coquitlam, Richmond, Prince George, Revelstoke and Penticton.

As Paul went through these numerous cycles of fear, pain and violence, whether in the streets or in the criminal justice system, we were not only struck by the futility and ineffectiveness of his bail conditions in terms of dealing with his issues of drug addiction and poverty, but also shocked by their harmful impact on his life. And as the police and the courts carved out new territories from which he was either excluded or confined, pushing him around from one city and one official to the next, we wondered about legal actors' role in the management and monitoring of poor people who used public spaces.

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This report focuses on red zones and other conditions of release with geographic or spatial dimensions imposed at bail or sentencing to marginalized groups of people who use public spaces for different and legitimate reasons.

It is part of a broader research project, funded by the Social Sciences and Humanities Research Council of Canada[5].

Conditions with geographic or spatial dimensions include four categories of conditions:

a) *Area restrictions ('red zones') or 'no-go' conditions*. Red zones can take different forms, but they refer to prohibitions to be found within specific perimeters, such as stretches of streets, blocks and place-specific radiuses, whereas 'no go' conditions are targeted at specific places such as parks, restaurants or bars, supermarkets or other public or private spaces.

b) *No-contact/non-association/non-communication conditions* require that people abstain from communicating with a complainant, witness or co-accused with whom they may share common spaces, as well as restrictions on the use of internet, cell phone or other communication devices;

c) *Residential conditions*, including house arrests, fixed address and curfews, prohibiting the occupation of public spaces during certain hours and restrictring the distance one can cover within one single day;

and,

d) *Demonstration-related conditions*, such as prohibitions to demonstrate or to participate in demonstrations, meetings, assemblies.

The project has documented and analyzed:

[5] See generally Marie-Eve Sylvestre, Dominique Bernier and Céline Bellot, "Zone restriction orders and the reproduction of socioeconomic inequality," (2015) 5(1) *Onati Socio-Legal Series* 280-297; Marie-Eve Sylvestre, William Damon, Nicholas Blomley and Céline Bellot, "Spatial Tactics in Criminal Courts and the Politics of Legal technicalities", (2015) 47(5) *Antipode* 1346-1366; Marie-Eve Sylvestre, Céline Bellot and Nicholas Blomley, "The Process is the Punishment: Bail and Sentencing Reform", in J. Desrosiers, M. Garcia and M-E. Sylvestre, Criminal Law Reform in Canada: challenges and possibilities, Éditions Yvon Blais, 2017; Marie-Eve Sylvestre, Francis Villeneuve Ménard, Véronique Fortin, Céline Bellot et Nicholas Blomley, "Conditions géographiques de mise en liberté et de probation imposées aux manifestants: une atteinte injustifiée aux droits à la liberté d'expression, d'association et de réunion pacifique", (2017) *McGill Law Journal*, (forthcoming).

1. The scope and significance of spatial restrictions imposed in the context of criminal proceedings, in particular at bail and at the sentencing stage.
2. The effects of these judicial orders on marginalized people, namely the homeless, street-level sex workers and drug users, and political demonstrators in terms of rights, and access to resources.
3. The objectives pursued and the justifications used by legal actors who issue, negotiate or administer these orders, including judges and justices of the peace, prosecutors and defense lawyers.
4. The impact of such orders on the administration of justice and the criminal justice system, in particular in light of the dramatic increase of administrative offences in Canada, primarily failure to comply with conditions and breach of probation.

The larger project compares four Canadian cities (Montreal, Ottawa, Toronto and Vancouver) and different groups of people who use public spaces, including demonstrators. In this report, we focus on Vancouver, and in particular on court orders imposed to homeless people and street-involved drug users and sex workers. While red zones are commonplace in B.C., they have not received the systematic scrutiny that this report provides.

In what follows, we first discuss the methodology used in our project (1) and the legal context in which these conditions are issued (2). We then provide an overview of the social context of the Downtown Eastside (DTES) (3), as well as information on policing and administration of justice in Vancouver (4). We suggest that in Vancouver, red zones conditions can be understood in the context of the overpolicing and surveillance of certain groups of people, including the homeless, street-involved drug users and sex workers in the DTES. Moreover, red zones directly contribute to the increase in the number of offences against the administration of justice that occupy a large amount of police, judicial and correctional resources.

In part 5, we analyze the data obtained through the JUSTIN database from the Ministry of Justice of British Columbia. We show that red zones and no go orders are among the most common conditions imposed by legal actors. This is particularly so at bail in cases of violent and drug offences. Moreover, red zones are concentrated in the DTES. Finally, conditions of release and red zones generate numerous breaches.

In parts 6 and 7, we analyse the results of our interviews with legal actors and people subject to conditions of release, focusing on the rationale behind the imposition of such conditions, their perceived efficacy and usefulness, as well as the challenges associated to them and the impact on individuals' rights and lives, contrasting the perspectives of two groups of actors.

In part 8, we show that while red zones conditions lead to multiple rights violations, they are rarely challenged. We then explore some of the obstacles to formulating rights claims.

In light of these findings, we conclude by suggesting that the law and practices surrounding the imposition and negotiation of conditions of release, including red zones, should be completely revised. In Vancouver, red zone conditions are often imposed contrary to the provisions of the Criminal Code and they often fail to meet the goals set by the law and supported by legal actors, including reducing crime, controlling the drug supply and promoting rehabilitation. Instead, red zones tend to be counterproductive for those subject to them, threatening access to emotional connections and valued resources, and increasing the likelihood of breaches and risk of negative police encounters and detention. As such, red zones infringe on important social and individual rights. Finally, red zone conditions can lead to multiple breaches that are extremely costly and create additional burdens for the administration of justice.

Ultimately, we hope that this report will contribute to rendering visible previously invisible practices of discrimination that have a disparate impact on the public poor at a systemic level, and that it will provide the basis for significant changes in how we deal with the social problems that criminalization tends to hide.

1. Methodology

Our study draws from a mixed methods approach combining qualitative data and quantitative analysis. We obtained quantitative data from the justice information system (JUSTIN) administered by the Court Services Branch (CSB) of the Ministry of Justice of British Columbia through an application for access to court record information. JUSTIN is a "computerized system used across B.C. for managing and administering the criminal justice process. It allows adult and youth criminal cases to be tracked and processed from initial police arrests and Crown counsel change assessments through to court judgment[6]".

The data obtained by our team comprised all adult criminal court cases either sentenced to probation or a conditional sentence, or cases not necessarily sentenced, but granted bail between 2005-2012 in the Vancouver Provincial Court (including the Drug Court) or Downtown Community Court[7]. The entire data set contains 30,505 distinct accused individuals and 94 931 CSB defined court cases (some individuals have more than one case). A CSB case is defined as "one accused person with one or more charges on an information that has resulted in a first appearance in court"[8].

The data set was coded and analysed by computer scientists through natural language processing (NLP). NLP draws from different fields of study, including artificial

[6] Office of the Auditor General of B.C., "Securing the JUSTIN system: access and security audit at the Ministry of Justice, January 2013, p. 9 (by John Doyle).
[7] Caroline Shandley, Vancouver Provincial Court; Vancouver Drug Court and Downtown Community Court Breach Analysis – Record Level Data and Methodology Notes, 9 December 2013, p. 1
[8] Ibid, p. 2

intelligence, linguistics and computer science. This 'area of research and application explores how computers can be used to understand and manipulate natural language text or speech to do useful things[9]'.

We also conducted fieldwork in Vancouver from November 2012 to April 2014. In total, we met with 18 people subject to conditions of release associated with bail or probation. Two focus groups were held at VANDU in 2013 with five and six participants respectively. Additional interviews were held with three individuals[10]. Three protestors, and two male sex workers were also separately interviewed. We obtained the full court records of 10 interviewees subject to conditions.

In addition, we draw from eighteen individual interviews conducted in 2012 by Will Damon for his MA research[11]. Some replicable patterns seem present. Most of the interviews were conducted in the DTES: evidence points to the significant concentration of such orders in the DTES (Damon 2014).

We also conducted interviews with six legal actors, including provincial judges, defence attorneys and federal prosecutors in addition to undertaking 25 hours of observations at the Provincial Court and DCC in the fall and winter of 2013-2014. Regrettably, we were denied permission to interview members of the Vancouver Police Department (VPD), the B.C. Prosecution Service, justices of the peace or probation officers from the Corrections Branch of the Ministry of Justice.

2. Legal context

The institutions of bail and probation are long-established and important instruments within the common law, probably emerging along with the appointment of justices of the peace at the end of the 12th century in England and the power conferred on them to bind undesirable individuals upon recognizance "to keep the peace and be of good behaviour"[12]. Bail advances important principles such as the presumption of innocence protected by international instruments and the Canadian Charter, while probation offers an alternative to incarceration, being focused on rehabilitation. Conditional sentences are more recent legislative instruments, having only been introduced in 1996 in the Criminal Code in the wake of an important sentencing reform.

While these three institutions are different by nature, triggering distinctive legal regimes at different stages of the proceedings, they are all forms of release to which conditions might be attached.

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[9] G. Chowdhury (2003) Natural language processing. Annual Review of Information Science and Technology, 37. pp. 51-89. http://dx.doi.org/10.1002/aris.1440370103

[10] There is one person who participated to both a focus group and an individual interview.

[11] William Damon, (2014) 'Spatial tactics in Vancouver's judicial system' MA thesis, Simon Fraser University.

[12] E.g. Elsa de Haas, *Antiquities of Bail*, Columbia University Press, 1940

At the pre-trial stage after proceeding to an arrest, a peace officer or an officer in charge shall release the individual unless it is necessary to detain that individual in custody. The person should be released "as soon as practicable" or taken before a justice within a period of 24 hours, or "as soon as possible"[13]. A police officer may release a person unconditionally after issuing an appearance notice or with the intention of requiring a summons, or they may release them after requiring that the person give a promise to appear in court or enters into an undertaking with conditions (known as "police bail"). Alternatively, when the accused is held in custody, he or she will be released by a justice of the peace based on an agreement between the prosecutor and the defense, or by a judge, after a bail hearing[14].

Judges can also impose conditions post-trial or post-conviction as part of sentencing after the accused pleaded or was found guilty, in a probation order, a conditional sentence order (CSO), a jail sentence served in the community, or at parole.

Additionally, a justice or a summary court can impose conditions in a recognizance to keep the peace and be of good behaviour in a case where someone has reasonable grounds to fear for his or her safety, that of their children or spouse or for damage to their property[15].

In this project, we focus primarily on *court*-imposed restrictive orders issued at the bail (pre-trial) and sentencing (post-trial) stages. As will become clear from our data however, the majority of release orders are issued at the pre-trial stage of the criminal justice system, at bail.

The law of bail

Bail refers to the release of a person charged with a criminal offence, prior to prosecution or sentencing. Section 11e) of the *Canadian Charter of Rights and Freedoms* provides that any person charged with an offence has the right not to be denied reasonable bail without just cause. According to the Supreme Court of Canada, s. 11 (e) "contains two distinct elements, namely the right to "reasonable bail" and the right not to be denied bail without "just cause"'"[16]. Section 11e) merely reflects the fundamental right of the accused to the presumption of innocence protected by section 11d) of the Canadian Charter at the bail stage of the criminal process.

[13] Ss. 497, 498, 499, 503 Cr.C.
[14] s. 515 Cr.C.
[15] s. 810 Cr.C.
[16] *R. v. Pearson*, (1992) 3 SCR 665, p. 689

At least two rules flow from these principles. First, the police and the court respectively have the duty to release, to release at the earliest reasonable possibility, and on the least onerous grounds[17].

It follows from this rule that all bail conditions should be considered 'optional'. In particular, there is no mandatory requirement to include the condition to "keep the peace and be of good behaviour' or "to report to the Court when required to do so" in undertakings[18]. Although justices of the peace have the jurisdiction to impose it[19], this condition is discretionary and the Crown must show cause that it is a reasonable condition to be imposed on a defendant.

According to the most recent decision from the Supreme Court of Canada in *R. v. Antic*[20], the following principles and guidelines should, among others, be adhered to:

> « (c) Save for exceptions, an unconditional release on an undertaking is the default position when granting release: s. 515(1).
>
> (d) The ladder principle articulates the manner in which alternative forms of release are to be imposed. According to it, "release is favoured at the earliest reasonable opportunity and, having regard to the [statutory criteria for detention], on the least onerous grounds": *Anoussis*, at para. 23. This principle must be adhered to strictly.
>
> (e) If the Crown proposes an alternative form of release, it must show why this form is necessary. The more restrictive the form of release, the greater the burden on the accused. Thus, a justice of the peace or a judge cannot impose a more restrictive form of release unless the Crown has shown it to be necessary having regard to the statutory criteria for detention.
>
> (f) Each rung of the ladder must be considered individually and must be rejected before moving to a more restrictive form of release. Where the parties disagree on the form of release, it is an error of law for a

[17] *R. v. St Cloud*, (2015) SCC 27, par. 113; see also *R. v. Anoussis*, 2008 ("ladder principle") cited in *R v. Antic*, (2017) SCC 27, par. 67

[18] *R. v. S.K.*, [1998] S.J. No. 863 (Sask. Prov. Ct), par. 25-27; *R. v. A.D.B*. 2009 SKPC 120 "Unfortunately there appears to be a belief among some counsel and justice officials that there are statutory conditions of release. I have been told on several occasions that the conditions to keep the peace and be of good behaviour and appear before the Court when required to do so are statutory. While these requirements are explicit in an undertaking or recognizance, they are not statutory conditions of judicial interim release. Nor should they be considered mandatory or usual conditions of release." (par. 11) "this is a practice which must not continue" (par. 22). See also *R. v. Doncaster*, 2013 NSSC 328 blaming the standard form used by prosecutors.

[19] *R. v. Bosanac*, [1995] O.J. No. 4303 (Ont. Ct. J.)

[20] *R. v. Antic*, (2017) SCC 27

> justice or a judge to order a more restrictive form of release without justifying the decision to reject the less onerous forms.
>
> […]

Despite these legal prescriptions however, many scholars and advocates have raised serious concerns that unconditional bail is being respected in practice[21]. Recent studies conducted in Canada estimate that between 80% and 100% of judicial bail releases involve some kind of community supervision. For instance, Nicole Myers estimated that 82.9% of accused in 11 adult bail courts in Ontario between 2006 and 2013 were required to be under some form of supervision in the community[22].

A study conducted by Karen Beattie, André Solecki and Kelly E. Morton Bourgon from the Research and Statistics Division of the Department of Justice of Canada made some striking findings in this regard. First of all, the study showed that, among the 1, 729 accused for which data was available, 41.1% were detained in custody following arrest, while 58.9% of them were released. Among the 1, 018 accused released by the police, at least 44.3% of them were released with conditions (through an undertaking or a recognizance), while in one of the three court locations, this rate was as high as 76,4%[23]. Then, among all accused who were initially detained by police, two-thirds were subsequently released at the JIR hearing in court (65.9%) while 34.1% were remanded by court[24]. And more importantly perhaps, it appears that not a single accused was released unconditionally[25]!

The most common release type was an undertaking with conditions (54.7%) (following s. 515(2)a) Cr.C.), while 33.9% of the released accused signed their own recognizance with conditions and or sureties (s. 515(2) b) or c) Cr.C.), 8% signed their own recognizance with conditions and deposit (s. 515(2) d) Cr.C.), and 3.3%, a recognizance with conditions, deposit and surety (s. 515(2e) Cr.C.). Therefore, although the courts seem to adhere to the ladder principle when it comes to giving priority to the first rung of the ladder before the others are considered, they seem to forget that this principle first

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[21] Gary T. Trotter, *The law of Bail in Canada*, 3rd edition, Toronto: Carswell, 2010; Martin Friedland, "Criminal Justice in Canada Revisited", (2004) 48(2) *Criminal Law Quaterly* 419

[22] Nicole Myers, « Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail » (2017) 57 *British Journal of Criminology* 664, at p. 673-674

[23] Karen Beattie, André Solecki and Kelly E. Morton Bourgon, *Police and Judicial Detention and Release Characteristics: Data from the Justice Effectiveness Study*, 2013. Data used in the report was taken from the Justice Effectiveness Study that collected data from Court and Crown files from 5 court locations in 4 provinces across Canada, including 3, 093 unique criminal court cases. See p. 14 (table 6). The importance of this study should not be underestimated given that we know little to nothing on police decisions to release.

[24] Ibid, p. 16

[25] Ibid, p. 19, figure 4

requires that "save for exceptions, an unconditional release on an undertaking is the default position when granting release: s. 515(1)"[26].

This trend is confirmed by our own observations, interviews and quantitative data. Offenders who are remanded and appear in custody are almost never released unconditionally: they are either held in custody until the end of the proceedings or released with conditions. As one actor observed: "when a defendant appears in custody, it would be surprising that he or she would be simply released on a condition to keep the peace or be of good behaviour". The quantitative data analysed in part 5 confirms this: only 3% of all bail orders in the JUSTIN dataset (n=3236) contain 0 condition of release over a period of seven years.

Secondly, conditions of release must be justified by the Crown, reasonable and within the Court's jurisdiction (intra vires)[27]. Except in cases of reverse onus, the Crown bears the burden to demonstrate that anything more restrictive than a simple release without conditions is justified[28].

Again, according to the Supreme Court of Canada, "terms of release imposed under s. 515(4) Cr.C. may "only be imposed to the extent that they are necessary" to address concerns related to the statutory criteria for detention and to ensure that the accused can be released.[29]" The statutory criteria for detention are found in s. 515(10) Cr.C. and can only be justified on one or more of the following three grounds: first, "to ensure attendance in court", secondly, "to ensure the protection and safety of the public having regard to all the circumstances including the likelihood that the accused, if released from custody, will commit a criminal offence", or thirdly, "to maintain the public confidence in the administration of justice"[30].

The conditions must also be reasonable and rational. In each case, the Crown must demonstrate the connection between the conditions and the alleged offence. Bail differs from probation because the individual is still presumed innocent; in some cases, he or she has not yet been formally accused. For instance, the courts have found that a prohibition to use alcohol or drugs, the imposition of a curfew, house arrest or "restraining all of the accused's assets" are not reasonable conditions in certain circumstances[31]. Other cases found that the condition to "follow the rules and

[26] *R. v. Antic*, (2017) SCC 27, par. 67 « (c) »
[27] *R. v. Pearson, R. v. Omeasoo*, 2013 ABPC 328
[28] *Keenan v. Stalker* (1979) 57 C.C.C. (2d) 267 (Que C.A.); *R. v. Root*, [2004] O.J. No 4347 (Ont Sup. Ct) ; *R. v. Antic*, (2017) SCC 27, par. 67
[29] *R. v. Antic*, (2017) SCC 27, par. 67 (j)
[30] s. 515 (10) *Cr. C., R. v. St Cloud*, 2015 SCC 27; *Keenan v. Stalker* (1979) 57 C.C.C. (2d) 267 (Que C.A.)
[31] *R. v. Omeasoo*, 2013 ABPC 328 (prohibition to use alcohol imposed to an alcoholic); *R v. Coombs*, 2004 ABQB 621 (prohibition to use drugs imposed to a drug addict); *R. v. Mann* (1993) 23 W.C.B. (2d) 311 (Ont. C.J.) (restraining all of the accused' assets); *R. v. Yurko*, 1999 ABQB 534 (imposing a curfew to an individual with no history of anti-social behaviour during the evening or at night) but c.f. R. v. Patko, (2005) BCCA 183 (a curfew is reasonable in the case of an accused who committed a vicious assault contributing to a

regulations and/or the lawful instructions of the staff" of a treatment facility amounts to improper delegation of judicial authority[32]. Finally and more specifically, red zone conditions imposed in a bail order have been found reasonable or unreasonable depending on the circumstances: in *R. v. Bielefield*, a restriction from being found within a one-block area of Hornby Street and Georgia Street was found reasonable to prevent the commission of offences by the accused while awaiting trial[33]. Finally, bail conditions "must not be imposed to change an accused person's behaviour or to punish an accused person"[34].

An undertaking issued by a police officer is effective immediately and, even *before* the information relating to the charges is laid, and an appearance notice, confirmed[35]. Moreover, any form of release, including the powers of release conferred upon the police, remains in effect until the end of the trial or until the accused is sentenced (unless reviewed or revoked)[36].

Pursuant to the *Criminal Code*, justices of the peace and judges have greater powers than the police to issue conditions at bail.

In addition to a promise to appear, the police can request that the person do one or more of the following things:

a) remain within a specified territorial division specified in the undertaking;
b) give notice to the police of any change of address, employment or occupation;
c) abstain from communicating with any alleged victim or witness or from going to any specific place;
d) surrender his or her passport;
e) abstain from possessing or acquiring firearms or ammunition;
f) report to a police officer or a bail supervisor at specified times,
g) abstain from consuming alcohol or not prescribed drugs; and
h) comply with any other condition that the police consider necessary to ensure the safety and security of any victim of or witness to the offence (s. 503 (2.1) Cr.C.).

These provisions, however, are subject to interpretation by legal actors and the courts. For instance, during our interviews, legal actors pointed out that the police do not have the jurisdiction to impose a prohibition to possess or use cell phones. This is also

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person's death, even if it was committed in the afternoon); *R. v. Singh*, 2011 ONSC 717 (house arrest was held unreasonable in the case of a G-20 demonstrator).

[32] *R. v. J.A.D.*, 1999 SKQB 262

[33] *R. v. Bielefeld* (1981) 64 C.C.C. (2d) 216 (BCSC)

[34] *R. v. Antic* (2017) SCC 27, par. 67 j)

[35] S. 145(5.1) Cr.C. and *R. v. Oliveira*, 2009 ONCA 219. However, if as of the first appearance date, no criminal proceeding has been commenced or no information sworn, the undertaking is no longer of any force or effect: *R. v. Killaly*, BCPC 138.

[36] S. 523 (1) Cr.C.; *R. v. Oliveira*, 2009 ONCA 219

confirmed by case law[37]. Others also argued that in their opinion, police officers are not allowed to impose red zone conditions, relying on a strict interpretation of s. 503(2.1) c) Cr.C. – limited to 'no go' conditions, and h), limited to such conditions necessary to ensure the safety and security of victim and witness and NOT to prevent recidivism[38].

A justice can impose all of the above conditions. However, he or she may also direct that the accused comply with any "other reasonable conditions specified in the order as the justice considers desirable", to ensure attendance in court, to ensure the protection and safety of the public, having regard to all the circumstances including the likelihood that the accused will commit a criminal offence, and to maintain the public confidence in the administration of justice[39]. Examples of conditions held to be *ultra vires* included a condition imposed to a youth to reside at a specific house and abide by its rules and regulations[40].

Upon request from the accused, a prosecutor may review at any time before or during appearance the order or the conditions imposed by the police[41]. Furthermore, a release order imposed by the Court can be reviewed at any time before the trial with the written consent of the prosecutor or by a judge of the Supreme Court of British Columbia[42]. According to the Supreme Court of Canada in *R v. St Cloud*, the judicial review process is not a *de novo* hearing providing open-ended discretion to the reviewing judge, but a hybrid remedy. The reviewing judge can only intervene "where relevant new evidence is tendered, where an error of law has been made or, finally, where the decision was clearly inappropriate"[43].

Conditions associated with bail are legally significant, in that failure to comply with conditions may lead to arrest and detention, and new criminal charges for breach and forfeiture proceedings (in the case of recognizances with sureties). An accused person found in violation of a bail order is subject to a reverse onus provision[44]. This reverse onus not only requires that the person provide evidence on a balance of probabilities that he or she had a lawful excuse not to comply with his conditions, but he also creates a presumption that the accused should be held in custody unless he or she shows cause

[37] e.g. *R. v. Skordas*, 2001 ABPC 118; *R. v. Barnett*, 2010 ONSC 3720

[38] e.g. *R. v. Khan*, (2003) O.J. No. 5301 (Ont. CJ); by contrast, red zone conditions can be imposed by justices of the peace: see *R. v. Bielefield*, (1981) 64 C.C.C. (2d) 216 (BCSC) in which the Court found that red zone conditions could be imposed according to the justice of the peace's residual power in s. 515(4) (f) Cr. C.

[39] s. 515(4) Cr.C.

[40] *R. v. C.C.H*. (1994) 24 W.C.B. (2d) 187 (N.S. Fam. Ct.)

[41] s. 515.1 Cr.C.

[42] s. 515.1 (prosecutor); s. 520-521 (judicial review), referring to s. 493 Cr.C. "judge".

[43] *R v. St Cloud*, (2015) SCC 27, par. 139; see also par. 92.

[44] Note however that on June 6, 2017, the Minister of Justice and Attorney General of Canada tabled *An Act to Amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act* (Bill C-51) to repeal multiple reverse onus provisions, including with respect to s. 145 (failure to comply): see section 9 of the Bill.

for his or her release. Courts will consider a breach of condition as one of the best predictors of future breaching and as such, it may lead the person to custody or he or she may be released on even more stringent conditions in future cases[45].

The law of probation and CSOs

Probation consists in releasing a convicted offender in the community under supervision upon the promise of being of good behaviour. The offender is released subject to a series of conditions and under the supervision of a probation officer. Probation is imposed only in specific circumstances. According to section 731 Cr.C., probation should be imposed "having regard to the age and character of the offender, the nature of the offence, and the circumstances surrounding its commission". It can be imposed in one of three situations: first, if no minimum punishment is prescribed, the sentencing judge can suspend the passing of sentence and direct that the offender be release on conditions (suspended sentence); secondly, the judge can impose a probation order in addition to a fine or a period or imprisonment not exceeding two years, and finally, a judge can also make a probation order where it discharges an accused (conditional discharge). Probation orders are regularly imposed in Canada, and in B.C.[46]

When issuing a probation order, the judge shall at least prescribe that the offender follow four compulsory conditions. Until 2014, probation came with the following three compulsory conditions:

a) to keep the peace and be of good behaviour,
b) to appear before the court when required to do so by the court,
c) to notify the court or the probation officer in advance of any change of address, employment and occupation[47]

In 2014, a fourth compulsory condition was added, requiring that the court prescribe that the offender "abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order" or that he or she "refrain from going to any place specified in the order" unless the victim, witness or other person gives their consent or the court decides it is not appropriate to do so[48]. As a result of these changes, non-communication or no contact and no go conditions are likely to be even more regularly imposed.

The sentencing judge may also prescribe optional conditions, including for instance, conditions to report to a probation officer; to abstain from the consumption of alcohol or unprescribed drugs; to abstain from possessing weapons; to provide for the support or care of dependants; to perform community service; and to participate in a treatment

[45] s. 145(5.1) and s. 515(6) c) Cr.C.
[46] In 2014-2015, probation orders were imposed in 43% of guilty cases across Canada, and 47% in B.C.: http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/legal22k-eng.htm
[47] s. 732.1(2) a), b) and c) *Cr. C*
[48] s. 731.1(2)a.1 Cr. C

program. Finally, the judge has a residual power to prescribe that the offender "comply with such other reasonable conditions as the court considers desirable, … for protecting society and for facilitating the offender's successful reintegration into the community"[49].

Probation orders impose certain restrictions to the freedom of an offender, but they have traditionally been seen as rehabilitative sentencing tools[50]. According to the Supreme Court of Canada, the sentencing judge may not impose conditions that would be contrary to provincial and federal laws or to the *Canadian Charter*. The conditions must also be reasonable and aim at protecting the society and facilitating the offender's reintegration. They cannot be primarily punitive[51], and will generally be linked to the particular offence, but need not be[52]. Instead, what is required is "a nexus between the offender, the protection of the community and his reintegration into the community"[53].

Conditions of probation have thus sometimes been challenged for not being reasonable or enforceable, or for lacking jurisdiction, but with a few exceptions, they have generally been upheld. For instance, in *R. v. Shoker*, the Supreme Court of Canada examined a condition to "submit to a urinalysis, blood test or breathalyser test upon the demand/request of a Peace Officer or Probation Officer to determine compliance" with an abstinence clause. The majority of the Court held that the sentencing judge had no authority under the residual clause (s. 732.1(3)h) Cr.C.) to impose a search and seizure of bodily substance as part of a probation order[54].

In *R. v. Pedersen* (1986), the former County Court of British Columbia upheld a probation condition imposing a geographical restriction area "known to be one in which drugs are frequently sold" to a young man who was found guilty of possession of marijuana in Vancouver, stating that the order aimed at "securing the good conduct of the Appellant and preventing a repetition by him of the same offence"[55]. In *R. v. Rowe* however, the Ontario Court of Appeal struck down a condition imposed to an offender convicted of criminal harassment "to leave the province of Ontario within two weeks of release"[56]. The Court modified the condition and limited the exclusion to the town of Napanee. In doing so, it held that "banishment orders should not be encouraged", that the larger the ambit of the banishment, the more difficult it would be to justify it, and that

[49] s. 732.1 (3) h) Cr. C.
[50] *R. v. Proulx*, 2000 SCC 5; *R. v. Shoker*, 2006 SCC 44, par. 10; *R. v. Goeujon*, (2006) BCCA 261, par. 49
[51] *R. v. Shoker*, [2006] 2 SCR 399, par. 13-14; R. v. Ziatas, (1973) 13 CCC (2d) 287 (Ont. C.A.); *R. v. Traverse*, 2006 MBCA 7 ;
[52] *R. v. Shoker*, [2006] 2 SCR 399, par. 13-14; see also *R v. Leschyshyn*, 2007 MBCA 41; *R. v. Etifier*, 2009 BCCA 292; *R v. Timmins*, 2006 BCCA 354; *R. v. Baydal*, 2011 BCCA 211
[53] *R. v. Shoker*, [2006] 2 SCR 399, par. 13
[54] In 2011, Parliament modified the Criminal Code in response to the Supreme Court of Canada's decision in Shoker : S.C. 2011, c. 7. The statutory regime came into force on March 31, 2015.
[55] *R. v. Pedersen*; see also e.g. *R. v. Deufourre*, (1979) (par. 10), *R. v. Powis* 1999).
[56] *R. v. Rowe*, 2006 212 C.C.C. 254 (Ont. C.A.)

"banishment from an entire province is an "extreme measure"[57]. It still allowed a limited exclusion ban in light of the appellant's serious record for domestic violence and harassment and of the appellants' plan for reintegration and rehabilitation. In *R. v. Etifier*, the BC Court of Appeal also struck down a condition not to "attend the city of Penticton, BC without priori written approval of your probation officer" because there was "no reason to believe that the accused will be rehabilitated more completely or more quickly by staying away from Penticton [or] that society will be safer or more secure if the accused stayed away from [that community]"[58].

In *R. v. Timmins*, the B.C. Court of Appeal upheld a no go condition "not to attend the Renegades Clubhouse in Prince George or any other clubhouse of a like variety". The Court was of the opinion that the condition was not punitive but focused on rehabilitating the offender by removing him from associations that tended to influence him into being involved in criminality[59]. In *R. v. Traverse*, a condition to abstain from the consumption of alcohol or drugs was also found reasonable as long as there was a nexus between the offender and his rehabilitation regardless of whether the condition is related to the offence[60]. The B.C. Court of Appeal came to the same conclusion in *R. v. Hardenstine* with respect to an abstinence clause and a no go condition "not to enter any premises such as a bar, pub or liquor store where the primary commodity sold is alcohol". While the "case at bar [did] not represent the strongest case" for imposing such conditions, the Court found that there was sufficient basis to conclude that these conditions were required to support the Appellant's rehabilitative plan[61].

Conditional sentences (CSOs) are jail sentences served in the community. By nature and definition, conditional sentences are thus first and foremost sentences of imprisonment. They require that the Court first impose a sentence of imprisonment of less than two years before considering whether the sentence can be served in the community[62]. First introduced in the Criminal Code in 1996 to reduce the use of incarceration, conditional sentences have been consistently limited though subsequent modifications of the Code, first in 1997, then in 2007 and 2012 and are now rarely used in the criminal justice system[63]. They are now subject to six conditions of admissibility set out in s. 742.1 Cr.C. including the following:

- the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles set out in sections 718 to 718.2;

[57] *R. v. Rowe*, 2006 212 C.C.C. 254 (Ont. C.A.), par. 5-7
[58] *R. v. Etifier*, 2009 BCCA 292, par. 18
[59] *R v. Timmins*, 2006 BCCA 354
[60] *R. v. Traverse*, 2006 MBCA 7
[61] *R. v. Hardenstine*, 2008 BCCA 474
[62] *R. v. Proulx*, 2000 SCC 5, par. 29
[63] In 2014-2015, conditional sentences were imposed in 4% of the cases across Canada and 7% (that is 1,688 CSOs out of 24,262 guilty cases) in B.C. : http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/legal22k-eng.htm .

- the offence is not an offence punishable by a minimum term of imprisonment
- the offense is not an offence prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life, or for which the maximum term of imprisonment is 10 years in cases of terrorism, criminal organization or involving bodily harm, drug trafficking or the use of a weapon;
- the offense is not an offence prosecuted by indictment, under any of the following provisions, including, among others, criminal harassment, motor vehicle theft, theft over 5000$, breaking and entering and arson;

Like probation orders, conditional sentence orders (CSOs) include a series of mandatory and optional conditions, but they should include punitive conditions that are restrictive of the offender's liberty[64]. Until 2014, CSOs included five compulsory conditions, but a sixth condition, similar to that imposed for probation, was added in 2014 to prescribe that the offender abstain from communicating with the victim, witness or other person or refrain from going to specified places[65].

In addition to the optional conditions available for probation, the court can also prescribe that the offender "comply with such other reasonable conditions as the court considers desirable,… , for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences"[66].

Failure to comply with a probation order can lead to new criminal charges for breach[67], and failure to comply with conditions issued in a CSO may include suspending the conditional sentence order and directing that the offender serve in custody a portion or the remainder of his or her sentence[68].

3. Poverty and Homelessness in Vancouver: the Social Context of the Downtown Eastside

It is clear from our study that the context within which conditions of release are applied is locally contextual. Thus it is necessary to note some salient contextual conditions in the case of Vancouver. Vancouver is the largest city in British Columbia with a significant concentration of the province's criminal justice services, welfare expenditures, and social service infrastructure. It is the location of the first legal safe injection site to have opened its doors in North America (INSITE)[69]; anti-poverty groups like Pivot Legal Society; an extensive network of low barrier shelters, like the Portland Hotel Society and

[64] *R. v. Proulx*, [2000] 1 SCR 61, at par. 34
[65] s. 742.3 (1.1). Cr. C.
[66] s. 742.3(2)(f) Cr. C.
[67] s. 733.1 Cr. C.
[68] s. 742.6(9) Cr. C
[69] In December 2016, amidst the opioid and deaths by overdose crisis, the Vancouver Coastal Health has provided financial support to another safe injection site in the DTES. Moreover, 15 overdose prevention sites staffed with nurses are now operating across B.C.

Rain City Housing; and the world renowned Centre for Excellence in HIV/AIDS, a pioneer in public health research. But, as a report by the United Nation's Population Fund points out:

> There is trouble in paradise. [...] The Downtown Eastside of Vancouver is home to a Hepatitis C (HCV) rate of just below 70 per cent and an HIV prevalence rate of an estimated 30 per cent—the same as Botswana's.[70]

The Downtown Eastside (DTES), 'the poorest postal code in Canada', is home to a visible homeless population, high rates of mental illness, and high rates of HIV/AIDS. According to the B.C Center for Excellence in HIV/AIDS, "The DTES has the lowest national life expectancy and the highest HIV prevalence in the Western world, reaching 27% among injection drug users"[71].

Because of the large number of red zones associated with the neighbourhood, this section reviews key research findings relating to homelessness, mental illness, drug use, and health in Vancouver, with an emphasis on the concentration of inequality in the DTES.

The Homeless and Marginally Housed

Vancouver is home to a relatively large homeless population and a severe housing crisis. According to the most recent *Metro Vancouver Homeless Count (2017)*, 3, 605 homeless people were counted in the Greater Vancouver area, an increase of 30% since 2014[72]. In March 2016, the City of Vancouver counted 1,847 homeless individuals[73]. Men (75%), middle-aged persons, and Indigenous people (38% in the City of Vancouver) remain overrepresented among the homeless population.

For many people living on welfare the only available accommodations are single residence occupancy hotels (SROs), which are quickly disappearing or becoming too expensive. According to a 2007 report by Simon Fraser University's Centre for Applied Research on Addiction and Mental Illness:

> In Vancouver...there are now just over 6,000 SROs, compared to 13,300 25 years ago. Existing buildings will decline at an even steeper rate due to

[70] Patricia Leidl, 2007. Vancouver: Prosperity and Poverty make for Uneasy Bedfellows in World's Most Livable City. State of the World Population 2007: Vancouver Feature. United Nations Population Fund, p. 1

[71] B.C Center for Excellence in HIV/AIDS. "Information About HIV/AIDS" http://www.cfenet.ubc.ca/healthcare-resources/about-hiv-aids

[72] B.C. Non-profit Housing Association and M. Thomson Consulting (2017). *2017 Homeless Count in Metro Vancouver.* Prepared for the Metro Vancouver Homelessness Partnering Strategy Community Entity. Burnaby, Vancouver. Indigenous people accounted for 34% of the homeless population.

[73] The Vancouver Homeless Count, 2016: www.**vancouver**.ca/files/cov/**homeless**-**count**-**2016**-report.pdf It is understood that homeless counts underestimate the number of homeless individuals.

> gentrification and the demolition of increasingly dilapidated SRO stock. Moreover, in many communities, adequate and affordable housing is beyond the means of people who rely on income support. Even with the recent increases to income assistance rates in BC, people on disability benefits or social assistance receive $375 per month for shelter (the support portion is $235/mo for regular assistance and $531/mo for persons with disabilities); however, average market rents in many of BC's urban centres are well over $600 per month. Even a poor quality SRO hotel room costs, on average, $380 per month.[74]

The trends identified in this report have only intensified. In October 2016, a report by B. Pauly and G. Cross from the University of Victoria and D. Weiss from the Union Gospel Mission found that shelter occupancy was at 97% in Vancouver[75]. Vacancy for the most affordable units, including single room occupancy hotels (SROs) and bachelor suits, are below 1%. Vancouver's housing market is still the most unaffordable in Canada,[76] driving many people to homelessness[77]. Welfare rates were only very recently increased by $100 per month after having been frozen at $610 a month for a decade[78].

Mental Illness and Drug Addiction

Homelessness and inadequate housing are related with severe addiction and mental illness (SAMIs). While it is difficult to determine the direction of causality, drug addiction, mental illness, and homelessness are mutually reinforcing. According to the 2012 review of the B.C Justice system, "In downtown Vancouver, 47% of homeless in shelters are addicts and 63% of unsheltered homeless suffer from addiction".[79]

In British Columbia an estimated 130,000 adults have severe addiction and/or mental illness.[80] This population is significantly over represented in B.C's correctional system.

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[74] Patterson et al. "Housing and Support for Adults with Severe Addictions and/or Mental Illness in British Columbia". Center for Applied Research in Mental Health and Addiction; February 2008. http://www.carmha.ca/publications/documents/Housing-SAMI-BC-FINAL-PD.pdf p 23

[75] Bernie Pauly, Geoff Cross and Derek Weiss, No Vacancy, Affordability & Homelessness in Vancouver, 2016 http://www.ugm.ca/affordability/

[76] Mayor's Taskforce on Housing Affordability. "Bold Ideas Towards an Affordable City" Final Report of Mayor's Task Force on Housing Affordability. Appendix B. City of Vancouver, 2012. http://vancouver.ca/files/cov/Staff_report_to_Council_re_task_force_report.pdf p4

[77] Bernie Pauly, Geoff Cross and Derek Weiss, No Vacancy, Affordability & Homelessnee in Vancouver, 2016 http://www.ugm.ca/affordability/

[78] Raise the Rates (2016). https://www.change.org/p/christy-clark-raise-social-assistance-rates-in-bc ; see http://www.cbc.ca/news/canada/british-columbia/b-c-government-set-to-increase-welfare-rates-and-disability-assistance-1.4214828 reporting that the increase is effective starting on September 20, 2017.

[79] Cowper, Geoffrey D. QC ". A Criminal Justice System for the 21st Century. B.C Justice Reform Initiative; Final Report to the Minister of Justice and Attorney General Shirley Bond. August 7, 2012. Web: http://bcjusticereform.ca/wp-content/uploads/2012/02/CowperFinalReport11.pdf p 152

[80] Patterson et al. "Housing and Support for Adults with Severe Addictions and/or Mental Illness in British Columbia". Center for Applied Research in Mental Health and Addiction; February 2008.

According to 2005 research by the Community Mental Health Association of B.C, "Over 30% of persons with serious mental illness interviewed had contact with police while making, or trying to make, their first contact with the mental health system".[81] According to a 2008 report by the Centre for Applied Research in Addictions and Mental Health, *Corrections, Health, and Human Services*: "it can be stated without exaggeration that substance use problems are endemic among prisoners, and co-occurring disorders appear to be the rule rather than the exception"[82] More recent reports of B.C's correctional population show similar findings: about 56% of all offenders under correctional supervision (for custody and community sentences) have been diagnosed with a substance abuse issue and/or mental health disorder.[83] A 2012 review of the B.C Justice System (the Cowper Report) found that there was more than 50% prevalence of mental illness amongst repeat offenders, a figure that has been steadily growing for years[84].

Crime

The crime rate in British Columbia has been dropping steadily over the last 10 years, and at a faster rate than in the rest of Canada[85]. The crime severity in B.C has also been steadily decreasing since the beginning of the years 2000, with a slight increase since 2014.[86] In Vancouver crime rates have dropped 38%, from 125:100,000 people in 2001 to 76:100,000 people in 2015[87]. However, police-reported crime in the city remains concentrated in the DTES[88].

The VPD identifies the DTES as home to high-recorded rates of illegal drug use and trafficking. It is also home to elevated recorded rates of violent crime, break and enters, and robberies.[89] Chronic offenders identified by the VPD also tend to be concentrated in

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http://www.carmha.ca/publications/documents/Housing-SAMI-BC-FINAL-PD.pdf , p 18

[81] Canadian Mental Health Association, Police and Mental Illness: Increased Interactions (March 2005), online: Canadian Mental Health Association <http://www.cmha.bc.ca/files/policesheets_all.pdf> .

[82] Ibid p. 8

[83] British Columbia Corrections, A Profile of B.C. Corrections – Protect Communities Reduce Offending, October 2013, p. 50.

[84] Cowper, Geoffrey D. QC ". A Criminal Justice System for the 21st Century. B.C Justice Reform Initiative; Final Report to the Minister of Justice and Attorney General Shirley Bond. August 7, 2012, p 152

[85] Cowper, Geoffrey D. QC ". A Criminal Justice System for the 21st Century. B.C Justice Reform Initiative; Final Report to the Minister of Justice and Attorney General Shirley Bond. August 7, 2012, p 18.

[86] Police-reported crime increased 4% in B.C. in 2015, but is still over 30% lower than a decade ago: Allen, Mary, 2015. Police-reported crime statistics 2015, Statistics Canada: http://www.statcan.gc.ca/pub/85-002-x/2016001/article/14642-eng.htm

[87] Police Services Division, B.C Ministry of Public Safety and Solicitor General. B.C. Policing Jursidiction Crime Trends 2015. Online: (http://www2.gov.bc.ca/gov/content/justice/criminal-justice/policing-in-bc/publications-statistics-legislation/crime-police-resource-statistics)

[88] City of Vancouver B, p 24.

[89] Vancouver Police Department, Project Lockstep: A United Effort to Save Lives in the Downtown Eastside. (February 4 2009). Online: http://vancouver.ca/police/assets/pdf/reports-policies/vpd-project-lockstep.pdf. P26.

the area. In addition, it is identified as the main locus for prostitution in the city.[90] According to a 2009 report by the Vancouver Police Department, "[c]urrent estimates suggest that there are between 1,000 and 1,500 sex trade workers in Vancouver and most work in the DTES...Primarily, these workers are women and between 75% and 80% of them are regular drug users. Up to 50% of sex workers are involved in the sex trade in order to support a drug addiction."[91] The majority of women in the sex trade are aboriginal (with some estimates as high as 70%) and are at significantly elevated rates for violence.[92]

4. Policing and the Administration of Justice in Vancouver

The correctional system in British Columbia has undergone a radical transformation in the last decades. Community supervision has replaced custodial sentences as the dominant form of correctional supervision, release on bail is significantly more common, remand (temporary detention awaiting trial) has become the main mode of incarceration, and offences against the administration of justice are on the rise**.** The presence of a new provincial criminal court, the Downtown Community Court (DCC), alongside other judicial reforms, have played an important role in driving these changes. Collectively these shifts have significantly altered the ways in which public spaces are regulated in Vancouver, particularly for marginalized and low-income residents.

Policing

The B.C police force has grown considerably. Since 2002 the B.C police force has grown by 2172 full time employees, or by 30%.[93] Since 2007, all of that growth has been in municipal police forces. As of 2015 the VPD had 1327 sworn members and 388.5 civilian members, roughly a 12% increase from 2004 levels[94]. The VPD has a significant crew concentration in the DTES. In addition, the VPD has a special, "Downtown Eastside Beat Enforcement Team (BET)" which, according to the VPD, serves as, "a high visibility foot beat presence on the street that concentrates its attention in the DTES".[95] The same patrol deployment study notes the existence of 91 "problem premises" in the DTES that

[90] Ibid, p 27
[91] Ibid.
[92] Ibid.
[93] See: B.C Ministry of Public Safety and Solicitor General, Policing Resources in B.C., 2015: http://www2.gov.bc.ca/gov/content/justice/criminal-justice/policing-in-bc/publications-statistics-legislation/crime-police-resource-statistics . British Columbia Ministry of Justice, "Criminal Justice Trends 2011/12" (August 2012) [unpublished], Online: (http://bcjusticereform.ca/wp-content/uploads/2012/02/Criminal-Justice-Trends-2011-12.pdf). p70-72
[94] The VPD Authorized strength has not increased 2009: B.C Ministry of Public Safety and Solicitor General, Policing Resources in B.C., 2015: http://www2.gov.bc.ca/gov/content/justice/criminal-justice/policing-in-bc/publications-statistics-legislation/crime-police-resource-statistics . VPD Annual Reports 2004 & 2014. Online: (http://vancouver.ca/police/about/publications/index.html)
[95] Demers, Simon et al, Vancouver Police Department. Patrol Deployment Study. (February 5, 2007). Online: (http://vancouver.ca/police/assets/pdf/studies/vpd-study-patrol-deployment.pdf) p1099.

accounted for 8.6% of all calls to the VPD in 2005-06. Eight were designated as "prolific consumers of police services" which, "required police at least once a day on average... Interestingly, the 8 prolific locations identified by the analysis were located within a 2-block radius from the intersection of Carrall Street and Hastings Street."[96]

Unlike other neighbourhoods in Vancouver, a majority of police calls in the area were officer initiated: "out of the 12,622 calls that originated from problem locations, 5,650 (44.8%) were officer-initiated or on-view calls."[97] These "on-view calls" were mostly for warrants (1,545), arrests (715), and court order breaches (563). 911 calls initiated by citizens were mostly for annoying circumstances (1,008), requests for assistance (711), and requests for assistance from ambulance operators (457).

There are indications that many residents see this surveillance as intrusive. Data compiled by the Vancouver Area Network of Drug Users (VANDU) and the Downtown Neighbourhood Council (DNC) indicates that VPD District 2 (which includes the DTES) is the location of five times as many drug charges than other districts, significantly more "street checks", and other signs of elevated police attention[98]. Similarly, in 2013, PIVOT Legal Society and VANDU obtained data showing that the VPD issued an overwhelming majority of tickets issued pursuant to city bylaws in the DTES, including 76% of jaywalking tickets, 31% for panhandling and 95% for street solicitation[99].

Administration of Justice

Recent trends in the administration of justice in Canada and in B.C. suggest that community supervision and conditions of release play an important role in contemporary criminal justice, occupying a significant amount of police, judicial, and correctional resources.

In 2014-2015, B.C. had the lowest adult incarceration rate in the country: 63 per 100, 000 adult population[100]. Moreover, the average number of adults in correctional services decreased by 18% from 2000/01 to 2014/15[101]. While 1,012 adults under correctional supervision in 2014/15 were in sentenced custody, 11,008 others were supervised under probation orders (82%)[102].

While Statistics Canada does not provide a detailed account of individuals on bail, in 2012-2013, B.C. Corrections Branch estimate that an average of 22,693 people were

[96] Ibid, p. 377
[97] Ibid, p. 381
[98] VANDU slides available from Will Damon
[99] http://www.pivotlegal.org/pivot_and_vandu_slam_vpd_over_city_bylaw_enforcement
[100] Julie Reitano, Adult Correctional Services 2014/2015, Statistics Canada, March 22, 2016: http://www.statcan.gc.ca/pub/85-002-x/2016001/article/14318-eng.htm , at p. 3
[101] Ibid, table 1
[102] Ibid, table 2

under some form of community supervision in this jurisdiction. Among them, 7,771 individuals were on bail (34%) while 11, 447 were on probation (51%) and 1,959 under a CSO (9%)[103].

More importantly, in 2014-2015, the commencement of bail supervision was the most common point of initial entry into correctional services in British Columbia (54%: 9,996 new initial entries), followed by remand (17%: 3 064 new initial entries) and probation (15%: 2,731 new initial entries)[104]. In comparison, in most provinces, the first point of contact for adults entering correctional services is remand (Ontario, Nova Scotia, New Brunswick and Saskatchewan) or probation (Newfoundland and Labrador, Nova Scotia ex aequo with remand).

These findings suggest that the use of supervised pre-trial release is very significant in the province.

Breaches: Administration of Justice Offences (AJO)

The rate at which court orders are violated or 'breached' is one of the best available statistical indicators of trends in the use of conditions of release. By this measure, release conditions, including area restrictions, are a widely and increasingly used tool in the Canadian criminal justice system.

According to Statistics Canada, in 2014, about one in ten Criminal Code offences Canada-wide reported by the police was an AJO (total: 171,897 incidents)[105]. Moreover, in 75% of the cases, AJO were *the* most serious offences involved in the incident. While the overall number of police reported offences against the administration of justice slightly decreased in Canada between 2004 and 2014, reports of the specific offence of failure to comply with conditions[106] increased by 8%. Failure to comply with conditions and breach of probation[107] represented 79% of all police-reported AJO committed in 2014, with failure to comply being *the* most common offence (57%) and breach of probation arriving in second position (22%)[108].

[103] B.C. Corrections Branch, A Profile of B.C. Corrections, October 2013, p. 18

[104] Julie Reitano, Adult Correctional Services 2014/2015, Statistics Canada, March 22, 2016, table 3

[105] Marta Burczycka, and Christopher Munch, Trends in offences against the administration of justice, 2015. Administration of justice offences are a suite of offences including failure to comply with a court order, breach of probation, failure to appear, unlawfully at large, escapes or helps escapes from unlawful custody and other administration of justice offences: Department of Justice Canada - Research and Statistics Division, The Justice System Costs of Administration of Justice Offences in Canada, 2009, see Table 1, p. 4.

[106] The Uniform Crime Reporting Survey (UCR) code "fail to comply with conditions" 3410 includes the following Criminal Code sections: 145(3-5.1a), 145(3-5.1b), 810(3b), 810.01(4), 810.1(3.1), 810.2(4), 811(a), 811(b).

[107] The UCR code "Breach of Probation Order" includes Criminal Code sections: 161.(4a), 161.(4b), 733.1(1a), 733.1(1b),753.3(1)

[108] Ibid, chart 3, p. 8. Other offences against the administration of justice include failures to appear, escape

Being charged with an AJO is highly consequential. First of all, accused charged with AJO as the most serious offence are significantly more likely to be detained by police following arrest (66.1% as opposed to 41.1% for all offences), and to be held in remand following a judicial interim release hearing (38.8% as opposed to 34.1% for all offences)[109]. Such offences are also more likely to be prosecuted, to lead to a guilty verdict and to a jail sentence than any other types of offences. In 2014, 91% of all persons accused of an AJO were charged as compared to those accused of other Criminal Code incidents, for which only 49% were charged[110]. As a result, in 2013/2014, in adult criminal courts across Canada, 39% of all completed cases included at least one administration of justice charge (139,776 on 360,640 completed cases), an increase of 6% from 2005/2006[111]. Among those 139,776 completed cases, 50% included a charge for failure to comply with conditions and 33% included a charge of breach of probation.

The situation in British Columbia shows an even more important increase. While there has been an overall decrease of 19% in the number of completed [criminal] cases between 2005/2006 and 2013/14 in B.C., the number of completed cases including at least one AJO increased by 10.8% during the same period (from 13, 010 cases in 2005/6 to 14, 413 cases in 2013/14), representing now over 40% of all the cases[112].

The consequences for the violation of a court order vary considerably depending on the nature of the breach, the context of the offence, and the criminal record of the accused. Nonetheless, 76% of the cases that included an AJO resulted in a guilty verdict, compared to 55% of the cases that did not include such an offence in 2013/14. Violations of court orders are also more likely to receive a prison sentence: in 2008/09 for instance, 35% of all criminal offences were punished with custody compared to 56% of BOP (breach of probation) and 45% of FTC (failure to comply) offences. However, violations of court orders were met with a much lighter median sentence length: 32 days for BOP and 20 days for FTC, compared to 118 days for all offences.

AJO also accounted for important increases in admissions to remand across the country. Remand, also referred to as preventative detention, is the court ordered detention of an accused person while awaiting a bail hearing or trial. In Canada, there are currently more people held in remand centres then imprisoned after a finding of guilt: 57% of all adults in provincial correctional facilities are currently in pre-trial detention[113]. While the

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custody, prisoner unlawfully at large and others.

[109] Karen Beattie, André Solecki and Kelly E. Morton Bourgon, *Police and Judicial Detention and Release Characteristics: Data from the Justice Effectiveness Study*, 2013, p. 13 and 18, tables 5 and 10

[110] Ibid, p. 10

[111] Ibid, p. 13

[112] Ibid, table 7, p. 27

[113] Correctional Services Program – Statistics Canada, 2017, Trends in the use of remand in Canada 2004-2005 to 2014-2015.

rate at which Canadians are sentenced to custody[114] has been steadily declining, the rate at which people are held in remand has increased by 71% since 1998. B.C. has followed similar trends. According to the 2012 Cowper report, "the remand population used to account for one-third of inmates but is now half. In addition, the majority of inmates who receive a jail sentence are initially admitted through remand: this comprises about 75% of admissions to custody"[115].

According to a study conducted by the Department of Justice, in 2009 only, all administration of justice offences in Canada cost approximately $730 million to the Canadian justice system, including nearly a quarter of billion dollars in police costs ($239M) and $296 million in corrections. Courts, prosecutions and legal aid costs amounted to approximately $204 million[116].

This use of remand is geographically concentrated in Vancouver (likely including many DTES related charges). According to a snapshot from the B.C Justice Dashboard in 2011/12 more than 10,300 new admissions to remand (out of 16,481 province wide) were in two pre-trial facilities in the greater Vancouver region[117].

In the last decade, reports of breaches in BC have primarily come from the police. Indeed, there has been a significant decline in the number of breach reports filed by probation officers since 2005.[118] An audit of B.C Community Corrections noted that:

> In the sample of offender files that we audited, 44 of 58 (76%) contained at least one alleged breach. Roughly a third of those files subsequently resulted in an enforced breach; the others did not. In the majority of the files where a breach occurred, the circumstance of the breach was recorded. However, fewer than 10% of the files (4 of 44) documented the reasons why the incident had or had not been reported to the courts, or included information about the changes made to the case management plan to reflect offender non-compliance.[119]

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[114] In Canada correctional responsibility is shared between provinces and the federal government. The federal government is responsible for all offenders sentenced to a prison sentence of two years or longer.
[115] Cowper, Geoffrey D. QC ". A Criminal Justice System for the 21st Century. B.C Justice Reform Initiative; Final Report to the Minister of Justice and Attorney General Shirley Bond. August 7, 2012, p. 38. More specifically, this is up to 57% in 2014/2015: Trends in the use of remand in Canada, 2004/05 to 2014/2015.
[116] Department of Justice Canada – Research and Statistics Division, The Justice System Costs of Administration of Justice Offences in Canada, 2009, table 10, p. 14 (this also includes OAJ committed by youth)
[117] See: B.C Corrections Dashboard. Web Resource: https://justicebcdashboard.bimeapp.com/players/beta/adult.
[118] Marta Burczycka, and Christopher Munch, Trends in offences against the administration of justice, 2015, p. 42.
[119] Auditor General of British Columbia, 2011, Effectiveness of B.C. Community Corrections, Report 10.

This suggests that not all breaches are reported to the courts or resolved through formal legal processes. Court orders can be enforced through a number of discretionary practices. It also suggests that a drop in the filing of breach reports by BC corrections staff is probably in part tied to large case loads (the second highest in Canada)[120], poor training, and disorganization. This kind of disorganization is also substantiated in another finding of the audit, it being noted that only 35% of interventions ordered by community corrections were ever completed [121]. However, the lack of good documentation on breach practices as well as the likely prevalence of informal modes of punishing breaches raises the question of the extent to which some punitive aspects of community supervision are statistically visible.

In addition, reduced breach rates can also be explained by a shift in the enforcement of court orders from corrections staff to police. While probation officers are filing breach less frequently, police have picked up the slack. According to the Cowper Report, the increase in the number of administrative offences "has come from charges recommended from the police rather than by probation officers"[122].

The Cowper report is unable to provide a documented reason for this change. However, it provides a series of possible explanations:

> (1) new police policies to pursue administration of justice charges aggressively as a way to manage offender behaviour "in particular with prolific offenders", a desire to improve public safety and encourage respect for orders of the court; in addition, "a substantial increase in police resources and the general decline in crime levels which may have freed police resources for pursuing these strategies"
> (2) [d]elay in time to trial, which creates a longer period of time within which an accused can fail to comply with conditions; and
> (3) [u]nrealistic conditions, not involving further criminal behaviour, which accused are unwilling or unable to comply with.[123]

As such, increases in the number of AJO, and in particular, breaches, have been an important source of concern for many policy-makers and law reformers in B.C. in the last few years. The Cowper Report paved the way in 2012, observing the significant amount of police, prosecutorial and correctional resources that these offences now require. It suggested that the treatment of these offences should be high on the reform agenda in B.C., pointing to the lack of consensus on the goals pursued by these offences and their outcomes: 'What are we seeking to accomplish with these prosecutions, and

[120] Ibid, p.19
[121] Ibid, p 5
[122] Cowper, Geoffrey D. QC ". A Criminal Justice System for the 21st Century. B.C Justice Reform Initiative; Final Report to the Minister of Justice and Attorney General Shirley Bond. August 7, 2012, p. 26-27 and 148
[123] Ibid

are we succeeding?' asked the report. The Fourth Year Anniversary update released in October 2016[124] noted that the increase in administrative offences "is an area which remains in need of a system-wide response that will necessarily include careful research, sound data and evidence" and called for a "rigorous consensus … common understanding, common goals and an over-all system approach" (p. 8) to community supervision.

Finally, a review of the BC Prosecution Service conducted in 2016 by Former Ontario Attorney General Murray Segal also found that the Crown should review its policy with respect to these offences:

> "One other area for Crown Counsel Policy review is the continued growth of administration of justice offences, particularly breach charges. There is no dispute that ignoring breaches may demonstrate a lack of respect for the justice system; however, there should be an informed discussion about what types of breaches warrant charging. At the current time, there is inadequate information about the type or nature of the breaches that have caused the number of charges to swell. The Cowper Report called for this study and discussion, and I would like to reinforce that it should continue to be a priority. This project, of course, needs to be undertaken with police.[125]"

Our hope is that our findings can provide some useful information that will help in such important system-wide discussions and improvements. We will get address possible reforms in the conclusion.

Judicial Infrastructure and Justice Reform

The growth of remand and community supervision in Canada may have also been facilitated by innovations in the judicial process, in particular, the development of a number of specialized courts that focus on community based alternatives to incarceration, and rely on new partnerships between health and social service agencies, the police, corrections, and the courts.

In particular, Vancouver's Downtown Community Court (DCC) is a problem solving court located in the middle of the DTES that differs from provincial criminal court in its use of an integrated case management approach. It was launched in September 2008 in response to the *Beyond the Revolving Door* Report.[126] The court is home to 15

[124] Cowper, D. Geoffrey (2016). A criminal justice system for the 21st Century: Fourth anniversary update to the Minister of Justice and Attorney General, Suzanne Anton, QC.

[125] Murray Segal, Championing Positive Change – findings of the Review of the BC Prosecution Service, 2016, p. 27

[126] Report from the DCC Executive Board on the Final Evaluation of the Downtown Community Court, September 30, 2013: www.provincialcourt.bc.ca/downloads/dcc/DCCEvaluation_ExecutiveBoard.pdf See also Ministry of Attorney General, Justice Services Branch. DCC in Vancouver – Efficiency Evaluation,

partnership agencies including crown prosecutor services, a full-time duty counsel, Vancouver Coastal Health, B.C Corrections, VPD, and others.[127] The court's catchment area is the entire downtown core, including the DTES, from Vancouver's West End through Stanley Park.[128] The court deals with Criminal Code summary conviction offences, possessions offences under the Controlled Drugs and Substances Act, and breaches to their own orders.[129] According to the Court's first interim report, the DCC primarily deals with theft (33%) and administrative offences (27%)[130]. The DCC is unique in the province of B.C. because it only deals with arraignments, bail and sentencing after hearing a guilty plea to designated offences. If offenders opt for a trial or if they are charged with more serious offences, they are automatically referred to the neighbouring Vancouver Provincial Court (VPC)[131].

The use of bail and other forms of community supervision is very common in the DCC. According to the Court's first (2010) interim evaluation, "the use of bail in the DCC was higher than at the comparisons. Approximately 80% of cases concluded in the DCC required at least one bail hearing, while the proportion was 65% in the VPC and 50% for the remainder of the province"[132], although the average length of stay in remand was approximately half shorter. The report also mentions that, "jail sentences are used proportionally less in the DCC (45%) and...[a]pproximately 63% of jail sentences in the DCC are sentences recorded as one-day jail sentences, compared to 50% in the VPC (Vancouver Provincial Court)."[133] As a result, probation was used in 27% of sentences in the DCC compared to 14% in the VPC and conditional sentence orders (CSOs) were used in 8% of cases compared to 2% in the VPC.[134]

The interim evaluation notes that the DCC model relies on simplified community supervision orders with few conditions, and employs breach only as a last resort when other supports fail, in order to reduce administrative of justice offences. However, the evaluation found that this "was not universally accepted by all justice officials" and as a result, "inconsistencies occurred that became a source of dissension. Use of breach procedures to leverage offender case management also increased the number of court

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September 6, 2013: www.provincialcourt.bc.ca/downloads/dcc/DCCEfficiency_Evaluation.pdf and the Interim Evaluation Report: August 30, 2010: http://www.criminaljusticereform.gov.bc.ca/en/reports/pdf/interimevaluation.pdf.

[127] Report from the DCC Executive Board on the Final Evaluation of the Downtown Community Court, September 30, 2013, p. 5

[128] Ministry of Attorney General, Justice Services Branch. DCC in Vancouver – Efficiency Evaluation, September 6, 2013, p. 3

[129] Report from the DCC Executive Board on the Final Evaluation of the Downtown Community Court, September 30, 2013, p. 6

[130] Interim Evaluation Report, August 30, 2010, p. iv; other offences include assault (14%), drug possession (9%) and mischief (5%).

[131] Ibid, p. 8

[132] Ibid, p. V

[133] Ibid. p. VI

[134] Ibid, p. 22

appearances and added more volume to the court list."[135] The evaluation also noted that the use of longer orders with multiple conditions was interfering with DCC goals.[136]

This said, three years later, a study into a subgroup of 250 offenders with complex needs who were assigned to an integrated and comprehensive case management team (CMT) at the DCC showed a significant decrease in recidivism rates compared to a similar comparison group from the VPC[137]. The authors concluded that the CMT is more efficient than traditional courtroom in reducing reoffending, in particular for property and administrative offences where the decreases were approximately twice as large as those observed in the comparison group. However, this study has some limitations: the subgroup is limited to 250 offenders and focuses on offenders with complex needs, the authors cannot assume complete equivalence between the two compared groups, and a longer follow up period is necessary to ensure the continuity of changes in recidivism[138]. Moreover, it is questionable whether the important investments made in the DCC[139] and in particular in the CMT, are at all offset by savings in other services, including the administration of justice. This is particularly so given the findings that the DCC has not affected the average number of appearances in court, the median time to case disposition and has only slightly increased the number of alternative sentences being imposed[140].

The DCC is a logical and well-intentioned response to the concerns raised in *Beyond the Revolving Door.* It administers a number of social services and health related interventions to help stabilize offenders with complex needs, avoids jail, and uses close partnerships between service providers, courts, police, and corrections. Nonetheless, institutions like the DCC, the Drug Treatment Court of Vancouver, the Aboriginal Sentencing Court, and others do appear to play an important role in the current correctional paradigm in B.C, driving community supervision and the growth of administration of justice offences.

[135] Ibid, p. 46
[136] Ibid.
[137] Julian Somers, Akm Moniruzzaman, Stefanie N. Rezansoff, Michelle Patterson, Examining the Impact of Case Management in Vancouver's Downtown Community Court: A Quasi Experimental Design, PLoS ONE 9(3) doi:10.1371/journal.pone.0090708
[138] Ibid, p. 7. In this case, follow up was up to a year.
[139] Costs include 6.2M for renovating the space and 5.2M in annual expenditures: http://www.vancouversun.com/Mulgrew+Lack+costs+data+downtown+community+court+outrage/9583966/story.html
[140] Ministry of Attorney General, Justice Services Branch. DCC in Vancouver – Efficiency Evaluation, September 6, 2013

5. A Statistical Overview of Conditions of Release Imposed in Vancouver

As a reminder, the data obtained by our team comprised all adult criminal court cases either sentenced to probation or a conditional sentence, or cases not necessarily sentenced, but granted bail between 2005-2012 in the Vancouver Provincial Court (including the Drug Court) or DCC. The entire data set contains 30,505 distinct accused individuals and 94,933 distinct court cases and 101,152 orders that generated 528,310 conditions.

This dataset was then divided into three substantive cohort groups - "bail", "probation" and "conditional sentence". The "bail" group includes 55, 976 distinct CSB defined cases, the second "probation" group contains 31,915 distinct defined court cases, and the third and "CSO" group contains 7,042 distinct cases. These cohort groups are not however mutually exclusive: certain accused might have received bail and not probation or bail and probation or only probation, and so on. In what follows, we first present some of our analyses of the dataset and then focus more specifically on the bail data.

Table 1 presents a summary of the dataset. It shows that bail has generated the greatest number of cases (59%), orders (73.6%) and conditions (61.8%) in the dataset.

Table 1 – Summary statistics

Order type	No. cases	%	No. orders	%	No. conditions	%
Bail	55 976	59.0	74 408	73.6	326 388	61.8
Probation	31 915	33.6	22 814	22.6	157 435	29.8
CSO	7 042	7.4	3 930	3.9	44 493	8.4
Total	**94 933**	**100**	**101 152**	**100**	**528 316**	**100**

- Conditional orders generate an important number of optional conditions

In total, the 101,152 orders in our dataset include a total of 528,316 conditions. Bail orders included on average 4.39 conditions whereas probation and CSO orders respectively comprised 6.9 and 11.3 conditions in total. However, some of the conditions imposed are mandatory whereas others are optional.

During the period covered by our data (2005-2012), probation and CSO orders respectively included three and five compulsory conditions, leaving an average of 3.9 optional conditions per probation order and 6.3 optional conditions per CSO order. Most probation orders contained between 4 and 6 conditions (51.3%) and 43.8% of them included 7 conditions or more. By contrast, 34.3% of CSOs contained between 7 and 9 conditions and 46.4% of them included between 10 and 13 conditions. For CSOs,

60.4% had 10 conditions or more whereas this was only the case of 10.3% of all probation orders.

Table 2 - Average number of optional conditions per order

Order type	# Orders	# Conditions	Average number (optional)
Bail	74 408	326 388	(4.39)
Probation	22 814	157 435	6.9 (3.9)
CSO	3 930	44 493	11.3 (6.3)
Total	**101 152**	**528 316**	**5.2**

Table 3 – Percentage of conditions per type of order

Number of conditions	Bail	Probation	CSO
0-3	46.7	4.9	0.3
4-6	35.2	51.3	5.0
7-9	12.5	33.5	34.3
10-13	5.1	9.4	46.4
14+	0.5	0.9	14.0
Total	**100**	**100**	**100**

The high average number of optional conditions in CSO orders is consistent with the fact that conditional sentence orders are by definition sentences of imprisonment and should generally include punitive conditions that are restrictive of the offender's liberty. In *R. v. Proulx*, Chief Justice Lamer held that "conditions such as house arrest or strict curfews should be the norm, not the exception"[141]. He also insisted on imposing restrictive conditions, drawing the line between probation and CSOs: "[T]here must be a reason for failing to impose punitive conditions when a conditional sentence order is made. Sentencing judges should always be mindful of the fact that conditional sentences are only to be imposed on offenders who would otherwise have been sent to jail. If the judge is of the opinion that punitive conditions are unnecessary, then probation, rather than a conditional sentence, is most likely the appropriate disposition.[142]"

This is not true of bail, however, as the accused is still presumed innocent. Yet bail orders in the dataset include an average of 4.39 conditions, all of them optional. As a result, the number of "optional" conditions imposed at bail is higher than at probation (326 388 in total and 4.39 conditions on average per order). Moreover, as the number of conditions increase, the gap between bail and probation orders tend to close. For instance, there are 9.4% of probation orders with 10 to 13 conditions, as opposed to

[141] *R. v. Proulx*, 2000 SCC 5, par. 36
[142] *Ibid*, par. 37

5.1% for bail orders, and nearly the same number of bail and probation orders with 14 conditions or more (0.5% of all bail orders compared to 0.9% for probation orders).

- **Area restrictions and no go orders represent nearly 20% of all the conditions imposed**

The most common condition imposed overall is the condition to keep the peace and be of good behaviour (15%). This is not surprising given that it is a compulsory condition for all probation and conditional sentence orders. Moreover, despite the fact that it is not mandatory, it is almost systematically imposed at bail. No go conditions arrive in second place, representing 12.3% of all the conditions imposed. Conditions requiring that a person "reside somewhere", "report to someone (whether a bail supervisor or to the court)" or "not to possess any weapons or knives" (no weapons[143]), represent approximately 12% of the conditions each (respectively 11.9%; 11.8% and 11.2%). No contact conditions arrived in sixth position with 8% and area restrictions followed in seventh position with 7.2%. Together, area restrictions and no go orders that have a direct impact on the use of public and private spaces represent 20% of all the conditions imposed. Finally, conditions prohibiting the use of drugs or alcohol represent 2.8% of all the conditions imposed[144].

Table 4 – Most common conditions imposed overall

Conditions	Number	%
Keep the peace	79 011	15.0
No go	64 939	12.3
Reside	62 752	11.9
Report to	62 240	11.8
No weapons	59 116	11.2
No contact	42 198	8.0
Area restrictions	37 816	7.2
Miscellaneous	31994	6.1
Appear before courtroom	30 487	5.8

[143] The most common conditions included in the "no weapons' category are listed below with their number of occurrences: "Not to possess any weapons as defined in the Criminal Code of Canada' (11023); « Not to possess any knives except while preparing or consuming food » (3069); « Not to possess any firearms, explosive substances or ammunition as defined in the Criminal Code of Canada » (2347) ; « Not to possess any knives except while preparing or consuming food, or for the purposes of legitimate employment » (1825) ; and « You are not to possess any weapons as defined in the Criminal Code of Canada » (1279).

[144] The most common conditions included in the category « no drugs » are as follows, with their occurrences : « Not to possess or use any drugs except those approved by the Drug Treatment Court Counsellor. I will advise the Court and my Treatment Counsellor of all medications I am taking. » (1657) ; « Abstain from the consumption of alcohol » (771) ; « Not to possess drug paraphernalia, non-prescription drugs or prescription drugs not in your name » (725) ; « To refrain absolutely from consuming alcohol or non prescription drugs (479) ; « Not to possess any non-prescription drugs or drug paraphernalia » (394).

Treatment	27 633	5.2
No drugs/alcohol	14 729	2.8
Curfew	8 472	1.6
No motor vehicle	5 729	1.1
House arrest	1 489	0.3
Total	**528 310**	**100**

These rates vary however depending on the stage of proceedings. At indicated in table 5, the condition to keep the peace is still the most common condition imposed (15.8%) at bail, coming ahead of no weapons (15.5%) and condition to report (12.3%). No go conditions come in fourth position (10.7%) while no contact conditions and area restrictions come in fifth (10.3%) and sixth (10%) positions.

Table 5 – Most common conditions imposed (bail)

Conditions	**Number**	**%**
Keep the peace	51 437	15.8
No weapons	50 578	15.5
Report to	39 984	12.3
No go	35 048	10.7
No contact	33 452	10.3
Area restrictions	32 626	10.0
Reside	26 936	8.3
Other	19 792	6.1
Treatment	11 581	3.5
No Drugs/alcohol	10 869	3.3
Curfew	5 767	1.8
No motor vehicle	4 464	1.4
Appear before courtroom	3 415	1.1
House arrest	439	0.1
Total	**326 388**	**100**

Interestingly, in a 2013 study conducted in 5 court locations in 4 provinces, Beattie, Solecki and Morton Bourgon also found that the condition to keep the peace and to be of good behaviour was the most common condition imposed as a result of judicial interim releases as half of the accused (50.6%) were given that condition. It was followed by the condition to "report as required" imposed to 48.7% of all accused. No contact conditions were imposed to 31% of all accused, whereas geographic restrictions and conditions to reside in specified place were respectively imposed to 24% and 23.3% of them. Finally, a condition to abstain from drugs or alcohol was imposed to 19% of all accused and a curfew to 9% of them[145].

[145] Karen Beattie, André Solecki and Kelly E. Morton Bourgon, *Police and Judicial Detention and Release*

The situation differs for probation orders where the most common condition is to reside (18.6%) followed by no go conditions (15.6%), conditions to keep the peace (15.1%) and to appear before the courtroom (14.5%). Area restrictions arrive only in tenth position (2.7%).

Table 6 – Most common conditions (probation)

Conditions	Number	%
Reside	29 209	18.6
No go	24 559	15.6
Keep the peace	23 691	15.1
Appear before courtroom	22 851	14.5
Report to	14 210	9.0
Treatment	12 563	8.0
Other	7 913	5.0
No contact	7 837	4.9
No weapons	7 258	4.6
Area restrictions	4 232	2.7
No drugs/alcohol	1 734	1.1
No motor vehicles	1 004	0.6
Curfew	273	0.2
House arrest	95	0.1
Total	**157 429**	**100**

Finally, conditions to report are the most common conditions imposed in CSOs (18.1%) followed by conditions to reside (14.9%) and no go orders (11.6%). 5.5% of all CSOs include a curfew, while 2.2% include an area restriction and a house arrest.

Table 7 – Most common conditions (CSO)

Conditions	Number	%
Report to	8037	18.1
Reside	6606	14.9
No go	5164	11.6
Other	4289	9.6
Appear before courtroom	4110	9.2
Keep the peace	3883	8.7
Treatment	3485	7.8

Characteristics: Data from the Justice Effectiveness Study, 2013, p. 20, figure 5. The most common conditions of police release differ quite dramatically. Overall, 67.1% of all accused were imposed a condition not to communicate in an undertaking or recognizance, whereas geographic restrictions were imposed to 4% of all accused only. This being said, the condition to abstain from alcohol or drugs was imposed to 22.7% of all accused, a similar rate to that in judicial interim releases (see p. 15, figure 3).

Curfew	2432	5.5
No drugs/alcohol	2125	4.8
No weapons	1280	2.9
Area restrictions	957	2.2
House arrest	955	2.2
No contact	909	2.1
No motor vehicles	261	0.6
Total	**44 493**	**100**

- **Area restrictions are primarily (and equally) imposed in the context of violent and drug offences**

Different types of conditions are imposed for different offences. As shown in table 8, area restrictions are primarily associated with violent offences (34.2% of all area restrictions imposed) and drug (33.5%) offences. No go orders are mostly imposed in the cases of property offences (45.3%) and administrative offences (40.3%) whereas only 3% of them are imposed in drug offences. No contact orders are disproportionately associated with violent offences (65.3%) followed by property offences (15%). Finally, conditions to report or to reside are primarily imposed in cases of property offences (36.2% and 41.8%), and they are equally distributed among the other types of offences.
Put another way, drug offences mostly attract area restrictions and conditions to reside and to report whereas violent offences lead to area restrictions and no contact conditions and administrative offences are primarily associated with no go conditions. Property offences attract all types of conditions.

Table 8 – Most common conditions by type of offences

	No go (%)	Red zone (%)	No contact (%)	Report to (%)	Reside (%)
Admin	**40.3**	9.8	8.7	19.1	16.5
Drug	3.0	**33.5**	9.2	**23.4**	**20.1**
Property	**45.3**	**20.7**	15.0	**36.2**	**41.8**
Violent	10.4	**34.2**	**65.3**	19.7	19.6
Other	0.9	1.8	1.7	1.7	1.9

- **Conditional orders, including area restrictions, generate numerous breaches**

Conditional orders issued at bail and at sentencing are associated with an important number of failures to comply or breaches.

As a reminder, the bail, probation and CSO data form three distinctive groups. The bail data included 55,976 distinct cases. Of those cases, 47,550 were substantive bail

cases[146] whereas 5,493 were breached. The probation data includes 31,915 cases, including 22,794 substantive sentenced cases and 5, 367 breached cases. The "CSO or conditional sentence order data" contains 7,042 distinct cases including 3,910 substantive sentenced, of which 1,463 were breached.

In the case of bail, there were 47,550 substantive cases, and of those, 5,493 were breached (11.6%). In turn, the 5,493 breached cases generated 8,426 additional breaches, for an average of 1.53 additional breach per breached case. The number of breaches is even higher at sentencing. As such, 23.5% or 5,357 cases of the 22,794 substantive probation cases were breached and the 5,357 breached cases generated an additional 10,274 breaches with an average of 1.91 breach per breached case. The actual breach of probation rates are likely to be higher because some of the substantive probation cases have breaching probation as their most serious offence. Finally, there were 3,910 substantive CSO cases and of those, 1,463 (or 37.4%) were breached. The breached cases generated on average 2.14 additional breaches for a total of 3,132 cases. The fact that breached orders led to 1.5 or twice the numbers of charges strongly indicate that several individuals breached their orders multiple times. This appears in table 9 below.

Table 9 – Breached cases

	No. Cases	**Breach**	**%**	**Additional breach cases**	**Average**
Bail	47 550	5 493	11.6	8 426	1.53
Probation	22 794	5 367	23.5	10 274	1.91
CSO	3 910	1 463	37.4	3 132	2.14

We can assume that the data provides a conservative estimate of actual breach rates. These are likely to be much higher, especially at bail. This is so for at least three reasons. First, we know that there are numerous cases where an accused breaches conditions of bail but is never charged. In such cases the breaches will not be recorded in the JUSTIN database. This is confirmed by our interviews with legal actors who suggested that many people were brought to court for breach, and warned by the judge without being formally charged. Secondly, some of the substantive bail cases have breaching bail under s. 145 Cr.C. as their most serious charge, which indicates that the accused was already on bail for a previous offence. Thirdly, the data does not include police issued appearance notices or promises to appear. Cases charged under s. 145(5) Cr.C. which refers to failing to appear pursuant to a police issued promise to appear, are not considered 'breach' bail cases. Finally, some of the substantive cases have not had yet the opportunity to be breached given the cut-offs for the collection of the data.

[146] According to the memo from the Court Services Branch, substantive bail cases are "what breaches are measured against, i.e. how many substantive cases were breached": Caroline Shandley, Record Level Data and Methodology Notes, 2013, addendum.

The particular case of bail

- **Contrary to the provisions of the Criminal Code, conditional releases are widespread at bail**

Bail orders account for 74% of all the orders in the dataset (74,408). As discussed earlier, there are no mandatory conditions for bail and therefore, bail conditions are always considered optional. Indeed, the Criminal Code provides that people should be released unconditionally and on the least onerous grounds.

Yet, Table 10 shows that only 3.1% of all bail orders (n= 2,326) contained no condition. Each bail order contained on average 4.4 conditions while each bail case contained on average 5.8 conditions. 46.7% of all bail orders (n=34,740) had three conditions or less. 41.4% of them contained between 4 and 7 conditions (n= 30,850) for a total of 88.1% between 0 and 7 (n=65,590) and nearly 12% had 8 conditions or more (n=8,818), including 5.5% of all bail orders that contained 10 conditions or more (n= 4,159). Overall, the 74,408 bail orders generated 326,388 conditions in the seven years.

These results clearly show that conditional release has become the only real alternative to remand. This goes directly against the prescriptions of the Criminal Code[147].

Table 10 – Number of conditions per bail order

Number of conditions	Bail orders	%	Cumulative %
0	2 326	3.1	3.1
1	7 754	10.4	13.5
2	12 245	16.5	30
3	12 415	16.7	46.7
4	11 541	15.5	62.2
5	8 050	10.8	73
6	6 619	8.9	81.9
7	4 640	6.2	88.1
8	2 997	4.0	92.1
9	1 662	2.2	94.3
10	1 056	1.4	95.7
11	923	1.2	96.9
12	1440	1.9	98.8
13	358	0.5	99.4
14+	382	0.5	99.9
Total	**74 408**	**100**	**100**

[147] *R. v. Antic*, (2017) SCC 27

- **Bail orders are primarily issued to young men in their thirties**

Bail orders in the dataset were issued to 82.1% of men and 17.9% women. Slightly over half of all bail orders (50.8%) are issued to individuals of 40 years old or less, with 30% of them issued to individuals between 30 and 39 years old.

The dataset includes a separate table showing **race and ethnicity** of all the accused. However, we have not analysed this table. Ethnicity is a self-reported field in the JUSTIN database. According to the Court Services Branch, it is "notoriously inconsistent"[148]. An accused may self-report using different ethnicity – as a matter of fact, the dataset comprised multiple examples of accused with inconsistent reporting throughout cases. Mistakes can also occur if someone makes an assumption as to ethnicity based on appearance and last name. This being said, we have many reasons to believe that Indigenous people are overrepresented in our dataset. According to Statistics Canada, in 2015-2016, Indigenous offenders accounted for 29% of admissions to provincial correctional services in B.C.[149] Moreover, they make up one third (34%) of the homeless population in Metro Vancouver despite representing only 2.5% of the population[150].

- **53% of all bail orders issued in drug offences and 52% of all bail orders issued in violent offences included an area restriction**

Overall, 29% of all bail orders included an area restriction or red zone (21,481 out of 74,064 bail orders). This number goes up to 53.4% in the case of bail orders issued for drug offences and to 52.5% in the case of violent offences. This percentage is significantly lower for property offences (21.9%).

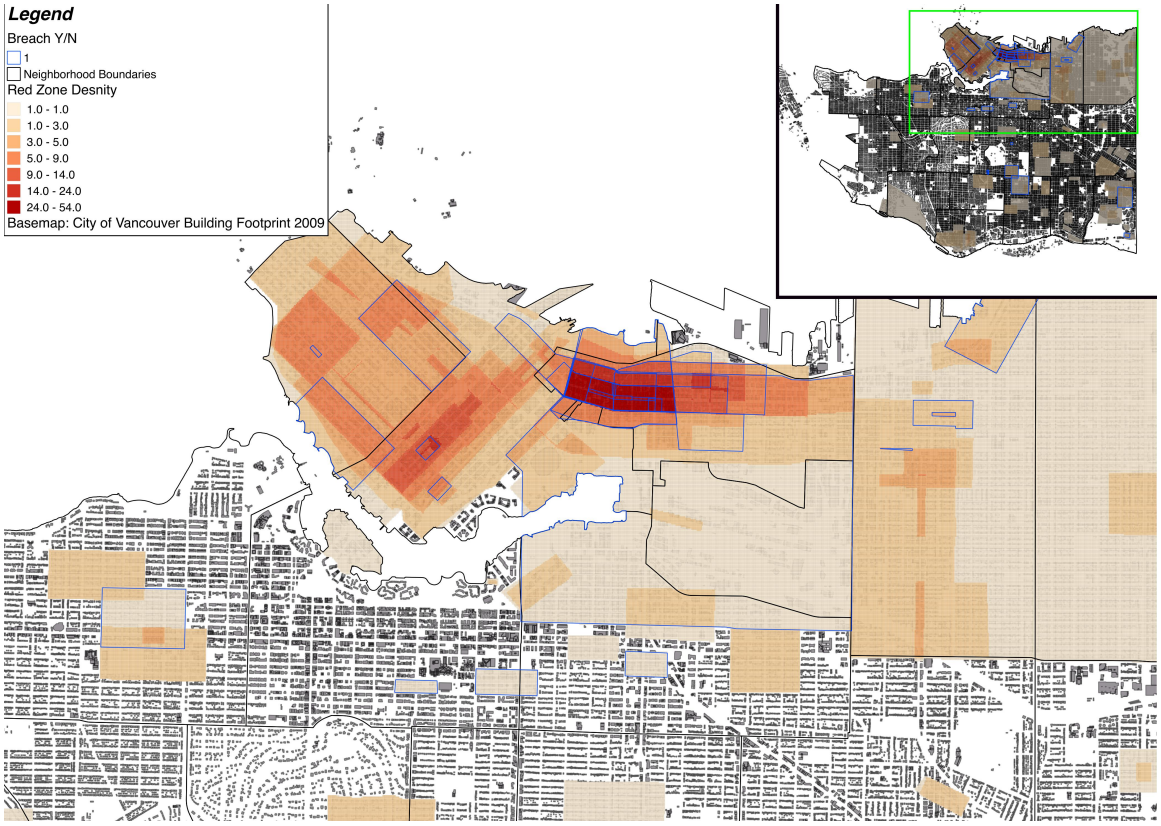
Table 11- Number and Percent of Bail Orders with Red Zones

	Property	Violent	Administrative	Drugs	Other
Cases with one or more red zones	4 504	8 688	2 338	5 511	440
Total number of cases	20 547	16 537	25 511	10 326	1 143
% with red zones	21.9%	52.5%	9.2%	53.4%	38.5%

[148] C. Shandley, Court Services Branch, Vancouver Provincial Court; Vancouver Drug Court and Downtown Community Court Breach Analysis – Record Level Data and Methodology Notes, Dec. 9, 2013, p. 2
[149] Julie Reitano, Adult Correctional Statistics in Canada, 2015-2016, Table 5, Statistics Canada, 2017
[150] Aboriginal Homelessness, 2017 Count in Metro Vancouver, Table 1, September 2017: http://www.metrovancouver.org/services/regional-planning/homelessness/resources/Pages/default.aspx

- **Area restrictions are concentrated in the Downtown Eastside**

Damon analyzed a sample of this dataset for the month of January 2011[151]. He found that 37% of all area restrictions were centered in the Downtown Eastside of Vancouver (and 11% were located in the downtown area). In addition, the DTES accounted for 92% of area restrictions related to drug offences[152]. The map below illustrates these findings.



Source:
http://summit.sfu.ca/system/files/iritems1/14152/etd8381_WDamon_supp_001.pdf

- **55% of individuals stay on bail for more than 90 days**

The database does not allow us to make clear findings with respect to the time between first appearance and bail hearing because this information was missing in over 45% of the cases. In the cases where this information was available (55%), we note that there is

[151] William Damon, *Spatial Tactics in Vancouver's Judicial System*, M.A. Thesis, Department of Geography, Simon Fraser University, 2014
[152] Ibid, chapter 6

a delay of 30 days or less in 21% of the cases whereas there was a delay of 96 days or more in 19% of the cases.

We can however account with more precision the length of time someone spends on bail by comparing the date the substantive bail order is issued and the case conclusion date. According to the JUSTIN database, a case is considered concluded when all counts associated with the case are disposed.

In 44.4% of the cases, the case is concluded in 90 days or less after the bail order is issued. 20.3% of the cases are concluded within 90 and 180 days while 10.6% are concluded between 181 and 270 days and 13.9% of them were closed more than a year after the bail order is issued.

Table 12 – Days between bail order and case conclusion

Number of days	Number of cases	%
0-90 days	33 051	44.4
91-180	15 114	20.3
181-270	7 857	10.6
271-364	6 285	8.5
365 +	10 334	13.9
N/A	1 749	2.4
Total	**74 408**	**100**

Breaches and regression analysis

The dataset does not allow us to make any findings with respect to which condition has actually been breached. Indeed, according to the Court Services Branch memo, "it is impossible to tell which condition has been breached without actually reading a police report to crown counsel (RCC)"[153]. However, by conducting *regression analysis*, a statistical method, which allows us to examine the substantive impact of one variable on another, we were able to identify whether certain types of conditions were statistically associated with a higher or lower likelihood of breach.

To conduct this analysis, we have followed William Damon's methodology, which in turn borrowed from Jane Sprott and Nicole Myers' 2011 analysis of bail conditions imposed in a Toronto Youth Bail Court[154]. Sprott and Myers used a logistical regression model to

[153] Caroline Shandley, Court Services Branch, Vancouver Provincial Court; Vancouver Drug Court and Downtown Community Court Breach Analysis – Record Level Data and Methodology Notes, December 9, 2013, p. 2

[154] William Damon, (2014) 'Spatial tactics in Vancouver's judicial system' MA thesis, Simon Fraser University, referring to Jane Sprott and Nicole Myers, 'Set Up to Fail: The Unintended Consequences of

show a correlation between an increased likelihood of breach, the time spent on bail, and the number of conditions imposed, controlling for a number of relevant demographic and legal variables[155]. There are important differences between Damon's and our comparable data set, and that of Sprott and Myers, which came from structured courtroom observation[156]. Yet, we reached similar conclusions in some regards. For instance, as we will see below, we found that there is a significant relationship between the number of bail conditions in a court order and the likelihood of breach.

Following Damon, the unit of analysis is an individual case. As a reminder, a case is defined as one accused person with one or more charges that have resulted in a first appearance in court. In cases in which the accused reoffends, one case could involve multiple bail orders each with unique conditions of release. The dependent variable considered in the following analysis is allegations of breach. This variable was dummy coded (1 = Breach Yes).

The statistical model used here begins by controlling for two demographic variables of the accused: age and gender. Age is an interval variable. Gender was dummy coded: 1 = Male; 0 = Female, as our data did not allow us to account for a broader gender spectrum.

As the conditions are not normally distributed, they were split into four roughly equal categories (counts): 1 = 1 to 3; 2 = 4 to 6; 3 = 7 to 9; and 4 = 9+ conditions of release. The length of bail was dummy coded so that 0 = less than 190 days; 1 = 190 or more days. Finally, some types of conditions of release were added to the model as binary variables: red zones, residential treatment, curfew, and no weapons.

We conducted these regressions separately for the bail, probation and CSO datasets. In each case, we ran four different models in order to assess the relationships between specific variables. The coefficients refer to the effect of the identified variable on the logarithmic likelihood of breach.

Multiple Bail Conditions', (2011) 53(4) *Canadian Journal of Criminology and Criminal Justice*, p. 404

[155] Logistical regression is similar to linear multiple regression but it is more suitable for measuring the log odds of a dichotomous variable (in this case, breach: Y/N) rather than a continuous variable

[156] William Damon, (2014) 'Spatial tactics in Vancouver's judicial system' MA thesis, Simon Fraser University

Table 13: Logistic regression – bail

Dependent variable:				
	Models			
	(1)	(2)	(3)	(4)
AGE	-0.008***	-0.008***	-0.008***	-0.009***
	(0.001)	(0.001)	(0.001)	(0.001)
GENDER (F)	0.814***	0.865***	0.855***	0.837***
	(0.238)	(0.239)	(0.239)	(0.239)
GENDER (M)	0.831***	0.863***	0.850***	0.848***
	(0.237)	(0.238)	(0.238)	(0.238)
Count (4-6)		0.215***	0.255***	
		(0.033)	(0.033)	
Count (7-9)		0.456***	0.456***	
		(0.049)	(0.049)	
Count (9+)		-0.041	-0.040	
		(0.048)	(0.048)	
Bail Duration (190days)		0.389***	0.396***	0.396***
		(0.022)	(0.022)	(0.022)
Drug Related		0.194	0.187	0.151
		(0.219)	(0.219)	(0.219)
Red Zone Condition			-0.101	-0.140*
			(0.078)	(0.078)
Residential Treatment			-2.677***	-2.509***
			(0.451)	(0.450)
Curfew			-1.280*	-1.284*
			(0.725)	(0.725)
No Weapons			-0.078	-0.083
			(0.132)	(0.132)
Constant	-2.332***	-2.552***	-2.544***	-2.472***
	(0.240)	(0.241)	(0.242)	(0.242)
Observations	73,957	72,907	72,907	72,907
Log Likelihood	-29,443.420	-28,723.690	-28,672.910	-28,737.670
Akaike Inf. Crit.	58,894.850	57,465.390	57,371.820	57,495.350
Note:	*p<0.1;* ***p<0.05;*** p<0.01			

Similarly to Damon and Sprott and Myers, we found that there was a significant relationship between the duration of the case, the number of bail conditions and the likelihood of breach when we integrated information relating to the bail process in model 2. In particular, those who breached had significantly more conditions than those who did not. There is a very strong relationship between having 4 to 6 conditions (25%) and 7 to 9 conditions (46%) and the likelihood of breach. In Table 10, we found that 35.2% of all bail orders had between 4 and 6 conditions whereas 12.4% of all bail orders had between 7 to 9 conditions. This means that almost half of the bail orders are either likely or very likely to be breached. This relationship ceases to exist however when the accused is released with 9 or more conditions (which only corresponds to approximately 5.5% of all bail orders). There are many possible explanations for these results. For instance, orders with 9 or more conditions may typically include a specific type of condition associated with a lower likelihood of breach, as we will see below.

We also found that those who breached had a significantly longer case-processing time. When the person is on bail for more than 190 days (a little over six months), it significantly increases the likelihood of breach. In the database, one third of all cases (32.6%) had been on bail for more than 190 days (see table 12). This means that these individuals are four times more likely to breach their bail order than those who are on bail for less than six months. The fact of being charged with a drug offence does not alter these relationships.

In Model 3, we introduced the type of conditions. We found that residential treatment and curfew conditions were associated with a very significant decrease in the likelihood of breach. However, there was no significant relationship between having a red zone condition and the likelihood of breach at the bail stage. These results should be qualified. First, according to our predictive models, the type of condition does not appear to be the strongest predictor of breach when compared to other factors. The number of conditions (4+) and the case-processing time (190 days+) are the strongest predictors of breaches. This does not mean that red zone conditions are not likely to be breached or that having a red zone in a bail order does not contribute to breaching. In fact, our qualitative data – in Part 7 – reveal that bail orders containing red zones are breached everyday and that individuals subject to conditions are regularly caught in their red zones. Further investigation into the data may reveal a connection, particularly perhaps in relation to drug offenses. However, this could reflect a reality expressed by legal actors – see part 6 – according to which many individuals who are caught breaching their red zones would not be formally charged, but only brought before the court at the bail stage. If the data were to confirm this practice, then this could mean that red zones are primarily used as surveillance and management tools to check on individuals. By contrast, residential treatment and curfew conditions have the effect of removing completely people from public spaces.

In Model 4, we removed the variables associated with the number of conditions and found the same predictive patterns.

We found different predictive patterns in the case of probation.

Table 14: Logistic Regression - Probation

Dependent variable:				
	Models			
	logistic			
	(1)	(2)	(3)	(4)
AGE	-0.017***	-0.013***	-0.013***	-0.017***
	(0.001)	(0.001)	(0.001)	(0.001)
GENDERM	0.108***	0.033**	0.037**	0.107***
	(0.015)	(0.016)	(0.016)	(0.015)
count46		-0.057***	-0.064***	
		(0.021)	(0.021)	
count79		0.303***	0.313***	
		(0.017)	(0.017)	
count9		1.288***	1.301***	
		(0.013)	(0.013)	
DrugRelated		-0.154***	-0.177***	0.151***
		(0.053)	(0.053)	(0.051)
RedZoneCondition			0.157***	0.216***
			(0.034)	(0.033)
ResidentialTreatment			-0.110***	-0.036*
			(0.021)	(0.020)
Curfew			-0.100	0.289**
			(0.130)	(0.125)
NoWeapons			-0.286***	-0.042
			(0.028)	(0.026)
Constant	-0.511***	-0.919***	-0.905***	-0.513***
	(0.018)	(0.019)	(0.020)	(0.018)
Observations	156,456	156,456	156,456	156,456
Log Likelihood	-96,546.760	-91,433.130	-91,353.460	-96,515.050
Akaike Inf. Crit.	193,099.500	182,880.300	182,728.900	193,046.100
Note:	*p<0.1;* ***p<0.05;*** p<0.01			

Our results first show that the variable “number of conditions” has a slightly different influence on the likelihood of breach. Remember that at the time that the data was collected, probation orders came with three compulsory conditions. Those who were imposed 4 to 6 conditions were less likely to breach as the model shows a negative relationship between the number of conditions and the likelihood of breach at this level. Yet, the relationship is completely reversed as the number of conditions increases, so that those who have 9 conditions or more are much more likely to breach their probation order.

When we add the types of conditions to the model (3), we observe that those who have a red zone condition are significantly more likely to breach their probation order. This result differs from bail. At the stage of probation, curfews are also predictors of breaches. Similarly to the bail situation however, there is a negative relationship between residential treatment conditions and the likelihood of breach. Therefore, those who are subject to residential treatment are significantly less likely to breach their probation orders.

There are several possible explanations for these results and further investigations would be needed. One hypothesis is that those who were subject to few conditions of release already presented low risks of breach and of recidivism altogether. In their cases, it is also possible to suggest that conditions were superfluous. By contrast, the people subject to many conditions may be poor and vulnerable individuals living in such precarious conditions that it is very difficult for them to comply with the conditions imposed. In other words, by imposing conditions on them, we ‘set them up to fail’ (Sprott and Myers, 2011; CCLA, 2014).

Our results elsewhere also show that the nature of the conditions imposed can have a positive or negative influence on the likelihood of breach. Based on the results of our interviews with legal actors (see part 6 below), we know that from their perspectives, red zone conditions aim at preventing crime by keeping an accused out of an area associated with criminal activity, whereas conditions imposing residential treatment are used to deal with drug addiction. The statistical analysis also shows that residential treatment conditions have a negative impact on the likelihood of breach whereas red zone conditions in the case of probation are more likely to be violated. Therefore, it seems to be easier for someone on probation to abide with a condition to follow a residential treatment than to comply with a geographical restriction. Perhaps when legal actors are unclear about the objectives they pursue and simply add one condition on top of another, the impact is strongly felt and increases the possibility of breaching the court orders.

We finally conducted logistic regression for conditional sentence orders.

Table 15 – Logistic regression (CSO)

	Dependent variable:			
	Models			
	logistic			
	(1)	(2)	(3)	(4)
AGE	-0.013***	-0.009***	-0.010***	-0.013***
	(0.001)	(0.001)	(0.001)	(0.001)
GENDERM	-0.098***	-0.158***	-0.159***	-0.099***
	(0.027)	(0.028)	(0.028)	(0.027)
count46		-0.084	-0.108	
		(0.121)	(0.121)	
count79		-0.273***	-0.274***	
		(0.044)	(0.044)	
count9		0.573***	0.579***	
		(0.026)	(0.026)	
DrugRelated		-0.437***	-0.481***	-0.415***
		(0.047)	(0.048)	(0.047)
RedZoneCondition			0.044	0.093
			(0.067)	(0.066)
ResidentialTreatment			-0.033	-0.016
			(0.036)	(0.036)
Curfew			-0.594***	-0.587***
			(0.046)	(0.046)
NoWeapons			-0.279***	-0.166***
			(0.059)	(0.058)
Constant	0.095***	-0.310***	-0.263***	0.160***
	(0.033)	(0.041)	(0.041)	(0.034)
Observations	44,096	44,096	44,096	44,096
Log Likelihood	-30,063.390	-29,579.680	-29,482.080	-29,937.540
Akaike Inf. Crit.	60,132.780	59,173.360	58,986.150	59,891.090
Note:	*p<0.1;* ***p<0.05;*** p<0.01			

The results show that the most significant predictor of future breach is still the high number of conditions. Those who have 9 or more conditions are more likely to breach their orders. In models 3 and 4, we also observe that there is a negative relationship between curfew and no weapons conditions and the likelihood of breach. As a result, those who are imposed a curfew are less likely to breach than those who are not. Curfew conditions are commonly imposed in CSOs. Red zones and residential treatment conditions have the same impact on the likelihood of breach than they had in probation orders, although this relationship is not statistically significant in CSOs.

As repeatedly shown above, the number of conditions and the length of the orders are the most significant predictors of breaches whether it is at bail, probation or in conditional sentence orders. As such, these results show that the cumulative imposition of numerous conditions fails to prevent breaches and crime. On the contrary, it is statistically associated with a higher likelihood of breach. One likely consequence is increased surveillance and attempts to control certain offenders within the criminal justice system. By contrast, if legal actors crafted bail or sentencing orders more sensitively, relying on certain type of conditions while avoiding others, they could better prevent recidivism and help individuals to leave the criminal justice system. For instance, imposing residential treatment significantly reduces the likelihood of breach. Other conditions, however, achieve the exact opposite, contributing to maintaining the person under judicial surveillance and control.

Keeping these results in mind, we now turn to the analysis of our interviews with legal actors and individuals subject to conditions of release.

6. Conditions of release from the perspectives of legal actors

We conducted individual interviews with six legal actors in Vancouver, including judges, prosecutors and defence attorneys. In what follows, we discuss some of our findings with respect to the rationale and objectives pursued by legal actors in using red zones, with a particular focus on bail; the considerations legal actors take into account when attempting to craft reasonable court orders; and the perceived efficacy or usefulness of these conditional orders, including red zones. Such evaluations, we suggest, differ in important ways from the experience of those governed by red zones and similar conditions.

In order to ensure the confidentiality and anonymity of our participants, we only refer to the interviewees as “legal actors” (LA) and unless absolutely necessary for comprehension purposes (or plainly obvious), we do not indicate their specific role in the criminal justice system.

Rationale and objectives pursued

Various rationales are given for the use of red zones. Typically, red zones are issued to prevent crime and recidivism (i), in certain hot spots that are tied to the drug supply (ii), or for rehabilitative (iii) or policing (iv) purposes, or to protect the public interest (v).

(i) Crime and crime prevention:

LA4 notes that the purpose of red zones 'is to keep the person out of an area that is going to draw them back into criminal activity, or allow them to continue in criminal activity'. For LA6, the purpose of a red zone is to 'prevent crime. That's the rationale. It's not as a punishment; it's to prevent crime. I mean, it's punishment in some way, for some people not to be able to go to Granville Mall definitely see it as punishment, because they want to go down there and party…'.

In this sense, conditions of release, such as red zones, are not seen to serve any complex function. Red zones are designed to move people away from particular areas. For LA6, the objective is to 'have people stop breaking the law, whether it's keeping them away from stores that they break, in the past stolen from, or getting them to not go to areas where people they've threatened live… They're preventative measures'

For LA1, area restrictions also serve as deterrent, reinforcing drug conditions: "there is a certain force in enforcing that condition, telling the accused that if you are in possession of drugs, you are going to be arrested not just for the substantive offence, but also breach if you are not supposed to possess it."

(ii) Concerns for particular geographical zones or hot spots

Legal actors noted the use of red zones in addressing crime 'hot spots'. Speaking of area restrictions, LA1 observed, "it is very much geographic, it is a problem that is geographically contained. And not just on the streets, in the buildings you know […] So it is really hard to separate the offence from the where it happened. And that is why the area restriction is so often imposed." In that sense, the red zone is less oriented to individual acts of criminal behaviour than about the general regulation of crime in a specific place.

This is closely tied to the institutional goal and desire to prevent drug traffickers from first, selling drugs on their block ("they've got their territory to be selling the drugs out of, they've got their corner or block. So usually when we ask for an area restriction, we are trying to keep people out of those blocks" - LA3) and second, entering the DTES in the first place in order to stop the drug supply. LA1 and LA3 both speak of preventing people from entering the DTES, especially those they identified as being non-addicted drug traffickers, the goal being to "stop the influx of people in this area who are sort of higher up in the trade" (LA1).

> "There is such a pervasive drug culture here in the DTES that it is our hope that if somebody is awaiting trial or I guess even on probation conditions that the hope is that if they are removed from this war zone, the DTES, that it reduces the likelihood that they will sell again, because that is where most of the users are, they are in the DTES, so we are trying to remove the supply away from the demand. (LA3)"

The police are important in communicating 'territories' and key 'hot spots' within the City that are then likely to be targets for area restrictions. As well as police representations of certain areas, this also seems to be driven by targeted public pressure. LA2 described the adoption of red zones in Oppenheimer Park, describing it as 'a particular park in our city, that is known for drug use, so there is there are really no pro-social activities that happen in this park, it really is just drug use and drug dealing', noting that

> '… the business association and citizens that live around that park have petitioned the police on numerous occasions to say "You have to clean up this park, it is terrible, we have kids living here" …. Because of that public pressure from the citizens that live around that and through the police to the Crown, that is one example where we would seek an area restriction to that park, even if that person wasn't arrested in that park. Currently nothing happens in that park except drugs, so just keep them out of there, in part because the local area wants to clean up the park"

LA1 described similar hot spots:

> 'So, for instance, there was a period of time when the police were concentrating on cleaning up the Carnegie Centre area. So they would ask, to the extent that you can, include the area around the Carnegie Centre, the laneways, because … there are people that use it, is a library, it is a community centre, and… the public is being effected, the legitimate users of that facility are being effected by the drug trafficking and the drug use that is taking place in and around there. And so we were conscious of that'.

He also noted the manner in which community pressure was applied directly to the prosecution: 'Other community groups approached the police and approached one of my supervisors about the Strathcona area, sort of east of Chinatown. Because there are schools, day cares, …. like it is a community'.

(iii) Rehabilitation

However, LA6 goes on to note that, at least within the DES drug market, red zones are also intended to be rehabilitative. A red zone that serves to keep people away from

areas of the DTES 'when they're coming down and getting into the drug scene, is rehabilitative in the sense that you're keeping them away from where the influences are, the negative influences on them'. However, this raises an important question. As LA1 notes, bail should not be used to facilitate rehabilitation, such as requirements that people attend a drug treatment facility: 'the purpose of bail is to address these three concerns, attendance in court, public safety, and the confidence in the administration of justice, having regard to the various factors in the code. The place for measures aimed at deterrence, rehabilitation, denunciation, you know, all those types of things, is sentencing. So, they should differ".

(iv) Policing

The relation between the police and the courts, in regards to conditions of release, is important to note. The police provide crucial information in a report, which may include requests for particular conditions. While the legal actors were clear that the courts were distinct from the police, they also noted that often they would take some direction from them: 'Often the police will make bail requests … I don't always follow them but usually … I'll request what the police have asked for. When I don't follow them it is because I think they are maybe a little too draconian" (LA2)

The process whereby files come through the courts has also changed. LA1 notes that when she first started (two decades ago), 'almost every file' came into the office on an in-custody basis (i.e. "where a police officer has arrested an individual, they have prepared a police report, the person remains in custody … and in the morning, Crown comes in for bail purposes at 7:30 in the morning, will review the report, make a charge approval decision or not, and if we approve charges then we determine our bail position"). Now, however, "more and more we have, because of our requests that the police do this, the police are submitting to us reports on an out of custody basis, that is that they have arrested the individual, they have released the individual pursuant to their powers of the Code so not going through the justice centre, … and the person has agreed to sign a promise to appear on a certain date at court and an undertaking to appear with conditions".

Not only do the conditions come from the police, but they also support their work. This is particularly true of area restrictions:

> "The other issue is just there aren't enough resources to adequately monitor these people in the community necessarily. So you could have a condition that, ok, you are not allowed to possess small baggies or digital scales or other packaging materials that traffickers use to package the drugs before they sell them, and that might be one way to restrict their ability to continue selling if indeed they were selling, but who is going to monitor that?" (LA3)

(v) The 'public interest'

Conditions of release were also discussed in relation to the 'public interest'. This concept seemed somewhat fluid, and capable of a number of meanings. On occasion, it seemed to be defined in terms of the financial cost of dealing with excess breaches in the case, for example, of a person with limited mental capacity. For LA3, it related to the third 'ground', which she defined as the 'public's perception of the administration of justice'. She interpreted this in the following way:

> 'One reason that you might ask for an area restriction is if somebody, let's say, is peddling drugs outside of a particular business and they are a problem of the business, and the business has tried to get this guy to move on, and that guy is still back there selling drugs everyday, and finally the police come, and they bust him and the shop owner is like "oh yay, he has finally been arrested". Then how is that person's perception of the administration of justice going to be if that guy is loitering outside their business again the next day? So I think it can effect that, how people perceive how justice is carried out if the person is back in the area where they have been a problem all along. Just shuffle them along, you know, move them somewhere else'.

LA3 also described the use of red zones in the DES in relation to drug trafficking as 'a harm reduction type of approach: "We are trying to reduce the likelihood that they will reoffend, and thus protect the public".

When asked to define the public interest, LA1 searched through the Criminal Code, pointing to the secondary ground 'where the detention is necessary for the protection or safety of the public'. She then illustrates this:

> "We take into account that there are legitimate … businesses that are operating that are affected by the drug trafficking trade, there are schools … and children that use the community centre, day cares, there are all kinds of public facilities where the public is impacted by the drug trade that happens. And it is not just perhaps that … they have to walk by somebody that is shooting up, that they are solicited and asked whether you want drugs, but like I said there is the needles in the school yards and drug trades … that happen in and around public areas like that. There are property offences; people's cars are broken into. So …. there is sort of a ripple effect to the drug trade that effects people running their lives and so that is what I mean by taking into account the public interest"

Overall, while legal actors sometimes expressed doubts with respect to the effectiveness of conditions of release ("I mean to determine effectiveness of those kinds of conditions is difficult" - LA1), they were generally seen in a positive light, achieving the goals noted above. For example, LA1 noted that red zones, as opposed to – say,

curfews – make sense at least in relation to drug trafficking in the DTES, given its distinct spatial dimensions:

> 'So I'm not so sure a curfew would address the kind of situation that occurs in the DTES. It very much is a geographic, it is a problem that is geographically contained. And not just on the streets but the buildings…. Some of those apartment buildings are just notorious for drug trafficking. So it really is hard to separate the offence from where it happened. And that is why the area restriction is so often imposed"

Red zones, in particular, were seen as useful in that they generated visible markers of compliance.

> "I think they can be effective because, for example, in this particular drug addled area, if someone has a red zone there, and the police see them there, and they are arrested it … keeps them out of that area, it stops them either before they are going to use or maybe just after they use, or right when they are about to deal … So getting them out of there, and arresting them, can check that behaviour."(LA2)

When asked if a one block red zone simply has the effect of dispersing criminal activity to the next block, some responded by noting police information that people tended to focus their activity on particular blocks:

> "… you probably could go off and deal drugs in another area, but we have found that often people have one block that they regularly deal…. But the hope is if we can't get a larger area restriction then one block, well then, at least they are not in that one block, and they will have to set up shop somewhere else." (LA2)

<u>Crafting a (reasonable) court order</u>

We asked respondents to explain the manner in which they helped to craft conditions of release. Given workload considerations, it is not surprising to see a somewhat bureaucratic mindset among legal actors, reliant on familiar templates: "[Red zones] have always been imposed, and from the very beginning I learned the standard Downtown Eastside area restriction: Gore Avenue to the East, Abbot Street to the West, Pender Street to the South, and Cordova Street to the North. Those [were] sort of ingrained in my head from the very beginning" (LA 1). LA 3 also refers to "Cordova Street on the North, Pender Street to the South, Cambie Street on the West and Gore Street on the East" as the "typical one in the Downtown Eastside".

Nevertheless, legal actors, whether defence or prosecution lawyers, seemed optimistic that conditions were reasonable and responsive to particular needs. As LA 6 put it, when deciding conditions, '… I'm trying to make it all personal… I am considering the individual profile of the person'. A defence counsel described speaking directly to the accused, and determining their situation, and then liaising closely with the Crown in

order to come up with conditions, including area restrictions, that were not excessively constrained or unrealistic. One legal actor noted that, as defence counsel, she would not sign off on an order until the conditions have been explored with the accused, arguing that the court is usually accommodating:

> "The court doesn't want to do that, they don't want to see them charged with more breaches. That's not the purpose of the order, to rack up more criminal charges, so they do try and accommodate if there is anything reasonable that we can suggest as to why it won't work."

Similarly, for LA4, "it's really based on where you are in town, what the norm of the neighbourhood is. Not the norm for the entire province, or the city, or the country. They are actually looking for each area as to what is ok in that area and what isn't"

LA1 noted that the process of crafting a red zone draws from multiple resources: "We will take into account what police recommend, we will take into account where the offence [is]. It is highly driven by where the offence is alleged to have taken place". However, if someone lives in the area where an offence is alleged to have occurred, the Crown will adapt: "if we know that the standard downtown eastside area restriction isn't practical because the person lives in the area, then we will see if there is a particular drug trafficking hot spot we can keep them out of that area".

i) Housing and resources

Residence within an area was noted as an important consideration, as was access to important resources. For instance, crown counsel will typically be amenable to reviewing police bail orders in order to allow the person to go to a doctor's office, a pharmacy or a bank, knowing that this would be allowed in court. LA1 noted that they would not red zone someone out of their home ("I can't remember one instance'"). However, LA3 observed that "if the trafficking is taking place out of a particular residence, then that is a case that I might say, 'Well, he lives there, but I want him out within 24 hours, he can attend once with a police officer to collect his belongings, but he still needs to find a new place to live'." Moreover, LA6 admitted that red zones could be difficult to craft, given the danger of making people homeless. However "at the end of the day, who do I have to give priority to? I have to give it to the public, I have a duty to protect the public".

ii) Enforceability

Crown counsels are also particularly concerned with enforceability, which is the likelihood that a condition might hold up in court before a judge. In that regard, geographical considerations will also come into play. For instance, LA1 reported that radiuses defined by distance are harder to enforce: "it is hard to determine where is the 50 meter mark". LA3 also echoes that sentiment about the use of radiuses: "I personally

do not like them because I think they are very difficult for people especially for people who are … at higher mental capacity. Because even for me I know I'd be thinking 'Well, 100 block of East Hastings, 2 block radius so that is like…? ' It confuses me so, if the police propose, I will look on a map…" Thus, when asked to review police bail, crown counsels will pay attention to geographical mistakes (for instance, the borders of the area are not contiguous or the order mentions that the street boundaries run down to the waterfront when they do not, etc.) or because the person lives in the area or has a family member living in the area, because those are said to not be enforceable: "when there is a problem often it is because the borders of the area restrictions don't match up and we have decisions that say that is not an enforceable condition" (LA1).

Efficacy and usefulness

That said, the legal actors we interviewed noted that there were some challenges associated with complying with conditions of release, including red zones, and some ambiguity regarding their efficacy. Some noted, interestingly, that some judges refuse to give area restrictions. As LA3 noted, 'they think it sets somebody up to breach, get arrested again'. LA4 reflected on the complexity of some of the conditions:

> "I look at some of those orders and think if I were told to do as many things as these guys were told to do, and I got arrested every time I was late, I'd be in jail all the time too. It becomes overwhelming the numbers of requirements … and you are dealing with a person who probably has a drug or alcohol addiction, who often has a mental illness, who doesn't have a solid living environment and being told to keep more appointments then I could handle keeping in a week. And they probably don't have an alarm clock either. So how in the world do we expect them to comply with those kinds of things? … It would be difficult for the people that are imposing those orders to live by some of those orders'.

While LA6 expressed his incomprehension in the case of a person who repeatedly breached his red zone ("'I just couldn't believe it', I said to him, 'I don't get it, why are you going there?'), LA4 also pointed out that "often the guys don't know what [order] they are on, when they are in jail. Are you on bail, are you on probation, are you on a CSO? They don't know which one they are on, they just know they're supposed to be seeing somebody"

The frequency of noncompliance with conditions of release was noted:

> "I have seen most stuff coming through these courts these days being failing to comply and breaches, and I don't understand. Where did all the real criminals go? Why isn't everybody charged with new offences? Because most of what we see on a day to day basis anymore are failures to comply and breaches" (LA4).

LA3 also noted that breaches of red zones are common, suggesting that some may occur "because … maybe they've got drug related issues and mental related issues'. However, she also noted that there

> "are some people with … flagrant disregard. 'Oh, nobody is going to notice me, this is where my buddy is, this is where I want to keep selling drugs'. We have some people that are banned from a particular area and then they are found the following week in the same area selling drugs again, and again they keep going back to that area and selling drugs.'

Others saw breaches less as failures than, strikingly, as successes. LA6 notes the frequency of breaches, but argues that the conditions serve valuable disciplinary purposes, and the breaches do not constitute 'real' crimes. A breach shows that the conditions are:

> '..working, he hasn't committed any new offences. I say well that's the whole point. Because the only place he knows where to work is in that area. If he is on the way to work and he is stopped he spends a week in jail, and he gets out, and he thinks 'Well, I guess I better get back to work' and bang he gets caught again.
>
> A; And maybe the behaviour will start to change?
>
> Q: Well exactly, that's why its there. If he was committing crimes, actually committing additional crimes I would treat him more seriously than 7 days in jail. I'm just trying to get the message that you aren't going down there"

Similarly, LA3 characterizes repeat breaches as poor choices that deserve an appropriate state response. Absent a lack of mental capacity, or a valid reason why a person accesses an area, 'if the guy … has breached five times and sure he is going to breach again, that's a choice he keeps making, and if he can't refrain from breaching then maybe he should be detained in remand because he's imposing a threat to the community, he can't abide by these conditions'.

During our interviews, some legal actors challenged statistics showing increases in the remand population or AOJ offences such as breach. LA1, for example, noted that the decision to detain someone on remand is based on a case-by-case assessment, "so it can't be that there's a trend and we're going to continue that trend". It was noted that the increase in AOJ offences might be a suspect statistic, given the way in which the court uses findings that do not show as a breach. As mentioned earlier, in recent years, many people have been brought to courts for a breach charge to see those charges being dropped and a warning issued. Despite the fact that the proceedings on such breach charges are stayed, it is interesting to ask what effects they may have on those subject to them.

Addiction

Drug trafficking and consumption were central to much of the conversation with Vancouver legal actors. The nature of addiction, and its relationship to conditions of release, was therefore an important topic. LA6 suggested that many addicts actively requested red zones. People came down to the DES, "they get involved with their drug crowd, and they get back into trouble. And I can tell you, almost every one of those orders, people say, 'Make an order I can't come down here.'"

That said, LA4 acknowledged the challenges of complying with a red zone for an addict:

> "keeping them from their favourite places is often … not a very useful condition, because a person addicted to drugs is going to go where they think they can find drugs, and they know they can find it at that corner. [But] the person will accept it almost always because they want to go out of jail and they know that the Crown is not going to give, on some of those ones".

However, such comments were unusual. More common was the observation of someone such as LA3, who endorsed the widespread use of red zones in the DES on the argument:

> "that it is our hope that if somebody is awaiting trial or I guess even on probation conditions that the hope is that if they are removed from this war zone - the Downtown Eastside - that it reduces the likelihood that they will sell again, because that is where most of the users are, they are in the Downtown Eastside, so we are trying to remove the supply away from the demand"

Similarly LA1 supported the cautious use of area restrictions in the case of street level addicted trafficker, pointing out that the accused

> "always has the ability to say that 'I cannot comply with it, I won't agree to it, because I live in the area', or even though it says no fixed address in the police report, but it [a red zone] is something that we will consider, because we are concerned as Crown about the impact of trafficking on the public, and at some point the public interest has to be given some priority, when a person who is addicted is continuing to [be] there is or alleged to have continued to commit offences which impact the public."

A condition not to possess illicit drugs was queried, it being pointed out that this is an offence already under the Criminal Code. The response of LA1 was an admittedly circular one: such a condition, she noted,

> '…can form part of a separate type of offence, that is that this is an individual who because of their addiction cannot abide by court orders, so for instance, if there is

a condition that they not possess any drugs, then we get a measure of whether this is an individual who will comply with a court order. It's circular, right. Because the person is not going to likely be able to abstain and therefore they have drug paraphernalia and they have drugs and so … maybe there is a certain force … in enforcing that condition, telling the accused that if you are if you are in possession of drugs, you are going to be arrested, not just for the substantive, but also breach if you are not supposed to possess it'

7. Effects of conditions of release on the rights and lives of individuals

As noted, individual interviews with people subject to conditions of release associated with bail or probation were conducted in 2013, with two focus groups held at VANDU, with follow-up interviews. Three protestors, and two male sex workers were separately interviewed. In addition, we draw from eighteen individual interviews conducted in 2012 by Will Damon for his MA research[157]. The data provide valuable information regarding the experience of conditions of release, including red zones. They suggest red zones are a commonplace for many marginalized people in Vancouver in general, and the DTES in particular.

That said, there was some variation in terms of respondent's experience with conditions of release. A few reported only a few bail or probation orders, while others noted the existence of multiple red zones throughout Canada, B.C. and the Lower Mainland. For example, Sarah[158] noted that she had been red zoned from New Westminster, West Vancouver, Surrey, North Vancouver, and West Vancouver. Patrick reported red zones in New Westminster, Surrey, Penticton, North and West Vancouver, Pacific Centre, and all Sears and Home Depot stores. While most conditions were court-imposed, some respondents noted red zoning by the police, either through formal means, or informal expulsion. Many people reported that they had violated their conditions, while trying to remain outside the radar. Many also noted that they had been arrested as a consequence, and were drawn back into the criminal justice system, often with negative consequences. Many reported that conditions seem fairly arbitrary (a red zone 'was basically thrown at me', noted Clyde) or confusing (one defined them as 'weird', while Clyde noted that one of his conditions required him to approach any walking police officer and ask him to search his bag). Conditions had been retroactively renegotiated, in a few cases.

Despite this variation, red zones were seen, almost exclusively, in a negative light. For a few, they appeared as one more inconvenience in an already challenged life. For others, they were deeply problematic, and were regarded as punitive and unproductive. Only

[157] Damon, William (2014). 'Spatial tactics in Vancouver's judicial system' MA thesis, Simon Fraser University

[158] All names are pseudonyms

one respondent in the VANDU focus groups, who noted that he had been verbally red zoned by the VPD from the 100-300 blocks of Hastings Street two years ago, saw the ban as useful. However, this was more a practical evaluation, given that the ban allowed him to distance himself from the dealers he had been working for, although he was still using drugs. Adrian took a more nuanced view, seeing potential for good and bad in their use: 'like anything it can be abused …. Anything can be good or bad, but I think they do use it to target some people, unfairly'.

Two sets of effects of red zoning can be discerned from the data, one concerning respondent's engagement with the criminal justice system, another entailing the effects on social and personal networks[159].

Engagement with the criminal justice system

a) Crime prevention

Conditions of release, according to the legal actors noted above, are intended either to reduce crime, or to help people to make 'good choices'. Most respondents were dismissive of such claims. Several pointed out that red zoning simply redistributed criminal activity. Adam, who counselled street kids in the sex trade, noted that: "If they've got an area restriction here, they're just going to go down two blocks. As long as they're within the borderlines of their working space. It's sickening really, it's bull shit". Nathan, who had been red zoned for PPT, noted that "it didn't make sense to me. They could red zone me, and I could just go two blocks from there and fuckin' do the same thing. It doesn't make sense to me, it doesn't". The consensus of the first focus group was that area restrictions only impacted petty street trafficking, not the higher level dealers. Chad, who was red zoned from a large section of the Downtown Eastside while on bail, claiming he was arrested while buying drugs, was struck by the dissonance: "I'm not a drug dealer I'm not selling drugs, I'm just using drugs. And you know, you hammer me on the cross for no reasons, you hammer me more than the dealer"

If the intention of red zones was to induce better decision-making by those subject to them, this was not always evident to those interviews. Many respondents claimed not to have been given reasons for their conditions, other than outright exclusion. Asked how the judge explained a red zone, Juan responded:

> "[What] I remember is if I go back, I get charged again, and they said I was looking at five months and it was going to go up.

[159] These appear to be substantiated by similar findings we have undertaken in Ottawa and Montreal. See also Ryan McNeil, Hannah Cooper, Will Small and Thomas Kerr, "Area restrictions, Risk, Harm and Health Care Access among People who Use Drugs in Vancouver, Canada: A Spatially Oriented Qualitative Study", (2015) *Health Place* 35:70: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4637230/

Q: Did they tell you why they kept you out of that area?

A: Yeah, because I was dealing dope"

Some noted that they would agree to anything to get out of detention, given addiction, and/or the negative conditions of remand. As Clyde noted, 'I usually agree to anything to get out of there'.

Further, respondents noted that they did not conform to a 'rational choice' model of behaviour when it came to abiding to their conditions of release, given their drug dependency. As a result, breaches were commonplace:' I was just messed up in the head really. I just didn't care. You know. And that was how I did it [breached], when I was getting high, and I needed some kind of income' (Clyde).

Conditions of release also had the potential to generate new forms of criminality, some noted. Patrick noted that by being red zoned from Skytrain, he opted to travel in stolen cars.

b) Ambiguity and miscommunication

Several respondents noted that conditions of release were often ambiguous, or subject to communication breakdown. Some noted that they assumed that they had been exempted from certain restrictions, only to discover that the court had failed to change their record. Nathan described being arrested by the police after the court forgot to lift his red zone, for example. Clyde claimed that he had not been given written instructions regarding a curfew after he was released on probation. This lead to a violent encounter with a police officer, he claimed, that lead to a subsequent arrest.

Many respondents appeared unclear or confused about the details of their interactions with the court. Some did not seem to know how long they were expected to abide by their area restrictions, for example. Asked how long his red zone was in force, Chet responded: 'I don't know… I believe once I've been dealt with, I'll still have it for a year or two'

Other respondents seemed rather vague concerning the perimeters of their area restrictions, although a failure to note the names of streets may not reflect their ability to negotiate these boundaries on the ground. One respondent, however, noted challenges associated with the use of a specified radius of exclusion. Patrick was obliged to remain 300 meters away from any Skytrain station. This proved a challenge, because he was living rough near a station. After numerous breaches, the police paced out the distance, and Patrick marked the perimeter with spray paint, noting:

"…I don't know how far 300 meters is, I don't know how many feet a meter is. I can't look at a distance and say that's about 400 yards. I can't do it. So when they

> say ‘Stay 300 meters away’, I don’t even know how many feet a metre is. I have no clue. I only got through half of grade six before I got kicked out”.

Bill described the legal ambiguity associated with a verbal red zone from the police to stay away from the four blocks surrounding the 200 block on Hastings. The uncertainty generates considerable concern for him: “The thing is I hesitate if I do go down there and I do get stopped. Because … I don’t know what they can carry out as charges on that. That's my concern, that's what I'm worried about”

c) The revolving door

Rather than a stepping-stone, allowing for advancement and improvement, some respondents indicate that conditions of release can serve as a revolving door, whereby people constantly cycle through the criminal justice system or, at worse, become further entangled. For Nathan: ‘It doesn’t do any good. It’s like going to drug court. Some people are good for a couple of months, [but then] they are back down here [with] the same conditions. You are prone to fail, just like the red zones’.

Respondents noted that this partly reflected the realities of addiction. In response to the suggestion that the courts red zone people to help with their addiction, Patrick responded: ‘that’s basically what it is, the court will give you a red zone so you can’t come into this area. But I’m an addict. They sell drugs in that area. So in order for me to get drugs, I have to go to that area. So even if the court tells me not to I still go. Even if the court tells me not to’. Alternatively, he noted, he would shift his activity close by, and then his red zone would be expanded, until he was excluded from an entire municipality.

Samuel argued that the only effect of a red zone in the DES is to ‘ensure that a person is going to come back through jail on a new charge’ because of the predictable effects of addiction:

> ‘it’s one of the areas where you go to score and you are an addict or you are severely addicted, you are not going to change to go someplace else, when all the people you know, and your dealers are in this area, you are going to go where you are comfortable. And they know that. That’s the trap about the whole thing … it’s only a matter of time until they screw up and go to jail. It’s part of a pathway that puts people back in jail’

Adam noted that his red zone ‘used to be like a revolving door for me’, noting that he would be routinely arrested for breaching his red zone, even through he was not engaged in criminal behaviour: “I could be standing on the corner in my red zone and then, boom, ‘Mr. XX you are in your red zone. And you are standing on the corner. Are you soliciting sex’, ‘No officer, I’m not soliciting sex, thank you very much, I’m just waiting for a friend.’ ‘Bullshit!’ Then they throw me in the city jail 3 to 5 days.’

Some noted the manner in which subsequent breaches lead to an escalation of negative consequences: ‘

> “For your first breach they will be lenient, give you a slap on the wrist, then kick you out the door. The second time they might do that or they will just hold you over, so the more breaches that you accumulate on your record, the punishment gets more severe. Next time you get two weeks, maybe the next time you get 30 days, next time 3 months. It just goes higher and higher and higher’ (Rob)

> ‘Oh, I used to get arrested and put in jail for 3 to 4 days at a time, every couple of week, because of [red zones] and charges, charges. So my criminal record is 3 months. Nothing is for anything criminal, it is always for breaching, possession, breaching, breaching, breaching. They would kick in your door and get you for breach so you would have a possession and a breach’ (Anne)

While some noted that the police would be a little more flexible when it comes to breaches, a number of respondents provided harrowing accounts of the consequences of breach, the effect of which was to cycle them through jail and punitive conditions of release. Patrick described the process whereby breaching his red zone generated new charges (a breach plus a new charge for being in his red zone):

> ‘So they do it again, Two, two, two, two, and the next thing I know I got a hundred [charges] coming at way, so it’s like ‘wow’, so I just started making deals and pleading out. So what it is they clump it all into one, they drop four and you plead out to two. So it’s six charges, you drop four, you plead out to two, so you get a certain amount of time. Well, I’m on the “step up” program, so every time I get busted and go to court, next time my sentence is automatically doubled. I was in for five months, my sentence automatically doubles, and if I breach my sentence is 10 months. So if I breach again it goes from 10 to 20 months. It is a step up program’

For some, the process itself became a form of punishment. As noted above, Clyde described being arrested for a curfew he was unaware of, and charged with assault on a police officer (he claimed that the police officer assaulted him). He was in remand for five months, until he was bailed out with a court-ordered curfew. He was unable to access housing, and was obliged to couch surf, where he developed a staph infection from bed bug bites. He was obliged to go to hospital every 12 hours for IV antibiotics:

> “And I’m on curfew, [it’s] five minutes to ten and I’m going to rip the IV. The doctor knows what’s going on. Goes into the lobby … and talks to the officers, tells them what is going on. And [the doctor said}: ‘I don’t care what you say about his conditions, he has to come in to the hospital every twelve hours’

Q: And what did the cops do?

A: Well they documented it, and the moment I was done with my IV antibiotics they arrested me and breached me eight counts, and I did five months".

d) Police encounters

Respondent's daily activities (such as binning, or 'hustling') mean that they are in public space a lot, which places them into contact with the police. One respondent noted that the police informally red zoned him from a specific area of Hastings Street (i.e. not through a police-issued undertaking). A male sex trade worker reported the following encounter in the suburbs: "six cops in an undercover car pull up at gun point, throw me in the back seat, and take me out somewhere outside of Abbotsford, and tell me, either you and your boyfriend leave, or you'll end up in jail, or worst case scenario you'll wind up in the river" (Adam)

Most reported conditions were court-imposed, however. Some respondents noted that the police enforcement of such conditions entailed excessive force. Nathan reported breaching his curfew, and being picked up by the police, beaten up, and dropped off in Stanley Park to walk back to the Downtown Eastside in the rain. Juan, a Latino, described his enforcement experience:

"The courts give you an order that you can't be somewhere; when the police come, he says "look, I see you again here, and I'm going to kick your bad ass, boy"… You go back and oh, I'm not going to be around that damn cop, but all of a sudden, boom, its that cop, and you are in the back alley, get beat up by these cops, and if you go complain, you get double, triple next time. That happened to me, you know".

e) Detention

One frequent consequence of police enforcement of breaches of red zones is detention. In some cases, this can be short, unless – as one respondent noted – you're arrested on a Friday, and then 'it is going to be a long fucking weekend in a cold ass fucking cell' (Clyde). Even shorter periods of detention, however, can be challenging:

'it is only for a couple hours, but it's mental anguish that really hurts the most, because you are in there with a whole bunch of drug addicts and people that are looking at long sentences that don't have anything to care for. Anything is possible. Your life could be threatened … Yeah, they are withdrawing, they're jonesing [craving], they're dope-sick, they're shitting and puking everywhere. I'm here for what, an area restriction violation? These guys are waiting to be put in jail. I'm waiting to be released' (Adam).

This respondent also claimed that rather being arrested, he would routinely be 'detained' for his own safety and that of others, and held for up to five days without access to a phone, etc. Bruce described the experience of his partner, detained for breaching while going through withdrawal:

> "So here you have a guy who is sweating. He shit himself. And the cops said clean that up. And wanted him to use his jacket to clean shit off the floor. And he said: 'No, please, I'm sick, please just help me. You have a janitor'. And they grabbed him and threw him on the floor".

Red zones and personal networks

a) Displacement

In some cases, people noted the effect of red zoning, particularly when compounded, was that they were forced to change residence. In some cases, people reported being obliged to move downtown. Sarah, for example, described being red zoned sequentially out of New Westminster, and Burnaby, and then relocating to the Downtown Eastside. A number noted that the effect of conditions was to force them to live on the street, when a restriction prevented them from accessing a formal or informal place of residence. One respondent, Clyde, noted that he was curfewed at night from public space, despite being homeless, placing him in a hopeless predicament.

b) Emotional harm

Several noted that conditions of release caused problems in maintaining family ties. Nathan, red zoned from Vancouver, noted that one of the worst consequences was "being separated from my nieces. When my nieces and nephews had a birthday, I could not go. Cause I had a red zone I could not go. They were like: "Uncle, Uncle, we thought you were coming?" It embarrassed my mom. I couldn't go to Vancouver cause they wouldn't allow me". Nathan noted that "I had a friend who died down here [the DTES] and I couldn't go to his funeral, which still kills me, because of the red zone". For Neil, the worst effect of being red zoning was "losing contact with my family, my son … I wanted to see my son, he is my blood, he's my boy".

Patrick was repeatedly red zoned from areas in which his girl friend resided, noting that he would agree to any restrictions to escape detention: "I know for a fact that when I go to court I will say, do, whatever I can to get out". However:

> "by giving me a red zone all it did was initiate another charge. It is enabling me to go back to jail. It would have been better for them to lock me up for the time and then let me out. But instead I end up going right back because my girlfriend she was situated, right. She's my girl, I don't care what cops say, what judges say, if my

girl's there, I'm going there. Just think, put yourself in my shoes. If you are married and your wife is in the middle of your red zone, would you go and see her?"

For these and for other reasons, red zones were not experienced by many as therapeutic interventions, but as forms of exclusion and banishment: For Adam: 'it doesn't feel too good. I can't go out with friends, I can't see my clients, I can't take my dogs for a walk in the area, it sucks for business for my shop. Until I can get a pardon I'm locked out of that square'. Asked how it feels to be red zoned, Neil responded: 'Hurtful, denied, lost ….'

c) Access to resources

Red zones often overlapped with areas that provided important resources. Paul argued that the worst effects of his red zone were that he could not access valued resources: 'All the resources that you need are in that red zone area. Like Carnegie is in there, I'm not allowed in Carnegie, which has all the resources to help get me in social assistances'. Clyde, a gay man, noted that his red zone (subsequently modified), excluded him from a drop-in centre for men in the sex trade. The effect more generally was to prevent 'access to a support group, food, resource, one of the few places I know where I feel comfortable. Kind of difficult'. For Adam, the worst consequence of red zoning was he could not provide support for others: 'the worst thing is not being able to give the street youth that I'm in contact with the proper support. That's the biggest thing. I don't care about nothing else…. And doing the outreach with street youth is the number one thing'.

Lisa described being red zoned from 'all of Hastings St' in the DTES while on bail for PPT, noting that for her: '… it didn't make sense, my bank was there, my home was there, my probation was there, my doctor was there, like come on guys! All of Hastings Street? Hello! My whole life is there! They're going to arrest you every time you want to go home?I'. For Sarah, being red zoned from Burnaby and New West was 'shitty, because that was my life, that's where I knew everybody, that's my everyday life, that's where I live'.

In order to access important resources, respondents described accessing their red zones, and experiencing negative police encounters as a response. Neil, red zoned from an area in Kelowna, described what he labeled as a police 'boot fucking':

> "I was drunk one night, smoking crack, and it was really cold, so I slept behind a generator, behind the Shell gas station in the red zone on Burtch Road, and I went into the Native friendship center across the street to get some coffee and something to eat and all of a sudden I hear: 'Put your hand behind your back, you are under arrest for being in your red zone'. Right away they roll in and cuff you up. RCMP, Kelowna detachment, that's a boot fucking'.

One respondent, Patrick, noted that when enrolled in the community court, he could only access his welfare cheque by conforming to the court's requirements:

> 'Every time, it's like a leash around your neck. You don't show up, you don't get it. You have an appointment two weeks before and you missed it and you show up to get your check, you ain't getting it. They'll issue a breach. And they'll arrest you right there. It happens all the time. Not just me, there is a lot of people that get there welfare through the community court'

Consequently, many respondents regarded red zones as punitive and unproductive.

We asked Chad, red zoned while on bail, whether it felt like he was being punished:

> A: yeah, big punishment and for nothing.
>
> Q: how has the restriction affected your everyday life?
>
> A: it is uncomfortable, everyday I wake up I have to hide to go where I need to go, or else they send me to jail, for nothing
>
> Q: has it made it harder to get to resources, to VANDU?
>
> A: of course it does
>
> Q: can you list some of the things?
>
> A: I can't go… like meet my friend at Columbia and Hastings, I can't visit nobody, I got to hide around, I can't do that. So I don't know what to do'

Finally, for Paul:

> 'Red zones are stupid. People are going to go, where they want to go, when they want to go. We live in a society where everyone should be fine with that. Let people do whatever they want to do… as long as nothing is causing harm or death to anybody, why not let 'em do it. You know, you understand?'

8. Rights Violations

Red zones and other conditions of release have the potential to infringe on multiple fundamental rights. These include freedom of association (s. 2c) of the *Canadian Charter of Rights and Freedoms*), mobility rights (s. 6 of the *Charter*), the right to life, security and liberty of the person (s. 7 of the *Charter*), the presumption of innocence and the right to reasonable bail (s. 11d) and e) of the *Charter*), the right against cruel and unusual punishment (s. 12 of the *Charter*), and the right to equality before the law (s. 15

of the *Charter*), as well as socio-economic rights protected in international human rights conventions such as the right to health, the right to housing or the right to work. However, there have been a limited number of rights claims and rights, generally speaking, do not seem to be an important issue for legal actors. As we will see, there are multiple obstacles to formulating rights claims.

Limited rights claims

Recent cases from the Supreme Court of Canada have recognized the rights of marginalized people to be protected against the negative effects of criminalization, in particular in the context of s. 7 of the *Charter*[160].

Yet, despite such important decisions there are very few challenges against conditions imposed at bail, probation or conditional sentence based on alleged rights violations. As a matter of fact, as our legal analysis showed (see part 3), bail or probation conditions are not easily contested, whether these objections are grounded in rights violations or in criminal law principles, such as reasonableness, enforceability or jurisdiction. Based on our analysis of the case law, we can identify only a few areas of Charter contestation associated with conditions of release.

1. Prohibitions to demonstrate or demonstration-related conditions.

Perhaps not surprisingly, demonstrators have been prone to challenge bail and probation conditions based on constitutional grounds. As we showed in a recent article[161], demonstrators are often imposed quite stringent bail conditions, including spatial restrictions combined with prohibitions to attend or to participate in public meetings or gatherings. These conditions have been found unconstitutional in the 1980s and 1990s, but more easily accepted by the courts after 2007.

Starting in 1982, a condition "not to attend at, demonstrate, obstruct or in any way cause a disturbance within a radius of one-half mile of the Litton systems" was found in violation of s. 2b) and c) of the Canadian Charter (freedom of expression and freedom of association and peaceful assembly), and not justified under s. 1[162]. The Ontario County Court held that rights could not be restricted based on speculative concerns and that the Crown must show compelling reasons to curtail them. In another case, a condition imposing a complete ban to participate in "any strike or lockout of a firm, industry shop or any other employee/employer establishment" was found too broad and narrowed

[160] PHS, 2011; Bedford, 2013

[161] Marie-Eve Sylvestre, Francis Villeneuve Ménard, Véronique Fortin, Céline Bellot et Nicholas Blomley. « Conditions géographiques de mise en liberté et de probation imposées aux manifestants : une atteinte injustifiée aux droits à la liberté d'expression, de réunion pacifique et d'association », (2017) 62(3) *McGill Law Journal* (forthcoming).

[162] *R. v. Collins*, (1982) 31 C.R. (3d) 283 (Ont. Co. Ct.)

down to a specific labour conflict in Cambridge, Ontario[163]. And a few years later, the Quebec Superior Court made an important ruling in *R. v. Manseau*[164], holding that in order to respect individual rights, complete bans on demonstrations should not be imposed. Instead, they should be replaced by more circumscribed and tailored restrictions, such as prohibitions to demonstrate on any private property without the owner's consent or prohibitions to participate in any unlawful or illegal demonstrations as well as requirements to leave any demonstration as soon as it becomes non peaceful or illegal. These conditions were subsequently followed, including outside of Quebec[165].

The situation started to change in 2007, however. For instance, in *R. c. Hébert*, the Quebec Superior Court upheld a probation condition imposing a complete ban on demonstrating[166] and the Ontario courts soon followed in a series of cases growing out of the G-20 protests and associated arrests, confirming restrictive bail conditions that included complete prohibitions from "organizing, participating in or attending any public demonstrations"[167].

2. Abstinence clauses

In some jurisdictions, defense counsel or trial judges object to the imposition of abstinence conditions (refraining from consuming alcohol or drugs) on alcoholics or drug addicts, suggesting that in their case, these conditions are unreasonable or not enforceable and leading to unnecessary breaches. Yet, abstinence conditions still abound and have rarely been challenged based on constitutional rights.

There is one interesting exception to this: *R. v. Omeasoo*[168]. In that case, a judge from the Alberta Provincial Court held that a condition prohibiting an alcoholic to consume alcohol was violating the accused' right to a reasonable bail under s. 11e) of the Charter. According to Judge Rosborough, while "[t]here are circumstances where individuals can be expected to comply with bail conditions merely because they are pronounced by a person in authority and will result in penal sanctions if breached, this is seldom the case with alcoholics subjected to abstention clauses. Ordering an alcoholic not to drink is tantamount to ordering the clinically depressed to "just cheer up." This type of condition has been characterized by some courts (at least in the context of a probation

[163] *R. v. Fields*, (1984) 42 C.R. 398
[164] *R. v. Manseau*, (1997) JQ no. 4553 (S.C.) (QL)
[165] *R. v. Clarke,* (2000) OJ No. 5738 (Ont. Sup. Ct.) (QL). In this case, the Ontario Superior Court found that both a condition not to demonstrate and a condition restricting the applicants from communicating with any member of the Ontario Coalition Against Poverty were in violation of s. 2b) and c) of the Charter. According to the Court, conditions not to communicate should also be individualized in order to withstand Charter scrutiny. See also *R. v. Gamblen*, 2013 ONCJ 661 with respect to non association clauses (rejecting a constitutional argument based on s. 9 of the Charter).
[166] *R. c. Hébert*, 2007 QCCS 7175 (Qc Sup. Ct.) ; appeal dismissed on other grounds in (2010) QCCA 2210
[167] *R. v. Hundert* 2010 ONCJ 343; *R. v. Singh*, (2011) ONSC 717
[168] 2013 ABPC 328

order) as "not entirely realistic." . . . It has been found to have set the accused up for failure.[169] »

The Court then urged peace officers or officers in charge who release individuals on bail to "first address his or her mind to the question of whether the detainee is an alcoholic. If so, and an election is made not to detain him or her, further inquiries must be made in order to determine: (i) whether the detainee is reasonably capable of complying with an 'abstinence clause'; (ii) if so, under what circumstances; and (iii) whether those circumstances are themselves reasonable. A peace officer or officer in charge must be wary of the detainee's *pro forma* agreement to abide by an abstinence clause (whether realistic or wholly unrealistic) simply to secure his or her immediate release from custody.[170]". Finally, the Court suggested that "the absence of an abstention clause from an order for judicial interim release does not place the community in any greater danger than release of an offender on an undertaking with an abstention clause that (s)he will not comply with." While the ruling in *Omeasoo* clearly set an important precedent in the case law, it appears to have had little effect to date.

3. Red zones

Finally, there are also a limited number of cases challenging the imposition of red zones or no go orders based on different Charter rights, ranging from the right to freedom of expression to the right to mobility and the right to life, liberty and security of the person.

The first case goes back to 1974. In *R. v. Melnyk*[171], the appellant challenged a red zone condition imposed in a probation order based on s. 2a) of the *Canadian Bill of Rights.* Section 2a) provided that " […] no law of Canada shall be construed and applied so as to authorize or effect the arbitrary detention, imprisonment or exile of any person" (our emphasis). The appellant was prohibited from being "found at any time during the night time, after 6 p.m. or before 9 a.m. in the downtown area of Vancouver, namely the waterfront to the North, Stanley Park to the West, the extensions of False Creek to the South and Commercial Drive to the East." The judge found no merit in that argument, but did not provide any reasons[172].

A decade later, the B.C. County Court also summarily dismissed another constitutional argument made by an appellant against his red zone. In *R. v. Pedersen*[173], the appellant, who was convicted of possession of marijuana, suggested that the terms of his probation order prohibiting him from entering the "area in Vancouver bounded by Drake Street on the South, Pender on the North, Richards Street on the East and Howe

[169] Ibid, par. 37
[170] Ibid, par. 40
[171] (1974) 19 C.C.C. (2d) 311 (B.C.S.C.)
[172] Par. 6
[173] *R. v. Pedersen*, (1986) 31 CCC (3d) 574 BC Co. Ct.)

on the West" interfered with his right to freedom of peaceful assembly and freedom of association. The Court refused to apply the rulings made in *Collins* (1982) and *Fields* (1984) to this context.

In 1991, the Court of Appeal rejected an argument that a restriction to be found in the entire province of British Columbia imposed against an individual convicted of assault and threats against the parents of his former spouse did infringe on the appellant's right to mobility protected by s. 6 of the Charter. At the sentencing hearing, the appellant had consented to the terms of his probation following his incarceration, but he challenged them after he was released from prison. The Court held that s. 6 did not extend to specific rights of movement and could not render unconstitutional "such a nicely gauged sentence". In the Court's opinion, this probation order could not be "looked on as a case of banishment at all". Instead, it was a case of "a nicely judged probation order designed to protect particular members of society who have been specifically threatened"[174]. Yet, while ordering that an individual be banished from a province does not raise constitutional issues based on s. 6, declaring a Canadian citizen inadmissible in Canada is constitutionally doubtful[175].

The case of *R. v. Reid*[176] is surely the most interesting and related case dealing with the constitutionality of red zones. In that case, the defence argued that the Public Prosecution Service of Canada's practice of seeking a standardized "one square mile red zone" in order to keep drug offenders away from the downtown area of Victoria for bail and probation in every case of drug trafficking and possession for the purpose of trafficking regardless of the specifics of the case or of the offender was unconstitutional and violated the offender's rights protected by s. 2b), 6, 7, 12, 15 of the Charter.

Judge Gove, who is now a judge at the Downtown Community Court in Vancouver, vehemently criticised this practice of the federal Crown. Although he did not go through each Charter claim made by the defence, he found that excluding an individual from the downtown of his city clearly interfered with his participation in the community and to do so without demonstrating that it is necessary and justified in the case of this individual would interfere with his liberty and be against the principles of fundamental justice (in particular here, arbitrariness, overbreadth and disproportionality)[177]. More specifically, red zone conditions cannot solely be based on the type of offence or a class of offenders. Judge Gove insisted however that his ruling should not be interpreted to hold all red zone conditions unconstitutional *per se*, but he suggested that such conditions be based on the unique circumstances of each case. He then turned to

[174] *R. v. Banks*, (1991) 3 C.R.R. (2d) 366 (B.C.C.A.)
[175] *Abounouar c. R.*, 2008 QCCA 540. At par., 10, the Court held that declaring a Canadian citizen inadmissible in Canada does not fall within s. 732.1(3) h) Cr.C. and the constitutionality of such a condition is doubtful. Abounouar was 19 years old and convicted of robbery, possession of a prohibited weapon and assault.
[176] *R. v. Reid*, 1999 BCPC 12 (J. Gove)
[177] par. 57, 61 and 63

examine two series of cases in which banishment were found to be appropriate, namely when banishment is imposed to protect a victim's safety and when it is imposed to facilitate or support an offender's rehabilitation[178]. In contrast, red zones were found inappropriate and illegal when there was no sufficient evidence to justify them or when they were simply imposed as a deterrent[179].

The *Reid* case spoke clearly of the punitive consequences of red zones. Michael Reid was a 21-year-old homeless man and marijuana user. He was arrested in downtown Victoria in a popular drug-trafficking area and subsequently charged with possession of marijuana. He was excluded from the standard one square mile Victoria "red zone" as a condition of bail. Michael was born in New Brunswick, he had a turbulent life, spent many years in foster homes and traveled to different cities in Canada. He had lived in British Columbia for the past four years at the time of his arrest. He worked in a fast food restaurant, but he had also been a panhandler and received social assistance in the past. He had a prior criminal record for breaking and entering and theft, possession of illegal property and failure to comply with a court order as a juvenile as well as two convictions of theft and assault as an adult. Michael lived at a shelter, used food banks and public health services as well as attended an adult education program, all located in downtown Victoria, an area where he was arrested and banished. Moreover, the red zone interfered with the route to his school and even to his bail supervisor's office.

In sentencing him, Judge Gove acknowledged those difficulties: "Many people subject to "red zone" conditions are denied the services that they need to change their lives, often away from drug addiction. […] Without these services they cannot overcome their problems or in some cases even live safely[180]". In the words of Melanie Ethier, who served as a witness in the Reid case, "red zones make poor people feel poorer"[181].

Finally, more recently, the Court of Appeal of Alberta found that a notice not to trespass banning the respondent from using the Edmonton Transit System was not in violation of s. 7 of the Charter[182].

This being said, considering that red zones and no go conditions are imposed repeatedly and on a daily basis in police stations and criminal courts, rights-based challenges can be said to be quite exceptional.

[178] It should be noted that this latter justification should only be applicable to probation. Bail orders should not be rehabilitative in nature (see above).
[179] Ibid, par. 66-81
[180] Ibid, par. 47
[181] Ibid, par. 12.
[182] *R. v. S.A*. 2012 ABQB 311, 2011 ABPC 269, application for leave at the Supreme Court of Canada dismissed in 2013.

Rights are not an issue, from the perspective of legal actors

This is also evident in our interviews with legal actors. When asked whether certain bail or probation conditions might impact fundamental rights, legal actors almost systematically expressed incomprehension and surprise. They confirmed that it was really unusual for them to make or hear such arguments: "It is rare that we are arguing really big rights issues at bail. Because generally the Crown isn't pounding the table about things unless there is a good reason for it as well' noted one (LA4). Another, noted the *Reid* case: "There was I think out of Victoria a challenge to area restrictions based on an argument that it restricted a persons right to mobility under section 6 of the Charter of Rights and Freedoms. But that is rarely raised, at least here." (LA1).

Moreover, they frequently traded off individual rights against other legal considerations and priorities: "The person has their liberty rights, their section 7 right to life, liberty and security of the person, they've got those rights, but the community also has a vested interest in being protected from these individuals who are accused of crime. So I think that like anything else in law, it is a balancing act. So yes individual rights are at play but they have to be balanced by the needs and rights of individuals in our communities" (LA3).

Some of them went even further and suggested that some spatial conditions such as red zones allowed for an evaluation of compliance that did not engage Charter rights. In other words, these conditions have the effect of circumventing Charter rights.

> "'It is easy for the police to spot, and know the person is in breach. They can run it on the computer without detaining the person and engaging any Charter rights, because if somebody is prohibited from possessing something, for instance, you'd probably have to detain them, you would have to have independent reason to go into their pockets, you're engaging their Charter rights, but with a red zone you can go: "Oh there's Mr. Smith", look in the computer, tic tac, "Oh yup that area restriction is still in place" and they've got their grounds and he is arrestable. It is a very easy one for them to enforce and it is easy for us to convict on because Mr. Smith is not allowed in that block, there he is in that block, pretty much case open and closed' (LA3)
>
> "How are we going to know if he is carrying around a digital scale in his pocket unless the police officer has reasonable, probable grounds to search them? That is not something that can be monitored and even if that person was subject to arbitrary search to see if they were complying with conditions who is going to do that? There is nobody to follow them around to make sure they are behaving themselves. So the area restriction seems to be the best way that we have to reduce their ability to continue selling." (LA3)

Obstacles to making rights claims

Considering our findings, we explored the reasons why individuals refrained from making rights arguments. We identified two broad categories of barriers (legal and practical/relational) that we briefly state below.

1) The law of bail and probation: limited legal space

There are multiple legal technicalities preventing individuals from challenging their conditions of release. As mentioned previously, once they have been imposed, bail conditions can only be reviewed before the trial with the written consent of the prosecutor or by in a separate proceeding before a judge of the Supreme Court of British Columbia, "where an error of law has been made or where the decision was clearly inappropriate"[183]. Furthermore, in accordance with the rule against collateral attacks on court orders, bail or probation conditions cannot be challenged during the trial or raised in defense to a breach charge.[184] Appellate courts should only consider the "fitness of the sentence[185]" and refrain from interfering with the trial judge's unless there was an error of law or the sentence was clearly unreasonable[186]. Finally, "in reviewing a sentencing judge's exercise of discretion on *Charter* grounds, an appellate court should first consider whether the sentencing judge acted within his statutory jurisdiction. If a sentence is illegal on the basis that it is unauthorized under the governing legislation, it must be struck down and the constitutional issue does not arise[187]."

2) Context, practices and power relations

The context in which conditional orders are imposed, particularly in the case of bail, does not provide the necessary space to discuss rights issues or challenges conditions: there are multiple actors involved, with a high volume of cases, and limited time and resources to put forward claims. The implied 'contract' between Crown and accused associated with bail conditions is also negated by the inherent power relationships associated with arrest and detention.

More specifically, our interviews and observations suggests a compounding set of circumstances that mitigates against a rights-based challenge to the prevailing system:

* Alleged offenders are held in overcrowded remand facilities while awaiting bail determination. They wish to be released at any cost and will often readily accept the suggested bail conditions, having understood that "if you plead guilty, you get out

[183] *R v. St Cloud*, (2015) SCC 27, par. 139; see also par. 92.
[184] *R v Litchfield*, [1993] 4 SCR 333; *Wilson v. The Queen*, [1983] 2 SCR 594
[185] Section 687 *Cr.C.*
[186] *R. v. Shropshire*, [1995] 4 SCR 227, para 46; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 SCR 1089, para. 42–48.
[187] *R. v. Shoker*, 2006 SCC 44, par. 18

today, but if you're innocent, you have to stay in" and wait for a bail hearing, or after going through multiple adjournments, will be ready to plead guilty and be sentenced to a probation order.

* As mentioned above, prosecutors are not always in a position to assess the significance of the spatial restrictions imposed by the police, to whom they tend to defer for their knowledge of where the "shifting hot spots" are located. While they will sometimes consider housing and access to services, including social, health and legal services, they are also sensitive to the public interest, as filtered through community complaints and police concerns about certain neighbourhoods.

* Duty counsels, representing the alleged or convicted offenders, only have a few minutes to discuss what the conditions entail and they sometimes advise their clients to accept all the conditions the prosecutor consents having regard to the chance of having bail denied altogether at a bail hearing.

* Under pressure, the alleged offenders often forget crucial details (such as their doctor's office being within the suggested area).

* Particularly risk-adverse judges and prosecutors follow established, if sometimes arbitrary, spatial templates.

* Justices of the peace with no legal training tend to defer to prosecutors, and judges are readily convinced based on inadequate evidence that without a series of conditions, they do not have sufficient guarantees to release the offender and prevent the repetition of the alleged offence.

3) Competing rationale

As mentioned in Part 6, different legal actors pursued different and sometimes competing goals whether they request, impose or negotiate conditions of release. This creates some tensions. It is particularly true of bail. At this stage, a policing logic can easily take precedence over and interfere with legislative and judicial objectives.

For the police, spatial restrictions appear to be an important policing and investigative tool[188]. Not only do they allow them to control certain neighbourhoods by keeping 'chronic offenders' away, but they also make it much easier for them to arrest an individual quickly without the need to have any reasonable grounds or to collect any evidence with respect to the perpetration of the underlying offence which initially led to

[188] As mentioned in the methodology, the Vancouver Police Department refused to grant us access to their officers in the context of this study. We thus make these conclusions with caution as they draw primarily from distilling secondary literature and speaking to other legal actors who interact with them on a daily basis.

the issuance of the conditions. In contrast, prosecutors and judges tend to be concerned about compliance and enforceability of court orders because breaches of court-imposed conditions are legally understood as offences against the administration of justice and a threat to the authority of the court (Murphy, 2009). Legal actors also see conditions of release as a lesser evil given that they are concerned with preserving the defendants' liberty and offering an alternative to pre-trial incarceration.

These tensions are consequential in terms of rights and uses of space as competing justifications build on one another and expand surveillance. For instance, according to some actors, after an arrest, the police may sometimes overstep their powers by imposing stricter conditions or broader area restrictions than they are entitled knowing that such conditions are not systematically reviewed. In turn, a judge may tend to accept stricter conditions to avoid sending the accused to a remand center.

Conclusion

In Vancouver, red zone and other spatial conditions of release are regularly imposed contrary to the provisions of the Criminal Code and fail to meet the goals set by the law and supported by legal actors, including reducing crime, controlling the drug supply and promoting rehabilitation. Instead, they tend to be counterproductive for those subject to them, threatening access to emotional connections and valued resources, and increasing the risk of negative police encounters and detention. As such, conditions of release infringe on important social and individual rights. Finally, red zone conditions lead to multiple breaches that are extremely costly, create additional burdens for the administration of justice and undermine respect for the justice system[189].

In conducting this research, we built on the important analysis and statements made by various policy makers and institutional reformers in the last decade in B.C., including Geoffrey Cowper and Murray Segal, as well as elsewhere in Canada, including for instance the most recent report by the Standing Senate Committee on Legal and Constitutional Affairs [190], who called for further study of offences against the administration of justice and appropriate reform. We cannot but agree with Geoffrey Cowper when he stated that administrative offences (directly generated by numerous and unreasonable conditions of releases, we might add) "is an area which remains in

[189] Cowper, Geoffrey D. QC ". A Criminal Justice System for the 21st Century. B.C Justice Reform Initiative; Final Report to the Minister of Justice and Attorney General Shirley Bond. August 7, 2012: "When everyone expects the terms of release to be breached, according to those concerned, respect for the system is undermined. "(p. 150) or Murray Segal, Championing Positive Change, Findings from the Review of the BC Prosecution Service, August 2016, "There is no dispute that ignoring breaches may demonstrate a lack of respect for the justice system; however, there should be an informed discussion about what type of breaches warrant charging".

[190] Senate of Canada, Delaying Justice is Denying Justice – An Urgent Need to Address Lengthy Court Delays in Canada, Final report of the Standing Committee on Legal and Constitutional Affairs, June 2017

need of a system-wide response that will necessarily include careful research, sound data and evidence, and exploring collaborative alternatives through pilot programs.[191]"

Based on our findings, we suggest that the law and practices surrounding the imposition and negotiation of conditions of release, including red zones, should be completely revised. We start with bail.

There is a pressing need for the recognition of prevailing law governing bail. Unconditional release must be the norm for granting release, as required by the Criminal Code, and must serve as a real alternative to remand, not a conduit to detention. In this regard, one can hope that the 2017 decision from the Supreme Court of Canada in *R. v. Antic* will send an important message to lower courts and change their practices. As our data confirmed, at the moment however, conditions of release have completely supplanted unconditional release. When the alternative to custody is unconditional release, it suddenly becomes easier to challenge unreasonable conditions of release. It also radically changes the power dynamic among legal actors, in particular for defence attorneys.

In order to achieve this, changes must also be made to the Criminal Code. In particular, s. 515 of the Criminal Code should be amended to clarify what should be the legitimate objectives of bail and better reflect the ladder principle. In addition, the police and justices of the peace should be required to justify in writing whenever unconditional release is denied.

In terms of objectives, conditions (and custody[192]) should only be imposed to ensure the accused's attendance in court (first ground) or in order to avoid serious and imminent harm (second ground). Conditions imposed to ensure that the accused will appear in court should be proportionate to the gravity of the alleged offense. For instance, it is hardly justifiable to keep a drug user in remand or under restrictive, and sometimes life-threatening, conditions of release in order for them to appear in court for minor offences, such as drug possession for the purposes of trafficking (often to sustain an addiction), small theft or fraud, or breaches.

Conditions imposed following the second ground should be imposed if there is a substantial likelihood that, if released, the accused will commit a criminal offence involving serious harm (second ground)[193]. At the moment, legal actors tend to focus on

[191] Cowper, D. Geoffrey. A criminal justice system for the 21st Century: Fourth anniversary update to the Minister of Justice and Attorney General, Suzanne Anton, QC, 2016, p. 8

[192] As a matter of fact, custody should be prohibited whenever it is reasonable to believe that the offender will not be incarcerated were he or she convicted for the offence. This change was successfully introduced in the UK : Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 11, par. 8, as referred to in Andrew Ashworth et Lucia Zedner, *Preventive Justice*, Oxford Unviersity Press, p. 71

[193] Note that this is exactly what the *Bail Reform Act* of 1970 implied. After the Act came into force, it was however amended to drop the words « involving serious harm » so that an accused could be denied bail if

the likelihood that the accused, if released, might be committing *any* criminal offence or interfere with the administration of justice, regardless of the gravity or seriousness of the future offence, or of any kind of proportionality between the nature of the restrictions imposed and that of the interference. The importance legal actors attach to crime prevention regardless of its gravity is particularly problematic as courts often do not have adequate evidence to sustain any risk analysis or base their decisions on evidence that would not be sufficient to justify a conviction[194]. The fact that the accused are subject to reverse onus in many cases, including in the context of breach charges, only adds to the problem and as such, we fully support the amendments recently introduced by Bill C-51. Finally, references to the commission of 'further' or 'new' offences, or recidivism, in the discourse of legal actors should be avoided as they seem to imply that the accused has committed the offense for which he or she is awaiting trial.

Bail conditions should also not be used to facilitate the surveillance and arrest of marginalized people in Vancouver. Most conditions of release are first imposed by the police and more often than not, ratified by prosecutors or courts (or slightly revised to ensure enforceability). Policing objectives are often at odds with judicial objectives, including the protection of fundamental rights. Courts should not be used to relay or respond to surveillance or bureaucratic imperatives.

Finally, bail conditions should not seek rehabilitation. Although legal actors are aware that rehabilitation should not be pursued at bail, in practice, the boundary between crime prevention and rehabilitation is often blurred. Many marginalized individuals who end up in the criminal justice system do so as a result of prior massive rights violations, including violations to their rights to life and security, equality without discrimination, health, housing, and to a minimum income. It is only fair to suggest that their most fundamental needs should be met. Yet, the criminal system justice, and bail in particular as individuals are still presumed innocent, cannot be the main point of entry to have access to such services. Diversion and the use of "appropriate measures" [195] in partnership with community groups and health and social services should become the norm with respect to dealing with minor offences, such as breaches, drug offences, and

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there was a likelihood that he or she could commit any offence, not just an offence involving serious harm : Martin Friedland, *Bail Reform Act Revisited*, Criminal Law Quaterly, p. 320

[194] A. ASHWORTH et L. ZEDNER, *Preventive Justice,* p. 70

[195] Standing Senate Committee on Legal and Constitutional Affairs, Delaying Justice is Denying Justice – An Urgent Need to Address Lengthy Court Delays in Canada (Final report), June 2017, p. 143: "An important point raised by Kevin Fenwick, then Deputy Minister and Deputy Attorney General with the Government of Saskatchewan's Ministry of Justice, was of the need to be wary of using the term "alternative" when talking about programs that divert accused persons and offenders away from the traditional courthouse route, saying that he preferred the term "appropriate measures". The committee concurs, since "alternative" suggests that such measures present a separate kind of justice or a different legal culture. What became clear from our study is that these measures have support across a diverse range of stakeholders in the justice system."

crimes against property, insofar as they are often directly connected to survival in the streets, or physical and mental health issues.

In fact, imposing unreasonable conditions amounts to denying judicial interim release and denying the right to reasonable bail, as Judge Rosborough reminded us in *R. v. Omeasoo*:

> It is trite to say that conditions in an undertaking which the accused cannot or almost certainly will not comply with cannot be reasonable. Requiring the accused to perform the impossible is simply another means of denying judicial interim release. The same would apply to conditions which, although not impossible in a technical sense, are so unlikely to be complied with as to be practically impossible. An example of that would be to release the impecunious accused on $1 million cash bail on the basis that he could buy a lottery ticket and potentially win enough money to post that cash bail[196].

Finally, let us emphasize that legal aid programs should be adequately funded to make sure that the right to a reasonable bail is respected.

At the sentencing stage, legal actors should be more parsimonious and craft individualized legal orders while paying attention to the type of conditions they impose to facilitate offenders' rehabilitation. They should create and reinforce their partnerships with health and social services as well as community groups who should be consulted about rehabilitation programs. The number of conditions should be strictly limited. Our regression analysis clearly showed that multiplying restrictive conditions in probation orders increases the likelihood of breach significantly. Moreover, our interviews with individual subject to court orders demonstrated how counterproductive and life threatening some of these conditions are. Legal actors are not social workers and despite the fact that they are constantly asked to deal with social problems, they should defer to those who have the relevant expertise.

In particular, legal actors may want to avoid imposing red zones and other spatial restrictions that fail to sustain rehabilitation and that, in some cases, significantly increase the likelihood of breaching. Keeping a person away from a specific area does not necessarily produce the intended results. Moreover, although this type of conditions was not at the heart of this study, we know from research that imposing prohibitions to use drugs or alcohol only set up drug users to fail and increase their vulnerability. Harm reduction services an strategies need to be part of our court orders. Requiring people to stay in a treatment center or directing that person to abide to a curfew also seem to have a positive impact on their ability to abide by their court order. As a result, legal actors should aim at better identifying the problems in a person's life in order to respond to such needs and protect them from reoffending, instead of creating the

[196] *R. v. Omeasoo*, (2013) ABPC 328, par. 33

conditions that maintain them under judicial supervision while interfering with important care. The same principles should apply to conditional sentences with the necessary adjustments in light of the fact that they are incarceration sentences.

In closing, it is our hope that this report will trigger a much-needed conversation and significant changes to costly, counterproductive and discriminatory practices of administration of justice that directly affect vulnerable people in Vancouver.