Alberta Bail Review:

Endorsing a Call for Change

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PART 1: Introduction and background

Introduction

In 2015, approximately 60,000 criminal arrests in Alberta were followed by the accused's first appearance at the bail stage before a justice of the peace, as required by law, within 24 hours.[1] Matters unresolved before the justice of the peace were the focus of one or more subsequent court appearances.

The pressures of volume and time are unrelenting in the bail system. Those pressures are compounded by the high stakes. Bail decisions can imperil public safety. They can also suspend or restrict the liberty of people who are presumed innocent and have not yet had their "day in court."

The day to day functioning of the bail system rests in the hands—and on the shoulders—of many people. Four groups are the primary focus of this report: police, Crown prosecutors, justices of the peace (JPs) and Provincial Court judges. All have been entrusted, in the name of all Albertans, with the duty and responsibility of meeting these tight deadlines and finding the "right" balance between public safety and individual rights. All must exercise their best judgement and discretion—within the confines of the law—in the hope that justice is done in every single case. It is a daunting task.

The pressures are further compounded by the fact that all court decisions are properly subject to public scrutiny and criticism, which can at times be vitriolic and ill-informed, making the job of decision makers even less enviable.

The bail system can also suffer from a perception that bail hearings are less weighty and perhaps less consequential than other steps in the judicial process. The rules of evidence are more relaxed, the burden of proof is less onerous, and bail hearings do not generally involve the testimony of witnesses and experts. Most who work in the bail system, however, would be more likely to agree with the prosecutor who told this Review "a proper show cause hearing needs to have the same sense of importance and urgency as a murder prosecution." The stakes for the accused and the public can be that high.

For the most part, the bail system operates "out of sight and out of mind," at least for the vast majority of Albertans. As a result, problems and deficiencies apparent to the people working in the system can be invisible to those outside, reducing the impetus and support for meaningful reform.

Despite this Review's relatively narrow mandate, I hope this report will enhance Albertans' understanding of how the system currently works, why certain reforms are required, and why the investment of additional public resources is essential, even at a time of economic distress. (On the eve of the report's submission, Alberta's finance minister said the province was facing a "once-in-a-lifetime" economic challenge and a budget deficit that could soon exceed $10.4 billion.)

Financial considerations were not part of the Review's mandate. The terms of reference did not call upon the Review to seek cost savings or to weigh the fiscal implications of its recommendations. My task was to examine specific aspects of the administration of Alberta's bail system to help the government ensure that the cause of justice is being properly served.

[1] Estimate based on 2014-2015 Priority 2 data provided by Hearing Office Review Committee.

Nevertheless, the Review was ever-mindful of the current economic and fiscal environment, a sensitivity reinforced at every turn by publically-funded stakeholders. They referred to the province's current economic malaise and the diminished health of Alberta's public finances. They spoke of their *own* stretched resources and strained budgets: judicial positions left vacant; prosecutors and police overburdened; social agencies struggling to meet the needs of the disadvantaged. And they spoke of the impacts—especially of decisions vital to the protection of individual rights and public safety that are at times being made in haste, by the wrong people, or in circumstances very far from ideal.

The Review is hopeful that its findings and recommendations will help address those deficiencies. Regrettably, the improvements will not come without cost. At the end of the day, the allocation of public resources properly lies in the hands of elected officials. They must make the difficult choices among competing priorities.

One final introductory note: I hope this report enhances appreciation within government and among the public for the efforts and dedication of those who do this important and challenging work on behalf of their fellow citizens.

The Review in context

This Review was initiated in response to the fatal shooting of RCMP Constable David Matthew Wynn and the wounding of Auxiliary Constable Derek Walter Bond by Shawn Maxwell Rehn, who later took his own life. The incident occurred in St. Albert in January 2015 while Rehn was out on bail pending a court appearance on outstanding charges.

Coincidentally, while the Review was underway a police officer in Ireland was shot dead by a man on bail,[2] and in Australia, a coroner's inquest was examining a deadly hostage-taking, also perpetrated by a man on bail.[3] All three incidents caused alarm in their respective jurisdictions and prompted many to question whether the bail system is "too lax."

Also while the Review was underway, two academic studies relating to Canada's bail system were published.[4] Both argued that the bail system is too *punitive*: too many accused are placed in remand while awaiting trial or are released into the community with too many onerous and perhaps unnecessary conditions. Those studies echoed the findings of *Set up to Fail*, an influential report published in 2014 by the Canadian Civil Liberties Association.[5]

Not surprisingly, the Review heard both views expressed during its consultations with stakeholders. But the Review also found some common ground, upon which this report and its recommendations are built. Virtually all stakeholders would agree that the administration of justice is best served when:

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[2] The Irish Times, "Analysis: Debate on denying prisoners bail is over before it begins." October 14, 2015 http://www.irishtimes.com/news/crime-and-law/analysis-debate-on-denying-prisoners-bail-is-over-before-it-begins-1.2390676

[3] Commonwealth of Australia 2015, *Martin Place Siege: Joint Commonwealth – New South Wales review*, Canberra, January 2015 https://www.dpmc.gov.au/sites/default/files/publications/170215_Martin_Place_Siege_Review_1.pdf

[4] Nicole Myers, "Eroding the Presumption of Innocence: Pre-trial detention and the use of conditional release on bail" (2016) *British Journal of Criminology,* Advance Access published online January 29, 2016 http://bjc.oxfordjournals.org/content/early/2016/01/29/bjc.azw002.full?sid=4729ec95-a795-4799-b402-594340db6ebf; Cheryl Webster, *"Broken Bail" in Canada: How We Might Go About Fixing It.* Report prepared for Justice Canada and released in February 2016. The Review received a copy from Justice Canada.

[5] Abby Deshman and Nicole Myers, *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention* (2014) Canadian Civil Liberties Association and Educational Trust. https://ccla.org/dev/v5/_doc/CCLA_set_up_to_fail.pdf

1. All roles in the system are properly delineated and assigned;
2. All participants are properly resourced and trained;
3. All participants have access to complete and accurate information; and
4. All accept that convenience and efficiency must not be allowed to trump the integrity of the process.

Background

The Review's mandate was derived from the *Report on Shawn Rehn: A review of the involvement of the Alberta Crown Prosecution Service with Shawn Maxwell Rehn*,[6] dated June 2015. The *Report* was prepared by Alberta Justice and Solicitor General in the wake of the January shooting. Among other things, the *Report* called for the undertaking of another review focused more generally on the administration of the bail system in Alberta.

The Rehn report highlighted in particular Alberta's approach to the conduct of first appearance[7] bail hearings. In most provinces, these hearings are normally held during regular business hours in a courtroom, with a Provincial Court judge or justice of the peace presiding and a prosecutor representing the Crown. In Alberta, the vast majority of first appearances at the bail stage are conducted by JPs at two centralized Hearing Offices with police representing the Crown.[8] The Hearing Offices operate around the clock using telephone or video links with police agencies throughout the province. This difference in approach was flagged by the Rehn report as an issue to be examined by the follow-up review.

The Rehn report also drew attention to section 524 of the *Criminal Code*, which governs the revocation of bail for people who are alleged to have violated the terms of their release or are alleged to have committed an indictable offence while on bail. The *Report* found that section 524 "may not have been fully utilized" in Rehn's case. It recommended that the follow-up review examine the use of bail revocation in Alberta more generally.

Rehn's final court appearance has raised questions about the completeness and accuracy of the information available to those who preside and present at bail hearings in Alberta. The *Report* recommended that the follow-up review examine the issue with an eye to improving the quality and consistency of "bail packages."

Because of the number and nature of his offences, Rehn met the criteria for Alberta Solicitor General's Priority Prolific Offender Program (PPOP), although he was not among the offenders included in the program. PPOP and a similar RCMP program have relevance to the bail system. The Rehn report recommended that these programs be included in the follow-up review.

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6 https://www.justice.alberta.ca/programs_services/criminal_pros/Documents/Report%20on%20Shawn%20Rehn%20-%20A%20review%20of%20the%20involvement%20of%20the%20Alberta%20Crown%20Prosecution%20Service%20with%20Shawn%20Maxwell%20Rehn.pdf

7 The first appearance of an accused before a judicial officer following arrest. There can be subsequent appearances, which usually take place before a Provincial Court judge.

8 The *Criminal Code* requires that bail hearings for certain serious offences—such as murder and piracy—be conducted in a "superior court," which in Alberta is the Court of Queen's Bench. Those proceedings always involve a Crown prosecutor as the bail presenter. The province has no say over who presides at those hearings. The Review has therefore restricted the focus of this discussion to Provincial Court and the Hearing Offices.

Two prosecution services operate throughout Alberta: The Alberta Crown Prosecution Service (ACPS), which has offices in 12 cities and towns, and the Public Prosecution Service of Canada (PPSC), with offices in Edmonton and Calgary. As noted in the *Report*, Rehn was prosecuted by both prosecution services over the years. The *Report* noted the absence of policies or guidelines "that ensure effective and timely communication between ACPS offices and between the two prosecution services to ensure coordination of bail proceedings." It recommended that the follow-up review explore whether such policies and guidelines would be beneficial.

These five recommendations of the *Report on Shawn Rehn* were accepted by the Minister of Justice and Solicitor General and became the Terms of Reference for what has come to be called the Alberta Bail Review.

Independence of Review

It was further decided that the Review should be led by someone independent of the Alberta Crown Prosecution Service and Alberta Justice and Solicitor General. The author of this document—a former general counsel at the Ottawa headquarters of the Public Prosecution Service of Canada—was commissioned to lead the Review.

I am pleased to advise that Alberta Justice and Solicitor General fully respected the Review's independence in the discharge of its mandate. The department made only one request: that the Review consult widely with stakeholders in Alberta's criminal justice system. The Review has done so.

Together or separately, Project Counsel Avril Inglis and I met with or spoke to well over 120 bail system participants, including members of the judiciary, police chiefs and officers, criminal defence lawyers, provincial and federal Crown prosecutors, government administrators, victims' groups, Native Courtworkers, Legal Aid representatives, and the John Howard and Elizabeth Fry Societies, among others. The Review also received written submissions from over 40 organizations and individuals.

The Review is profoundly grateful for the time and attention, ideas and insights freely offered by all who participated in the consultation process. Despite their varying perspectives and prescriptions for change, they all share a common goal: to improve the administration of justice in Alberta.

Terms of Reference

The Alberta Bail Review was specifically mandated to consider the following:

a) Who should conduct bail hearings and in what circumstances;
b) How best to utilize section 524 of the Criminal Code;
c) What information should be provided in bail packages prepared by policing agencies and how best to ensure the accuracy and availability of that information;
d) How the PPOP (the Alberta Solicitor General's Priority Prolific Offender Program) and HOM (the RCMP's Habitual Offender Management initiative) programs can be utilized effectively to ensure accurate information is available during bail proceedings; and
e) The coordination of bail proceedings between offices of the ACPS and with offices of the Public Prosecution Service of Canada (PPSC), and other areas related to the conduct of bail hearings that are appropriate.

Organization and conduct of the Review

Alberta Justice and Solicitor General assigned from its staff a project manager, Evelyn Schwabe; an administrative assistant, Jean Mah; and a researcher, Nancy Zhang. All contributed to the Review on an as-needed basis. In consultation with the Project Lead, Alberta Justice and Solicitor General appointed Avril Inglis, a prosecutor with the Alberta Crown Prosecution Service, as Project Counsel. The team was fully assembled in late September, 2015.

The Review began by identifying appropriate stakeholders, gathering information from government sources, and reviewing other published materials relevant to the bail system in Alberta and the Review's terms of reference. Beginning in October, invitations to participate in the Review were extended to over 50 groups or individuals (see Appendix A). They included members of the judiciary, police services, criminal defence lawyers, provincial and federal Crown prosecutors, government administrators, victims' groups, Native court workers, Legal Aid, and the John Howard and Elizabeth Fry Societies, among others. The Review received a positive response from virtually every group contacted.

By early November, the Review had received over 40 written submissions. Concurrently, the Project Counsel was meeting with police and prosecutors in various locations in the province. Those meetings provided the Review with a more detailed understanding of how the bail system currently operates throughout Alberta.

The next phase of the process unfolded in November and December when the Project Lead and Project Counsel held in-person consultations in Edmonton, Red Deer and Calgary. Other stakeholders were interviewed by phone.

In January, the Review conducted further research and held additional consultations with, among others, the director of the Alberta Crown Prosecution Service, Assistant Deputy Minister Eric Tolppanen, and the Chief Federal Prosecutor for Alberta, Wes Smart. This report began to take shape in the final weeks of January.

The Review is profoundly grateful for the time and attention, ideas and insights freely offered by all who participated in the consultation process. Despite their varying perspectives and prescriptions for change, they all share a common goal: to improve the administration of justice in Alberta.

PART 2: Principal findings and recommendations

a. Who should conduct bail hearings and in what circumstances

As noted above, the vast majority of bail hearings in Alberta are conducted by Provincial Court judges in courtrooms throughout the province and by justices of the peace in two Hearing Offices: one in Edmonton and one in Calgary. In the courtrooms, provincial and federal prosecutors represent the Crown. In the Hearing Offices, police are almost always the bail presenters.

For convenience, the Review has divided this first item in its Terms of Reference into three sub-headings:

1. Who should ***present*** at bail hearings: Crown prosecutors, police, or both?
2. Who should ***preside*** at bail hearings: Provincial Court judges, justices of the peace, or both?
3. In what ***forum*** should bail hearings take place: courtrooms, Hearing Offices, or both?

1. Who should present at bail hearings

Although police representing the Crown at bail hearings is a practice of very long standing in Alberta, it fails to meet the requirements set out in the *Criminal Code*. The practice is also strongly opposed by most stakeholders in Alberta's criminal justice system. It is time for the current practice to end.

There seems to be a universal and long-standing assumption—on the part of police and other stakeholders—that police officers presenting at bail hearings do so as "representatives" or "agents" of the Crown. In fact, no such agency relationship exists between the Crown and police in this regard, and no authority to represent the Crown has been otherwise delegated to police.

The statutory law relating to judicial interim release (bail) is found in section 515 of the *Code.* Section 515(1) says a justice shall order the release of an accused,

> *unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made …* [emphasis added]

"The prosecutor" is the only entity given express authority to perform that "show cause" function. For reasons more fully explained in the body of this report and in an appended legal analysis (Appendix B), I am of the view that police do not meet the definition of prosecutor for the purposes of section 515(1), and their presenting role at bail hearings has no basis in law. Also appended is a legal opinion on this issue commissioned by the Edmonton Police Service (Appendix C).

Stakeholder input

Legal arguments aside, stakeholders identified a number of compelling *policy* reasons for ending the practice of police presenting at bail hearings. With near unanimity, they said the administration of justice is best served when Crowns fulfill that role. Collectively, their reasons can be summarized as follows:

- **Presenting at bail hearings is a Crown function, not a police function.**
  Police investigate crime, protect public safety, and serve as witnesses in court; it is the role of provincial and federal prosecutors to represent and advocate for the Crown in court proceedings. The roles are fundamentally different and should be properly delineated. A logical and appropriate

point at which to draw the line is when a person under arrest first appears before a judicial officer—the first appearance at the bail stage.

- **Crown prosecutors have a special obligation "to see that justice is done."**
  That obligation is described in the *Code of Conduct* of the Law Society of Alberta:

  > *When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law … [The prosecutor's] primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately.*[9]

  Those obligations are especially important when the accused is unrepresented by counsel, as is currently the case in Alberta at most Hearing Office bail hearings.

- **Prosecutors have a better understanding of the law.**
  The law of bail is complex and ever-changing, shaped by legislative amendments and new court decisions. Lawyers are trained in the law and the practice of legal advocacy.

- **Police are at a disadvantage when defence lawyers are involved.**
  Related to the last point, most police are ill-equipped to engage with defence counsel on legal principles and case law. Many stakeholders also say that justices of the peace are more attentive to and respectful of lawyers, unfairly tilting the "playing field," at a risk to public safety.

- **Potential for bias or conflict of interest.**
  The "dispassion" required of prosecutors is not necessarily present in a police presenter—often the same officer who made the arrest, perhaps in trying circumstances. Also, police are often under pressure to move an accused quickly through the system to free up space in holding cells, a priority that might conflict with the best interests of justice.

- **Presenting at bail hearings diverts police resources from law enforcement.**
  Larger police services staff and maintain dedicated bail units at considerable expense. For small police services and RCMP detachments, bail hearings—and the often-long wait for them to proceed—can keep patrol officers off the street.

Also, training, oversight and especially accountability would be better facilitated if bail presenters fell under the aegis of two institutions—the ACPS and PPSC—instead of being dispersed across 112 RCMP detachments and 10 municipal and First Nations police services.

RECOMMENDATION 1: The Review recommends that Crown prosecutors replace police presenters at Hearing Office bail hearings.

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[9] [Version 2015_V1] p. 86. http://www.lawsociety.ab.ca/docs/default-source/regulations/code619a07ad53956b1d9ea9ff0000251143.pdf?sfvrsn=2 See also the comments of Binnie, J in *R. v. Regan,* [2002] 1 SCR 297, para. 156. http://www.canlii.org/en/ca/scc/doc/2002/2002scc12/2002scc12.html

RECOMMENDATION 2: The Review recommends that the provincial and federal governments provide the additional resources necessary for their respective prosecution services to properly discharge these added responsibilities.

RECOMMENDATION 3: The Review recommends that ACPS and PPSC consider using specially assigned Hearing Office and docket court prosecutors on a full-time basis.

RECOMMENDATION 4: If Alberta Justice and Solicitor General and police services wish to maintain the practice of police representing the Crown at Hearing Office bail hearings, the Minister of Justice should (1) satisfy herself that police have the requisite authority under the *Criminal Code*, and/or (2) seek an appropriate amendment to the *Criminal Code*.

RECOMMENDATION 5: If Alberta Justice and Solicitor General and police services wish to maintain the practice of police presenting at Hearing Office bail hearings, the Review recommends that the Crown's position on detention or release (including the conditions of release) be determined by a prosecutor.

RECOMMENDATION 6: The Review recommends that the ACPS and PPSC provide education to police agencies in Alberta to ensure that police are properly trained in the use of their release powers under the *Criminal Code*.

2. Who should *preside* at bail hearings

The previous question—who should present—involved two actors with fundamentally different educational backgrounds and roles and responsibilities in the criminal justice system. That is not the case with "who should preside."

In Alberta, both judges and JPs are experienced lawyers. Their roles in the criminal justice system are fundamentally the same: to act as impartial decision-makers. Both are clearly empowered by the *Criminal Code* to preside at bail hearings. The independence and impartiality of both is protected by law.

The differences that do exist are not always so obvious, obscured in part by the strengths and weaknesses of individuals, and by the forums and circumstances in which they currently preside.

Nevertheless, I agree with the majority of stakeholders, who appreciate the economy and efficiency of having JPs preside at first appearance, but believe justice is best served when Provincial Court judges preside at bail hearings thereafter. On average, the legal knowledge and experience of Provincial Court judges is unmatched by JPs, whose pay and benefits, hours of work, length of tenure and status in the community are substantially less attractive to those seeking a judicial appointment.

I also note the opinion, pervasive among stakeholders, that some JPs currently lack the depth of legal knowledge required to address some of the more complex issues that can arise in bail hearings.

RECOMMENDATION 7: The Review recommends the continued involvement of both Provincial Court judges and justices of the peace in Alberta's bail system.

RECOMMENDATION 8: The Review recommends that justices of the peace preside at first appearances and Provincial Court judges preside at subsequent appearances at the bail stage, wherever possible.

RECOMMENDATION 9: The Review recommends enhanced training in the law of bail be made available to judicial officers in Alberta. It further recommends the public disclosure of basic information about that training, while respecting the principles of judicial independence.

3. In what *forum* should bail hearings take place

The vast majority of bail hearings in Alberta take place in two forums.[10] All first appearances after arrest are handled by JPs in the two centralized Hearing Offices in Edmonton and Calgary, which operate around the clock. Subsequent hearings, if required, are handled during normal business hours by judges in courtrooms throughout the province (with some notable exceptions discussed below).

All accused who "appear" at the Hearing Offices do so by CCTV (video) or telephone.[11] CCTV is available if the accused is held in a remand centre, or in a police station in Edmonton or Calgary. In all other circumstances, the accused "appears" by phone. Bail appearances in court can be in-person or via CCTV from a remand centre. Alberta Provincial Courts do not do bail hearings by telephone.

Most stakeholders have a clear preference: if money and physical resources were no object, all bail hearings would likely be held in public courtrooms in or near the community in which the alleged offence took place. That forum better connects the justice system with the community; it has more *gravitas*; it allows greater and perhaps more meaningful interaction among participants; it allows the presence of Native Courtworkers and other parties; it provides (at least currently) better access to legal representation; it is more accessible to public attendance and more open to public scrutiny.

The Hearing Offices, on the other hand, provide a more economical and, in some respects, more efficient alternative. For example, the JPs who preside at the Hearing Offices are paid substantially less than Provincial Court judges, and many work in relatively modest environments. The Hearing Office JPs are also concentrated in two centres rather than dispersed across the province, greatly reducing overhead costs, enhancing their collective productivity, and allowing them to service the entire province around the clock.

Stakeholders identified four issues of particular concern relating to the Hearing Offices.

1. **Wait times.** Police arrange a first appearance at the bail stage for an accused in their custody by faxing a "request for service" to a Hearing Office. The request is placed in a queue and the police are notified when the JP is ready to proceed. The time span between the request and the call-back can be both unpredictable and lengthy, sometimes tying up police officers for hours.

2. **No Duty counsel.** Legal Aid does not provide duty counsel for accused at Hearing Office bail hearings, leaving most accused unrepresented at a time when their liberty is at stake.

3. **Tele-bail.** Many Hearing Office bail hearings are conducted over the telephone, with the JP on one end and the accused and presenting police officer on the other. The JP does not have the

[10] This discussion will not include the less common bail hearings reserved for the Court of Queen's Bench in relation to s. 469 *Criminal Code* offences.
[11] The Calgary Hearing Office can accommodate in-person bail hearings, and did so during the 2013 flood—a rare exception to the normal practice. The Edmonton Hearing office is not equipped to hold in-person bail hearings.

benefit of seeing the accused, and the accused can find it especially difficult to present his or her case. Most stakeholders say tele-bail should be eliminated. I agree.

4. **24/7, 365.** Alberta is the only jurisdiction in the country where bail hearings are held around the clock; the practice is not required by law. Police say they need the service to avoid overcrowding in their holding cells; some defence counsel say it's important for their clients, others question its value; JPs would like to see the midnight to 8 a.m. shift eliminated, in part because of concerns about the quality of late-night hearings. The Review discusses the issue in the body of this report but makes no formal recommendation.

Recommendations 7 and 8 above reflect my views about the appropriate forum for bail hearings (essentially, maintain the division as it currently exists in most of the province).

RECOMMENDATION 10: The Review recommends that resource and management issues relating to wait times at the Hearing Offices be addressed as soon as possible.

RECOMMENDATION 11: The Review recommends that the use of tele-bail in Alberta be eliminated as soon as practicable.

RECOMMENDATION 12: The Review recommends that Legal Aid duty counsel be made available at Hearing Office bail hearings in conjunction with greater Crown involvement.

RECOMMENDATION 13: The Review recommends that Legal Aid Alberta be provided with the additional funding required to properly discharge this added responsibility.

RECOMMENDATION 14: The Review recommends that more light be shed on the bail-hearing functions of the Hearing Offices, and that those hearings be reasonably accessible to the public.

RECOMMENDATION 15: The Review recommends a way be found to ensure that all contested bail hearings after first appearance in the Grande Prairie and Peace River districts be heard by a Provincial Court judge.

RECOMMENDATION 16: The Review recommends that the Red Deer pilot project continue and the results of the project be made public, while respecting the principles of judicial independence.

b. How best to utilize section 524 of the *Criminal Code*

Section 524 allows for the revocation of a judicial interim release order when a person on bail has, allegedly, violated the terms of release or committed an indictable offence.

If bail is revoked, the release order is cancelled and an order of detention is made. The detained person is then in a "reverse onus" situation and must justify why he or she ought to be released again. If the accused *is* released, he or she will be subject to a single, new release order regardless of the number of orders the accused was originally subject to. This is preferable to the accused having to carry and comply with several orders, containing multiple and possibly conflicting conditions.

No statistics are available on the use of s. 524 revocations in Alberta. Stakeholders say the opportunity to use the section arises frequently, but revocations do not often occur. The reasons include procedural

hurdles, the need for better training on the section's use, problems relating to the transfer of court documents, and other information management and access issues.

RECOMMENDATION 17: The Review recommends that prosecutors always *consider* seeking bail revocation when an accused on bail allegedly commits indictable offences or fails to comply with a release order.

RECOMMENDATION 18: The Review recommends that the government of Alberta facilitate the development of an e-court document management system as soon as possible.

RECOMMENDATION 19: The Review recommends the use of electronically transmitted information wherever feasible for the purposes of the bail process.

RECOMMENDATION 20: The Review recommends the ACPS and the PPSC develop Practice Directives to guide prosecutors on how best to address s. 524 bail revocation applications when the outstanding charges (and release orders) are in another jurisdiction.

RECOMMENDATION 21: The Review recommends the ACPS and the PPSC receive enhanced training on the revocation procedure set out in s. 524 of the *Criminal Code*.

RECOMMENDATION 22: The Review recommends the ACPS extend the availability of PRISM and CREF to all of its offices, and the PPSC enhance the access of in-house prosecutors and agents to the documentation they require for s. 524 revocation applications.

RECOMMENDATION 23: The Review recommends that the Chief Judge of the Provincial Court clarify the role of the Hearing Offices with respect to s. 524 revocation applications.

RECOMMENDATION 24: The Review recommends that the Resolution and Court Administration Services Division of Alberta Justice and Solicitor General work with the Provincial Court to find a solution to the "no venue" for bail revocation problem in the Peace River, Grande Prairie and Red Deer regions as soon as possible.

c. What information should be provided in bail packages and how best to ensure the accuracy and availability of that information

The Review has identified the information that police should provide to Crown prosecutors before bail hearings (which is not necessarily the same information that should be sent to the presiding JP). It has also identified issues affecting the accuracy and availability of that information. Two are particularly notable: some police do not always (and sometimes cannot) check the JOIN database when preparing the package, and police have difficulty obtaining up-to-date information about an accused's out-of-province offences due to a major data-entry backlog at CPIC, Canada's only national database of criminal records.

The Review has also identified three significant issues relating to the use of bail package information, two of which raise serious concerns about procedural fairness.

- some police presenters do not understand how bail packages are used by JPs;

- JPs receive the packages before the hearing and might read information that is not entered into evidence;
- the accused does not receive disclosure of the bail package.

RECOMMENDATION 25: Before a bail hearing, the police should provide Crown counsel with the following information, at a minimum:

- A copy of the Information setting out the criminal charges;
- An accurate synopsis of the allegations/circumstances of the offences;
- An up-to-date criminal record, including both a CPIC print out and JOIN sheet;
- Information on outstanding charges and copies of forms of release on those charges;
- Details of the accused's personal circumstances, e.g., residence, employment, ties to the community, etc.;
- If police are recommending unusual or restrictive terms of release, or that bail be denied, the factual basis for their justification should also be included.

RECOMMENDATION 26: The Review recommends that (a) bail presenters discontinue sending bail packages to the Hearing Offices and send instead only the following documents in advance of a bail hearing: a request for service form; a copy of the Information; a copy of the warrant remanding the accused; and a copy of the accused's criminal record; (b) that the criminal record not be considered by the JP until it is entered as an exhibit and becomes part of the evidentiary record.

RECOMMENDATION 27: The Review recommends that Crown counsel assume responsibility for providing disclosure at Hearing Office bail hearings.

RECOMMENDATON 28: The Review recommends that police always do a JOIN check when preparing bail packages, and that Alberta Justice and Solicitor General facilitate greater police access to the database and training in its use.

RECOMMENDATION 29: The Review recommends that police and prosecution services explore opportunities to increase information-sharing between provincial jurisdictions, including information on criminal convictions, outstanding charges and release orders.[12]

d. How the PPOP and HOM programs can be utilized effectively to ensure accurate information is available during bail proceedings

The Review supports the objectives of both programs and applauds their efforts to create enhanced bail packages. However, the core purpose of both programs goes well beyond the generation of bail packages and the mandate of this review. Therefore, the Review has no recommendations regarding PPOP and HOM.

[12] Adapted from a recommendation made by the Ontario Bail Experts Table. http://www.attorneygeneral.jus.gov.on.ca/english/jot/bail_experts_table_recommendations.pdf

e. The coordination of bail proceedings between offices of the ACPS and with offices of the PPSC, and other areas related to the conduct of bail hearings that are appropriate

A lack of coordination between regional ACPS offices in addressing bail revocation was identified as an issue. It is addressed by Recommendation 20 above. No significant deficiencies were identified in the relationship between the ACPS and PPSC, except as suggested in the following recommendation.

RECOMMENDATION 30: That the major/minor agreement between the ACPS and PPSC be amended to specifically address the coordination of bail hearings, including revocation applications and information sharing. This will provide greater clarity to prosecutors in both agencies.

"Other areas related to the conduct of bail hearings that are appropriate"

RECOMMENDATION 31: The Review recommends improving bail-related data collection to allow a more complete understanding of the operation and outcomes of the bail process in Alberta.

PART 3: The foundation and law of bail

The discussions, findings and recommendations at the core of this report are best understood if the reader has a basic understanding of the law of bail and the foundation upon which it rests. The following provides a brief overview and highlights certain aspects of the law that are of particular relevance to the Review's mandate and findings.

Presumption of innocence and protection of personal liberty

The law of bail in Canada is based on two fundamental principles, common to all free and democratic societies. The first is the presumption of innocence: people accused of a criminal offence are presumed innocent unless and until they are found guilty beyond a reasonable doubt in a court of law. The second is that innocent people should not be punished, especially when the punishment involves the suspension or curtailment of personal liberty.[13] As Justice Iacobucci of the Supreme Court of Canada observed in a 2002 decision, "Liberty lost is never regained and can never be fully compensated for …" He added,

> *In the context of the criminal law, this fundamental freedom is embodied generally in the right to be presumed innocent until proven guilty, and further in the specific right to bail. When bail is denied to an individual who is merely accused of a criminal offence, the presumption of innocence is necessarily infringed.*[14]

As the Supreme Court affirmed more recently, that infringement of liberty can have profound effects. It quoted approvingly from an often-cited 1965 study by Martin L. Friedland, then a professor at Osgoode Hall Law School:

> *Custody during the period before trial not only affects the mental, social, and physical life of the accused and his family, but also may have a substantial impact on the result of the trial itself. The law should abhor any unnecessary deprivation of liberty and positive steps should be taken to ensure that detention before trial is kept to a minimum.*[15]

The presumption of innocence is not simply a legal nicety. In 2013-2014, according to Statistics Canada, 37 per cent of all cases completed in adult criminal court in Canada did *not* result in a finding of guilt. Thirty-two per cent of cases (each of which can include multiple charges) were stayed or withdrawn, four per cent resulted in acquittal, and one per cent resulted in some other outcome.[16]

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[13] The presumption of innocence is constitutionally entrenched in section 11(d) of the *Canadian Charter of Rights and Freedoms*. Section 11 (e) confirms the right of any person "not to be denied reasonable bail without just cause." Section 7 stipulates that everyone has the right to "life, liberty and security of the person and not to be deprived thereof except in accordance with the principles of fundamental justice." https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html?searchUrlHash=AAAAAQARY2hhcnRlciBvZiByaWdodHMAAAAAAQ&resultIndex=6

[14] Dissenting opinion in *R. v. Hall, [2002] 3 SCR 309, 2002 SCC 64 (CanLII)*, at paras. 47 and 48. http://www.canlii.org/en/ca/scc/doc/2002/2002scc64/2002scc64.html

[15] Quoted in *Ell v. Alberta*, [2003] 1 SCR 857, 2003 SCC 35 (CanLII), para 24. http://www.canlii.org/en/ca/scc/doc/2003/2003scc35/2003scc35.html?autocompleteStr=ELL%20v.%20ALBERTA%20%20%5B2003%5D%201%20S.C.R.&autocompletePos=1

[16] *Adult criminal court statistics in Canada, 2013/2014*. Statistics Canada Catalogue no. 85-002-X, p. 8. http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14226-eng.pdf

Also relevant is the time it takes for the judicial process to unfold. According again to Statistics Canada, the *median* length of time for a case to be completed in adult criminal court in Alberta in 2013-2014 was 127 days—just over four months.[17] For those denied bail, that is long period of incarceration without a finding of guilt. In contrast, the median length of a custodial sentence imposed by Canadian adult criminal courts in 2013-2014—on those convicted and no longer presumed innocent—was just 30 days.[18]

In light of the foregoing, it is not surprising that the law of bail favours the release of the accused pending a resolution of the case.

A 'delicate' balance

A 2015 decision by the Supreme Court of Canada, *R. v. St-Cloud*, called the presumption of innocence "the cornerstone of Canadian criminal law," and the granting of bail to accused persons "the cardinal rule and detention, the exception."[19] But the Court underlined that there *are* exceptions, framing the issue in these words:

> *The repute of our criminal justice system rests on the deeply held belief of Canadians that the right to liberty and the presumption of innocence are fundamental values of our society that require protection. However, that repute also depends on the confidence citizens have that persons charged with serious crimes will not be able to evade justice, harm others or interfere with the administration of justice while awaiting trial. […]*
>
> *Moreover, Parliament […] recognized that there are circumstances in which allowing a person charged with a serious crime to be released into the community pending trial in the face of overwhelming evidence might suggest to the public that justice has not been done.*[20]

The Court said the decision to grant bail "involves a delicate balancing of all the relevant circumstances."[21]

The law of bail

The Law of Bail in Canada by Justice Gary Trotter is the foremost text on the subject. It is published in a loose-leaf binder to allow frequent updates. The current edition contains about 650 pages. As Justice Trotter has noted, the law of bail is "complex."[22] What follows is, by necessity, a rudimentary overview of the legal aspects of bail most relevant to the Review.

The statutory law of bail is established in Part XVI of the *Criminal Code*.[23] It provides for two types of bail: bail by police and bail by judicial officers. In both respects, the *Code* generally favours unconditional release, but provides for conditions or detention where justified.

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[17] *Ibid.*, p. 18. The median length is the point at which half the cases took more time and half the cases took less time.
[18] *Ibid*., p. 10
[19] *R. v. St-Cloud* 2015 SCC 27. Per Justice Wagner at para. 70 https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15358/index.do
[20] *Ibid*., paras. 1-2.
[21] *Ibid*. para 6
[22] *Understanding Bail in Canada*. Irwin Law Inc., 2013. p. ix
[23] R.S.C., 1985, c. C-46 http://laws-lois.justice.gc.ca/PDF/C-46.pdf

Police bail

Sections 493 to 502 set out the police powers of arrest, and the police authority to release an accused without judicial intervention. The latter is often referred to as "police bail".

For most offences, police are required to release an accused—with the proviso that the accused appear in court on a specific date—unless the police believe, on reasonable grounds, that keeping the person in custody "is necessary in the public interest" or that the accused will fail to appear in court.[24]

For less serious offences, police can release people on a summons, an appearance notice or a promise to appear. These documents impose no restrictions on the accused pending his or her court appearance. If police are concerned about the accused re-offending or not attending as required for court, they can release the person on a recognizance or undertaking with conditions. For example, an accused might be required to pay a cash deposit of up to $500, refundable if they attend court, or they might be required to surrender their firearm(s) and/or passport and abstain from drinking alcohol and/or contacting victims or witnesses.

If police choose not to release the accused, they are required under subsection 503(1) of the *Code* to take the person "before a justice to be dealt with according to law" within twenty-four hours of the arrest.[25] That appearance before a JP (or judge) is generally referred to as the "first appearance" bail hearing.

Judicial Interim Release

The Criminal Code refers to bail as Judicial Interim Release.

Section 515 of the *Code* requires, in relation to most offences, that a prosecutor "show cause" as to why the accused should remain in custody or why release should come only with conditions that restrict the person's liberty or put the accused in some specific legal or financial jeopardy (jeopardy shared with family or friends if they agree to act as sureties, pledging to supervise the accused and agreeing to pay a specified sum of money if bail conditions are violated.)

As specified in section 515(2), release orders may include various forms and combinations of undertakings, recognizances, cash deposits and sureties. Commonly-imposed restrictions on liberty require the accused to abide by a curfew and live at a specific address, or forbid the accused to possess weapons, contact certain people (including victims, witnesses or co-accused), leave the jurisdiction, consume alcohol and illegal drugs, enter a bar, or be near a specific area.

Section 515(3) codifies what is referred to as the "ladder" principle. When selecting from among the release orders set out in s. 515(2), the justice or judge is supposed to choose the least onerous order unless the prosecutor "shows cause" why a more onerous order is required.

Section 515 also has "reverse onus" provisions for certain offences, such as murder.[26] They require the *accused* to justify *release*.

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[24] *Ibid*. subsections 497(1.1) and 498(1.1)

[25] If a justice is available, the police must do so "without unreasonable delay" within the 24-hour period. If a justice is not available within that time frame, the police must do so "as soon as possible."

[26] The offences are listed in subsection 515(6). As noted below, a reverse onus is also found in s. 524, which deals with bail revocation.

Prosecutors must base their "just cause" for detention or conditional release on at least one of three specified grounds (and their related criteria):

1. **To ensure the accused's attendance in court to face the charges (the "primary ground").**

   Criteria include:

   - The nature of the offence and the potential penalty;
   - The strength of the evidence against the accused;
   - The ties the accused has to the community;
   - The accused's criminal record and compliance with previous court orders;
   - The accused's behaviour prior to apprehension.

2. **For the protection or the safety of the public ("secondary ground").**

   Criteria include:

   - The accused's criminal record and compliance with previous court orders;
   - Whether the accused is already on bail or probation;
   - The nature of the offence and strength of the evidence;
   - The stability of the accused person.

3. **To maintain confidence in the administration of justice ("tertiary ground").**

   Criteria include:

   - The apparent strength of the prosecution's case;
   - The gravity of the offence;
   - The circumstances surrounding the offence, including whether a firearm was used;
   - The accused's criminal record and compliance with previous court orders;
   - The fact that the accused is facing a potentially lengthy prison term if convicted.

Adjournments

The first appearance does not necessarily involve a full "show cause" hearing. Some accused choose to remain in detention pending trial. More commonly, an accused will seek an adjournment, delaying the show cause hearing while they seek legal advice or representation, or while they arrange sureties. In the meantime, they will be remanded into custody. A prosecutor can also seek an adjournment, although it cannot be "for more than three clear days" without the accused's consent.[27]

[27] For example, a prosecutor might need an adjournment to obtain information needed to support a bail revocation application.

Release Orders and Conditions

Section 11(e) of the Charter guarantees the right of any person charged with an offence "not to be denied reasonable bail without just cause".[28] Reasonable bail, said Justice Lamer in *R. v. Pearson* "refers to the terms of bail. Thus the quantum of bail and the restrictions imposed on the accused's liberty while on bail must be "reasonable."[29] The prosecutor and accused can agree to terms and conditions, leading to a "consent release" (providing the judicial officer determines that release on the agreed conditions is appropriate).

Judicial Officers Who Preside at Bail Hearings

Bail hearings for certain serious offences set out in s. 469 of the *Criminal Code*, such as murder, piracy, and treason, are conducted exclusively by superior court judges. In Alberta, that means judges of the Court of Queen's Bench. For all other criminal offences, bail hearings may take place before Provincial Court judges or justices of the peace.

Bail Hearings in Relation to Young Persons

The *Youth Criminal Justice Act* ("*YCJA"*) specifies that only a "youth justice court judge" may preside over the bail hearing of a young person (over 12 and under 18 years of age) charged with an offence listed in s. 469 of the *Criminal Code*. In the case of all other offences, a Provincial Court judge (who may or may not be a "youth justice court judge") or a justice of the peace may preside, using the same procedure applicable to adults under s. 515 of the *Criminal Code*.[30] However, if the young person's initial bail hearing is not conducted before a youth justice court judge, the *YCJA* provides for an automatic right to a rehearing of the matter before a youth justice court judge, at the request of the young person or the prosecutor.[31]

Bail Reviews

An accused person or the prosecutor may apply for a review of a bail order if they believe the decision should be vacated (set aside) or varied because of (1) an error made by the judge or justice of the peace; (2) new evidence or a change of circumstances relevant to the issue of bail; or, (3) a combination of the two.

Most reviews relate to non-s. 469 offences and are heard by judges of the Court of Queen's Bench. Bail reviews for s. 469 offences (such as murder) are heard in the Court of Appeal.

An accused held in detention while awaiting trial has the right to an automatic review after 90 days if held in relation to an indictable offence, or after 30 days for summary conviction offences. The purpose of the review is to prevent the person from being "forgotten" and left to languish in custody. The custodian of the remand centre must make this application as per s. 525 of the *Code*.

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[28] *Constitution Act, 1982*
[29] *R. v. Pearson,* [1992] 3 S.C.R. 665, at 689. https://www.canlii.org/en/ca/scc/doc/1992/1992canlii52/1992canlii52.pdf
[30] s. 28 *YCJA*
[31] s. 33 *YCJA*

PART 4: Alberta's administration of judicial interim release

Under Canada's constitution, only the federal government has the power to enact and amend criminal law, including the law relating to bail. However, the provinces are empowered to *administer* the law. How they do so with respect to judicial interim release varies across the country (s. 469 offenses are not included in this discussion). For example:[32]

- In New Brunswick, all bail hearings are held in Provincial Court with a judge presiding.
- In Ontario, the majority of bail decisions are made in Provincial Court with a justice of the peace (JP) presiding.
- In Nova Scotia, bail hearings during normal office hours are conducted by judges; after hours, by JPs.
- In Quebec, JPs do preside at bail hearings, but only after hours and only if the matter is uncontested.
- Four provinces have centralized JP services that routinely handle bail matters by phone or video link.[33]
- In most provinces, prosecutors always represent the Crown at bail hearings; only in Alberta, BC and Saskatchewan do police routinely do so (although to differing degrees).
- In Manitoba, all JPs authorized to preside at bail hearings work full time; in Nova Scotia, all work part time; New Brunswick has no JPs at all.
- In several provinces, including Ontario, JPs who preside at bail hearings are not required by law to be lawyers; in others, including Alberta, they are.

Uniquely Albertan

Alberta's administration of the bail system is unique in Canada with respect to first appearance bail hearings. Alberta is the only province where all first appearances are conducted by JPs in centralized locations. Alberta is also the only jurisdiction where police assume the role of "prosecutor" at virtually all first appearances.

For the most part, police in Alberta make arrests and lay charges without first consulting a provincial or federal Crown prosecutor. Pre-charge approval is standard practice in only three provinces; Alberta is not among them. Nevertheless, some Crowns are available to police who wish to seek their advice, an invitation that some police services accept more frequently than others.

It is also rare that police in Alberta consult with a Crown prosecutor in advance of a first appearance bail hearing. In the vast majority of cases, the "Crown" position (on release or detention) advanced by the police is *determined* by the police with no consultation with, or input from, a Crown prosecutor.

(To avoid confusion between police and Crown prosecutors, the Review prefers to use the term "police presenter" when referring to an officer who "presents the case" for the state at a bail hearing.)

Police act as presenting officers only at Hearing Office bail hearings. If the matter is adjourned to Provincial Court, a prosecutor will always represent the Crown thereafter.

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[32] The following is based on the results of cross-jurisdictional surveys conducted in 2015 by the Alberta Crown Prosecution Service and the Hearing Office Review Committee.

[33] The Justice Centre in BC, the Hearing Offices in Alberta, the JP Hub in Saskatchewan, and the Justice of the Peace Centre in Nova Scotia.

If the JP bail hearing is adjourned (no decision rendered), the matter is usually transferred to the next available docket court at the nearest court location. If the region where the accused is charged does not have a docket court sitting regularly, the matter may be transferred to a larger center, most frequently Edmonton or Calgary, where the accused will appear in court via video link from the remand center in which he or she is housed. As noted above, Legal Aid counsel are available in docket courts, whether the accused appears in person or via CCTV.

Needless to say, whatever the outcome of the first appearance bail process, a Crown prosecutor will have carriage of the file once the underlying charges later go before the court.

Outcomes of bail at first appearance

The Review found it surprisingly difficult to obtain statistical information about the outcomes of bail hearings in Alberta. One of the few agencies to provide data to the Review was the Edmonton Police Service. It reported the following about the "30,000-plus" first appearance bail hearings it was involved with in 2014 and 2015:

- 50% of the accused chose not to speak to bail and were remanded to court
- Of those not remanded to court,
    - roughly 80% were released, about half on a no-cash recognizance, and half on cash bail (with or without deposit);
    - 14% were denied bail and remanded into custody;
    - 6% pleaded guilty (provincial and municipal offences only).

The relative proportion of those released to those denied bail appears to be generally in line with findings from other Canadian jurisdictions reported in academic studies.[34]

[34] See for example: Nicole Myers, "Eroding the Presumption of Innocence: Pre-trial detention and the use of conditional release on bail" (2016) *British Journal of Criminology,* Advance Access published online January 29, 2016 http://bjc.oxfordjournals.org/content/early/2016/01/29/bjc.azw002.full?sid=4729ec95-a795-4799-b402-594340db6ebf

PART 5: Addressing the Terms of Reference

a. Who should conduct bail hearings and in what circumstances

As noted above, the vast majority of bail hearings in Alberta are conducted by Provincial Court judges in courtrooms throughout the province and by JPs in two Hearing Offices: one in Edmonton and one in Calgary. In the courtrooms, provincial and federal prosecutors represent the Crown. In the Hearing Offices, police are almost always the bail presenters.[35]

For convenience, the Review has divided this first item in its Terms of Reference into three sub-headings:

1. Who should present at bail hearings: police, Crown prosecutors or both?
2. Who should preside at bail hearings: Provincial Court judges, justices of the peace or both?
3. In what forum should bail hearings take place: courtrooms, Hearing Offices or both?

1. Who should present at bail hearings

It became apparent to the Review during the course of its work that "who should present" raised a more fundamental question: do police have the *legal authority* to "represent" the Crown in first appearance bail hearings?

1.1 Can police be 'prosecutors'?

Based on the input received by the Review through written submissions and in-person consultations, there seems to be a universal and long-standing assumption—on the part of police and other stakeholders—that police officers presenting at bail hearings do so as either "representatives" or "agents" of the Crown.

It appears to be a practice dating back to the arrival of the Northwest Mounted Police on the Canadian Prairies when, in the colourful words of the late Alberta Justice John Wesley McClung,

> *The NWMP became a quasi-military force with power to try the offenders they had earlier arrested. Bootleggers, wolfers, rustlers and poachers could be arrested, prosecuted, convicted, sentenced and detained with the speed needed for the realities of a harsh new land.*[36]

Even as recently as the mid-1970s, police were routinely prosecuting criminal cases in rural Alberta.[37]

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[35] As noted above, the *Criminal Code* requires that bail hearings for certain serious offences—such as murder and piracy—be conducted in a "superior court," which in Alberta is the Court of Queen's Bench. Those proceedings always involve a Crown prosecutor as the bail presenter. The province has no say over who presides at those hearings or whether a Crown presents. The Review has therefore restricted the focus of this discussion to Provincial Court and the Hearing Offices.

[36] *History of the Alberta Court of Appeal*. page 23 https://albertacourts.ca/docs/default-source/Court-of-Appeal/mcclung.pdf?sfvrsn=2

[37] See, for example, *Administration of Justice in the Provincial Courts of Alberta, Report No. 2,* the 1975 report by a provincial Board of Review led by Mr. Justice W. J. C. Kirby.

However, in its submission to the Review in the fall of 2015, the Medicine Hat Police Service said a defence counsel the previous year challenged the authority of its officers to act as prosecutors at bail hearings. The Review asked the Alberta Crown Prosecution Service about the matter and was told only that the issue was "resolved." Medicine Hat police continue to present at bail hearings.

The Review is also aware of the government of Newfoundland and Labrador's view that due to the definitions of "prosecutor" in the Criminal Code, section 34(1)(a) of the federal *Interpretation Act* and case law, "even if police officers were permitted to conduct bail hearings, they could only do so in regards to strictly summary conviction offences and then only if the police officer had been designated as an agent by the Attorney General."[38]

The issue was also raised in the fall of 2009 in an exchange of correspondence between the Chief of the Edmonton Police Service and what was then Alberta Justice and Attorney General (the Review was given copies of the correspondence). In a letter dated September 29 of that year, the Chief informed the department that as of December 31, 2009, the Edmonton Police Service "will no longer be acting as prosecutors presenting cases for pre-trial detention or strict conditions of release." The Chief cited two reasons. Budget pressures was the second. The first made a veiled reference to the authority of police to act as bail presenters. The idea was conveyed in a single sentence: "The role of the prosecutor is clearly defined in the Criminal Code of Canada."

The Chief received a reply from an Assistant Deputy Minister, Alberta Justice and Solicitor General. It reads in part,

> *Police officers have been conducting bail hearings for many years; a procedure that is entirely legal. It is important to note that there is nothing in the definition of "prosecutor" that prevents the police from conducting bail hearings.*

The Edmonton Police Service backed away from its stated intention to stop presenting at bail hearings.

1.2 The Review's analysis

The Review was not mandated to provide a formal legal opinion on this issue. However, at the Review's request, Project Counsel prepared a legal memorandum on the authority of police to act at bail hearings. See Appendix B.

As noted above, the statutory law relating to judicial interim release is found in section 515 of the *Criminal Code.* Section 515(1) says a justice shall order the release of an accused "unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made …" [emphasis added]

"The prosecutor" is the only entity given the express authority to perform that "show cause" function. The long-standing Supreme Court of Canada decision in *Edmunds v. The Queen* [39] establishes that while

[38] From Newfoundland's response to a cross-jurisdictional survey of Heads of Prosecution conducted by ACPS in 2015.
[39] 1981 CanLII 173 (SCC). http://www.canlii.org/en/ca/scc/doc/1981/1981canlii173/1981canlii173.pdf

police officers can present at bail hearings in relation to summary conviction offences[40], they do not come within the s. 2 definition of "prosecutor."

Prosecutor defined

The definition of "prosecutor" in s. 2 of the *Criminal Code* applies to criminal proceedings in relation to indictable offences, including bail hearings. It reads as follows:

> ***prosecutor*** *means the Attorney General or, where the Attorney General does not intervene, means the person who institutes proceedings to which this Act applies, and includes counsel acting on behalf of either of them.*[41]

The definition requires further parsing.

- The *Code* defines "counsel" as "a barrister or solicitor," which would exclude almost all police bail presenters.
- The *Code* defines "Attorney General" as "the Attorney General or Solicitor General of the province in which those proceedings are taken and includes his or her lawful deputy."
- In Canada, Crown prosecutors—not police—embody the Attorney General in court.
- In Alberta, police officers are not "lawful deputies" of the Attorney General.
- "The person who institutes proceedings" allows for private prosecutions ("where the Attorney General does not intervene"). Even if this language applied to the police, the authority would be restricted to the officer who swore the information against the accused. In most cases, that is not the officer who presents at the bail hearing.

As noted above, the definition of prosecutor in s. 2 applies in all relevant circumstances except when charges are prosecuted summarily, in which case the definition in s. 785 applies:

> *"prosecutor" means the Attorney General or where the Attorney General does not intervene, the informant, and includes counsel or an agent acting on behalf of either of them*.[42] [emphasis added]

Unfortunately, s.785 is less than helpful in this situation.

First, most bail hearings are conducted in relation to indictable or hybrid offences (which are deemed indictable until an election is made), not summary conviction offences.

Second, both the ACPS and PPSC confirmed to the Review that peace officers have no delegated authority—in writing or otherwise—to act on behalf of the Crown at bail hearings. The fact that police presenters may view themselves as having agent status is, of course, not determinative of the matter.

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[40] But only when properly appointed as agents by the Attorney General.

[41] The French version reads as follows: ***poursuivant*** Le procureur général ou, lorsque celui-ci n'intervient pas, la personne qui intente des poursuites en vertu de la présente loi. Est visé par la présente définition tout avocat agissant pour le compte de l'un ou de l'autre. (*prosecutor*)

[42] The French version reads as follows: poursuivant Le procureur général ou le dénonciateur lorsque le procureur général n'intervient pas, y compris un avocat ou un mandataire agissant pour le compte de l'un ou de l'autre. (prosecutor)

And finally, even if police *were* acting as agents of the Crown under s. 785, that would not help them where it counts, which is s. 2. Significantly, Parliament omitted the word “agent” in the s. 2 definition of “prosecutor” but included it the s. 785 definition. Relying on general principles of statutory interpretation, one can presume the omission in s. 2 was intentional. That would mean Parliament did not want any non-lawyers, including police, to represent the Attorney General in s. 515 proceedings in relation to indictable offences.

The Review is of the opinion that police do not meet the definition of prosecutor for the purposes of section 515(1), and their presenting role at bail hearings has no basis in law.

An opinion from the Edmonton Police Service

As its work neared completion in January 2016, the Review received a 32-page legal opinion commissioned by the Edmonton Police Service. It states, beginning on page 2, “the practice of having police prosecute offenses is, at best, questionable.” The opinion is attached as Appendix C.

1.3 Who should present—Stakeholder input

The wording of the *Criminal Code* is certainly not the only reason to question the use of police presenters in bail hearings. With near unanimity, stakeholders said the administration of justice is best served when Crown prosecutors perform that function. Their reasons can be grouped under six principal headings:

- Presenting at bail hearings is a Crown function, not a police function;
- Crown prosecutors have a special obligation ‘to see that justice is done;’
- Prosecutors have a better understanding of the law;
- Police are at a disadvantage when defence lawyers are involved;
- Potential for bias or conflict of interest;
- Presenting at bail hearings diverts police resources from law enforcement.

Police and bail in Alberta

- Alberta has 112 RCMP detachments and 10 municipal or First Nations police services:

  Blood Tribe • Calgary • Camrose • Edmonton • Lacombe • Lakeshore Regional • Lethbridge Regional • Medicine Hat • Taber • Tsuu T'ina Nation

- Every police officer has discretion (within the law) about who to release and who to hold for a bail hearing. The decision can be made by an arresting officer, a shift supervisor or, in larger detachments or agencies, a court liaison member.

- The decision to detain or release is often based on a set of criteria referred to by the acronym RICE:

  - **R**epetition: does the accused's record suggest a high risk of re-offending;
  - **I**dentity: do police need more time to establish the accused's identity;
  - **C**riminal record: what are the nature and number of previous offences;
  - **E**vidence: do police need more time to investigate the alleged offence.

- Over 290,000 crimes were reported by police in Alberta in 2014, according to Statistics Canada.[1]
- Police present at 99% of Hearing Office bail hearings in Alberta.[2]
- The percentage of arrested people who are held for a bail hearing is said to vary widely among police services (no statistics were readily available to the Review). Some are said to be significantly less inclined than others to use their own powers of release, preferring to pass the decision on to a JP or Provincial Court judge.

1. *Police-reported crime statistics in Canada, 2014*. Statistics Canada Catalogue no. 85-002-X. p. 30.
2. *Hearing Office Review Committee Discussion Document*, November 19, 2015, p. 5.

1.3.1 Presenting at bail hearings is a Crown function, not a police function

No participants in the criminal justice system were more adamant on this point than the RCMP and the smaller municipal police services.

In their consultation with the Review, senior officers at RCMP K Division said police and Crown prosecutors have different roles in the criminal justice system. Police investigate crime and protect public safety; representing the Crown in court proceedings is the function of Crown prosecutors. The Camrose Police Service agreed. Presenting at bail hearings "falls into their domain, rather than ours."

That view was also expressed in the written submission from the Society of Justices of the Peace in Alberta, whose members preside at all bail hearings involving police presenters. "This is a Court proceeding," it said, and the job of representing the state in court "is clearly the function of the Crown and not a police service."

The associations that represent police officers in Edmonton and Calgary also see bail hearings as a forum for lawyers, not their members. "Police should not be conducting bail hearings. It is not part of their job," wrote the Calgary Police Association in its submission to the Review. "This is not a core police duty," said the Edmonton Police Association. "This is the realm of a lawyer."

The Executive Director of the Elizabeth Fry Society in Calgary, Katelyn Lucus, agreed. "We wouldn't ask a lawyer to do the police's job," so why do we ask police in this circumstance to do the job of a lawyer? Calgary defence counsel Markham Silver framed the issue in a slightly different way: It just seems *wrong* to have a non-lawyer making legal representations for the Crown.

The comments of these and other stakeholders reflect a view expressed 40 years ago—in 1975—by a special Board of Review that examined the administration of justice in the Provincial Courts of Alberta. At that time, police were still prosecuting criminal cases in rural areas. Led by Justice W. J. C. Kirby, the Board's final report called for an end to the practice.

> *The police have important work to do: they should be allowed to do that work. Their role in the Provincial Court should be confined to appearing as witnesses, and providing security.*[43]

Case management

The Public Prosecution Service of Canada said the involvement of Crowns in Hearing Office bail hearings "could also lead to greater efficiency because prosecutors would be in a position to make strategic case management decisions at the earliest stages of the prosecution." That benefit was also highlighted by the Acting Assistant Deputy Minister of Resolution and Court Administration Services within Alberta Justice and Solicitor General.

The Review also identified a significant communication gap between police and Crowns under the current system. When police present at a Hearing Office bail hearing, there is no formal system to ensure that the results of the hearing are shared with the appropriate Crown prosecution service.

As a result, decisions to release at the first appearance are rarely—if ever—considered by prosecutors for judicial review in Queen's Bench. Without information about the conduct of the police bail hearing, the prosecutor would not be able to identify a basis for a review. For example, the prosecutor is not informed

[43] *Ibid*., p. 14.

whether or not the police opposed release, what information and records were presented to the JP, or what the defence position was. Without those details, consideration of review is impractical. The result: if an accused is released, the bail hearing in front of a justice of the peace usually stands as the final decision. Crown involvement in the hearing would eliminate that gap.

Crown involvement at the initial bail stage could also be particularly helpful in situations where bail revocation is appropriate.

1.3.2 Crown prosecutors have a special obligation 'to see that justice is done'

In a consultation with the Review, Margaret Keelaghan of Calgary Legal Guidance, which provides legal services to the disadvantaged, described Crown presenters as the "gold standard" for bail hearings. She cited in particular the unique ethical obligations of prosecutors. Those obligations are spelled out in the Code of Conduct of the Law Society of Alberta. The relevant section reads in part:

> *When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law … [The prosecutor's] primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately.*[44]

The obligation was further described by Justice Ian Binnie of the Supreme Court of Canada in *R. v. Regan*. He said it had three components:

> *The first is objectivity, that is to say, the duty to deal dispassionately with the facts as they are, uncoloured by subjective emotions or prejudices. The second is independence from other interests that may have a bearing on the prosecution, including the police and the defence. The third, related to the first, is lack of animus – either negative or positive – towards the suspect or accused. The Crown Attorney is expected to act in an even-handed way.*[45]

Twenty-five years ago, in 1990, the Law Reform Commission of Canada recommended that "All public prosecutions should be conducted by a lawyer responsible to, and under the supervision of, the Attorney General." The reason:

> *The public prosecutor is a lawyer, is subject to professional discipline for any breach of the ethical code of lawyers, and must act fairly. Police prosecutors are not subject to these constraints, and are not independent of the investigative process. … In our view, a professional prosecutor should have carriage of all state-initiated criminal cases.*

Margaret Keelaghan (Calgary Legal Guidance) said the duty to act fairly is especially important when the accused is not represented by counsel, currently the most common scenario at Hearing Office bail hearings.

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[44] [Version 2015_V1] p. 86. *R. v. Regan* 2002 SCC 12, para. 156 http://www.canlii.org/en/ca/scc/doc/2002/2002scc12/2002scc12.html?autocompleteStr=R.%20v.%20Regan%202002%20SCC%2012&autocompletePos=1

[45] *R. v. Regan* 2002 SCC 12, para. 156 http://www.canlii.org/en/ca/scc/doc/2002/2002scc12/2002scc12.html?autocompleteStr=R.%20v.%20Regan%202002%20SCC%2012&autocompletePos=1

The consensus among defence lawyers and Crowns is that most accused "will agree to anything to get out," consenting to bail conditions that can be too restrictive, thus limiting the accused's freedom unnecessarily or setting them up for a subsequent breach. That concern was raised in a recently published study by Nicole Myers, one of Canada's leading scholars on the subject of bail.

> *It could be argued that the rational choice is to agree to comply and secure immediate release, rather than to challenge the conditions and increase the probability of being detained. It is likely most accused would agree to comply with anything to get out of detention even if they know it is unlikely they will be able to abide by the conditions.* [46]

Crowns, according to the stakeholders, might be less inclined than police to seek overly-strict conditions, given their ethical obligations.

The Chief Justice of the Alberta Court of Queen's Bench also highlighted the Crown's ethical obligations in his consultation with the Review. The duty of the Crown is different than the duty of a police officer, he said, making it "preferable" that Crowns present at bail hearings.

The Criminal Defence Lawyers Association made the same point in its written submission. "CDLA prefers Crown counsel in bail hearings as Crowns have a duty to be objective" whereas police do not, it said.

Disclosure

When police were asked whether they provide disclosure to the accused or their counsel, the answer was, essentially, "No, that's the Crown's job."[47] Crowns do indeed have an obligation to provide disclosure. If Crowns were involved in Hearing Office proceedings, accused and their counsel would enjoy more consistent access to information about the alleged offence and other relevant details. That point was underlined emphatically in the written submission from Paul Moreau, an Edmonton criminal defence lawyer and former Crown prosecutor with extensive experience in bail proceedings.

> *It should be understood that the defence receives NO information of any kind in the vast majority of bail applications, and this is a situation which should be remedied as soon as possible. As a matter of procedural fairness, as well as respect for Charter s.7 principles of fundamental justice, the defence should receive at least the same package of information which is sent to the Hearing Office. The right to disclosure guaranteed by the Charter is frequently by-passed at this early stage of prosecutions, and it should not be.*

The disclosure issues that arise when police present at bail hearings was highlighted in a 2014 Saskatchewan report titled *The Duty to Disclose: The Challenges, Costs and Possible Solutions.* The report was prepared by the Collaborative Centre for Justice and Safety at the University of Regina for the Saskatchewan Ministry of Justice and the Saskatchewan Association of Chiefs of Police. It referred to communities in that province where RCMP officers operate "in lieu of Crown" at first appearance bail hearings, as police do throughout Alberta.

> *Although a long-standing convention, this practice is problematic given the Crown's ultimate responsibility for the materials disclosed to the defence. It was reported that having police acting in prosecutorial roles might lead to problems in properly tracking disclosed materials, as well as*

[46] Myers (2016) *supra*, p. 13.
[47] A more complete discussion of disclosure obligations is presented under Term of Reference (c), below.

meeting the suggested ideal that all requests for disclosure be made through the Crown offices. Furthermore, the police are not necessarily adequately trained in disclosure-related matters…[48]

The authors recommended "that Crown Counsel assume the responsibility of providing prosecutorial services in locations currently using police officers."

In its 2014-2015 *Annual Report*, Saskatchewan's Ministry of Justice reported that its prosecution service that year had assumed docket court responsibilities in eight communities.

This marks the first year of a three-year process that will see Public Prosecutions assume prosecution responsibilities in all Saskatchewan docket courts. This will create efficiencies in the criminal justice system by involving prosecutors at the earliest stage of docket court.[49]

1.3.3 Prosecutors have a better understanding of the law

This point was made most forcefully by defence lawyer Paul Moreau.

The conduct of a Judicial Interim Release hearing is a serious and complex matter, which demands a thorough knowledge of relevant statute law and common law, a mastery of the factual allegations, knowledge of rules of evidence, criminal procedure, and the principles of the Charter of Rights. As well-meaning as the police generally are, they do not receive the education and training required to discharge this responsibility.

Many others agreed, including a prosecutor in Calgary who wrote:

Police are not properly equipped to deal with bail and should not be conducting bail hearings. They have not received enough training to come to reasoned decisions about release. They do not have the resources that we have at the Crown to determine the jeopardy of release (or they are not using them). They are not lawyers and seem to not be properly educated on the intersection of the Charter and the Criminal Code. For example, they would never be able to make representations about the strength of the Crown case or the likely sentence.

The Society of Justices of the Peace in Alberta made this observation:

Although there are some very capable police officers conducting JIR hearings, many show a substantial lack of understanding about the onus to show cause … Many officers will ask for a denial or granting of JIR in totally inappropriate cases.

'A waste of time and resources'

The Society said some police either don't understand—or are too hesitant to use—their own release powers, placing unnecessary stress on both the accused and the Hearing Offices.

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[48] Jones, N.A., Ruddell, R., Leyton-Brown, K., Michaels, S. (2014). *The Duty to Disclose The Challenges, Costs and Possible Solutions: Final Report.* Regina, SK. Collaborative Centre for Justice and Safety, p. 276 http://www.justiceandsafety.ca/rsu_docs/duty-to-disclose-final-with-cover-to-ps.pdf

[49] http://publications.gov.sk.ca/documents/9/82855-2014-15%20Justice%20AR%20website.pdf, p. 10

The Criminal Trial Lawyers' Association (CTLA) in Edmonton agrees. It is largely indifferent as to whether police or Crowns present at bail hearings, but it, too, is concerned about the training received by police—not only for their role in first appearance bail hearings, but also with respect to their own powers of release.

> *There are a number of cases which should not even go before the justice of the peace, as the accused should have been released on a Promise to Appear, an Undertaking to a Police Officer with conditions or, if taken into custody, released by the officer in charge on a Recognizance with conditions. Indeed, there are several cases where the courts have found that the failure to do this breaches s. 9 of the Canadian Charter of Rights and Freedoms. See for example, R. v. Vidovic, 2013 ABPC 310, R. v. Scott, 2014 ABPC 159 (undisturbed on appeal) and R. v. Hotte, 2015 ABQB 323.*

Pat Yuzwenko, Senior Counsel in the Youth Criminal Defence Office of Legal Aid Alberta, said the issue is especially evident in bail hearings for young persons.

> *We believe many of these JP bail hearings can be avoided if police were properly trained on the release provisions in the YCJA [Youth Criminal Justice Act]. Youth cannot be detained unless certain conditions are met. We often see youth being brought before a JP for a bail hearing when those conditions do not exist, which means release is mandatory. It is a waste of time and resources to have a youth appear before a JP in those circumstances.*

Stakeholders said the problem of inadequate training is most pronounced in bail hearings involving RCMP detachments and smaller police services, which lack the large, specialized bail units operated by the Calgary and Edmonton police services.

RCMP K Division readily acknowledges that training is an issue. In some circumstances, the bail presenter might be a junior officer who has been on the job for a matter of months, and has yet to benefit from the RCMP's principal means of bail instruction: on the job training. That is simply the reality in small detachments, they said. (On-the-job training is the principal learning tool used by almost all Alberta police services for bail presenters. Its limitations were acknowledged by the Calgary Police Association: unless the mentor is well-schooled and up to date, the training can simply perpetuate and reinforce "bad" practices.)

The Alberta Police-Based Victim Services Association (APBVSA)[50] also flagged the problem of junior officers presenting at bail hearings, noting that an "inexperienced cadet" would have trouble articulating the proper grounds for detaining an accused, which could lead to inappropriate releases.

A prosecutor in Wetaskiwin said the inadequacies of police presenters in the smaller forces is easy to understand: "[They] are so overloaded with other responsibilities that they cannot devote the necessary attention to bail."

In its written submission to the Review, the Public Prosecution Service of Canada said bail hearings are often straight forward and do not require the full skills and knowledge of a Crown lawyer. However,

[50] The APBVSA represents all 76 police-based victim programs in Alberta. See: http://victimservicesalberta.com/

> *Having prosecutors handle bail in all cases would provide greater assurance that unforeseen legal or procedural issues are being handled most effectively, such as the appropriate management of cases where a reverse onus (s. 515(6) CC) applies.*

The John Howard Society expressed concern about the turnover among police presenters. It said the job is often a short-term assignment, which limits the experience of officers and requires constant training.

The high turnover in police presenters was also mentioned by Josh Hawkes, Executive Director, Appeals, Education & Prosecution Policy Branch of the Alberta Crown Prosecution Service. He said Alberta Justice and Solicitor General has been struggling to deal with the need for "ongoing and almost continuous training, given that churn factor."

1.3.4 Police are at a disadvantage when defence lawyers are involved

Police presenters are frequently outmatched in experience and education when defence counsel take part in a bail hearing, according to many stakeholders.

The Edmonton Police Service told the Review that when a lawyer is arguing on the accused's behalf, "having Crown counsel present ensures that the level of advocacy is balanced."

The Camrose Police Service agrees:

> *Although most bail hearing processes are fairly [simple], there are times where there can be some benefit to making reference to case law, or areas of the Criminal Code, that a Crown Prosecutor is likely more familiar with than a police officer. In these cases, it could provide the opportunity for a seasoned defence counsel to "out-litigate" a police officer in a more advanced bail hearing situation.*

Members of the defence bar told the Review that some police presenters will seek an adjournment as a matter of course if the accused is represented by counsel. The Edmonton Police Service, as an example, advises its members to seek an adjournment when a defence lawyer wants to cite case law or raise issues they believe are beyond the scope of section 515 of the *Code*.

A 'lack of respect'

When a defence lawyer *does* take part in a bail hearing, stakeholders said, the police presenter often faces "an uphill battle."

"Sometimes police will be ignored," said a member of the Canadian Bar Association. *"Totally* ignored," was the phrase used by RCMP. It is a widely-held perception. JPs, defence lawyers and prosecutors "are on the same footing," "in the same club," and "speak the same language," others said. As fellow lawyers, they have a mutual respect that is often not extended to police. One Crown counsel summed it up this way: when the accused is represented at a bail hearing by a "seasoned criminal defence lawyer," a presenting police officer is at "a profound disadvantage."

In 2007, this issue caught the attention of Alberta's Crime Reduction and Safe Communities Task Force. The group's final report included this observation and recommendation:

> *When there are bail applications before justices of the peace, frequently only the police and defense lawyers are involved while typically Crown prosecutors are not. This places a heavy onus*

> *on the police to prepare the case and puts the officers at a disadvantage when legal issues are raised. A process should be put in place to allow Crown prosecutors to be more directly involved in leading the bail application process from the point of arrest and appearance before a justice of the peace.*[51]

The situation today remains essentially unchanged.

There is a perception among some stakeholders that the "disadvantage" is often reflected in the hearing's outcome, leading in some cases to the release of people who pose a risk to public safety.

1.3.5 Potential for bias or conflict of interest

Several stakeholders identified a potential conflict of interest or perceived bias when police present at bail hearings.

A lawyer with Legal Aid Alberta said police are wearing multiple hats when they appear in court as advocates rather than witnesses. They "represent" the investigator, the arresting officer, the jailer, and now the prosecutor. That could involve the juggling of competing interests and priorities—a juggling act that a prosecutor would not have to perform. "How can they *not* be biased?" was a rhetorical question posed by a member of the Criminal Defence Lawyers Association during a consultation in Calgary.

The Calgary Police Service speaks with pride about its Court Services Section (CSS), which includes the bail presenting officers. But the Service's written submission makes clear that the unit's role is "multifaceted," encompassing all aspects of the care and custody of arrested persons awaiting judicial process.

> *Running a jail and comprehensively considering all factors that ought to be reviewed in a 'best practices' judicial interim release hearing are not always related or mutually compatible.*
>
> *Safely running a jail will often be a police priority. In particular, within the CSS there is a constant discussion of liability associated with maintaining persons in custody and length of stay, particularly in the antiquated facility at the CPS. As a result, expedited releases and/or transitions to Court/Remand are commonplace.*

'Clearly unseemly'

Potential conflicts can be more unsettling, according to some stakeholders. Barb Mueller of Native Counselling Services posed this hypothetical question: What if the presenting officer "roughed up" the accused during arrest or detention? Is it fair or appropriate for that officer to then represent the Crown at a bail hearing?

The Society of Justices of the Peace expressed the same concern in its written submission.

> *Some officers presenting are the same officer who has been dealing with the accused throughout the investigation. Scenarios where an accused is charged with assaulting a*

[51] *Keeping Communities Safe: Report and Recommendations*, p. 51

> *police officer (to wit: the presenting officer) are not uncommon in rural locations and, no matter how fair the police officer might be, are clearly unseemly.*

The John Howard Society had a more general concern: because of their role in the criminal justice system, it said, police might be more inclined than Crowns to take a hard line and seek an accused's detention, which might not serve the interests of justice.

1.3.6 Presenting at bail hearings diverts police resources from law enforcement

The Edmonton Police Service says the equivalent of four full-time positions are required to handle its bail presentation duties, at a cost of approximately $620,000 per year—resources that might otherwise be allocated to core police duties.[52]

Presenting at bail hearings can also represent a significant drain on the resources of smaller police forces, such as the Camrose Police Service.

> *There is no question that a police officer being involved in bail hearing processes removes that officer from performing core policing duties for several hours during the course of his or her shift. This is especially evident in a smaller organization like ourselves, where bail hearings are predominantly conducted by our patrol members, and we may only have two or three members on in any given shift.*

Especially irksome for the smaller forces is the wait time for a hearing to proceed. Officers submit a request to the Hearing Office and then stand by for a call back. "The waiting time to get the accused before a justice can take hours," said the Medicine Hat Police Service. "This added burden of conducting bail hearings takes officers way from their traditional policing duties."

It also takes time for police to properly prepare for a bail hearing. Edmonton police estimate that it takes a trained officer about an hour to put together a bail package. According to the Justices of the Peace Society, many officers don't seem to *have* the time, given the quality of some submissions. The Society also noted that if a police shift-change occurs before the hearing takes place, the presenting officer is sometimes ill-equipped to proceed.

> *Many officers are totally unprepared often through no fault of their own. This is particularly noticeable with the RCMP. Officers will actually tell the Justice of the Peace that they just came on shift and don't really know anything about the case except what their colleague wrote in the report.*

As noted above, to properly present at bail hearings, police need appropriate training. But finding the necessary time and resources can be a challenge, especially given the training demands related to core policing duties. Although the problem is most pronounced in smaller communities, it can be an issue for the major municipal forces as well. The Calgary Police Service told the Review that it used to run a two-day "Presenting Officer" course, but that training was recently cut to one day due to staffing challenges.

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[52] "Justice of the Peace Bail Process." PowerPoint presentation by S/Sgt. Brad Mandrusiak, Investigation Management and Approval Centre Branch, Edmonton Police Service. Provided to the Review by Calgary Police Service.

The Medicine Hat Police Service summed up its own arguments in favour of greater Crown involvement in the bail system in these words:

> *Having Crown prosecutors present at bail hearings will result in more appropriate detention orders and releases and ensure that those who should remain in custody remain in custody and those who should be released are released with appropriate conditions. The present system of having police officers conduct bail hearings increases the risk to the community as many accused are released from custody when they should have been detained.*

The 2008-2009 Bail Project

In May 2008, Alberta's Justice Minister told the Legislature of the government's intention to have Crown prosecutors replace police presenters in Hearing Office bail hearings. She said in part,

> *While highly trained in enforcement, police are not legally trained. Having prosecutors involved will ensure that people who should not be released remain in custody and those that should be released are released with the appropriate conditions.*

The plan was to be phased in, beginning with Crowns initially replacing police presenters in Edmonton and Calgary during normal business hours. The project was short-lived. It appears to have run from October 2008 to October 2009, when it was "mothballed." As described in the 2009-2010 Annual Report of Alberta Justice,

> *The Justices of the Peace bail initiative was suspended due to fiscal restraints. As of October 1, 2009, Crown prosecutors are no longer conducting bail matters before Justices of the Peace until resources enable the project to resume.*

To the Review's knowledge, the pilot was never given a formal evaluation. However, the Review did receive an unattributed document from Alberta Justice and Solicitor General relating to the project, dated September 3, 2009.

> *There has been some improvement in the overall integrity and effectiveness of the bail process. For example, prior to the bail project, it was observed that the police were not properly using s.524 in hearings that they were presenting. Further, they were detaining many individuals that did not need to be detained. On those that were released, we saw some inappropriate conditions that later needed to be fixed by prosecutors in court. In addition, there has been at least a few high profile mistakes made by the police which would likely not have been made by Crown Counsel. All of these things would have improved with our involvement in the project.*

The Edmonton Police Service has a different take on the project. A PowerPoint presentation by a Staff Sergeant in the Investigation Management and Approval Centre Branch makes the following observations:

- *Crowns unable to match work rate of police officers, creating delays*
- *Crowns complained about the "working conditions" in APU [Arrest Processing Unit]*
- *Crowns unwilling to work outside business hours*
- *Crowns were frustrated/surprised to find recommended bail conditions often being refused by the sitting justices*

Further details about the project can be found in Appendix D.

1.4 On the other hand…

Although most stakeholders believe it would be beneficial to have Crown prosecutors present at all bail hearings, a great many expressed concern about the cost implications. They also identified potential operational drawbacks, and a few wondered whether, at the end of the day, greater Crown involvement would make a meaningful difference. Prosecutors are also wary of the potential impacts on their own workloads and schedules.

As noted earlier, the two Hearing Offices combined received about 60,000 judicial interim release requests in 2014-2015, almost all involving police presenters. That is an average of 164 per day, every day of the year. Not all requests involve a full bail hearing. Nevertheless, it would be a heavy load to transfer from 10 municipal and First Nations police services and 112 RCMP detachments to the shoulders of the Alberta Crown Prosecution Service and the Public Prosecution Service of Canada. The ACPS currently has 245 Crowns who prosecute *Criminal Code* cases; the PPSC has about 60 in-house prosecutors (some positions are currently vacant) plus 29 agents.

Furthermore, the Hearing Offices currently work around the clock, every day of the year, as do the police. The federal and provincial Crown prosecution services operate, for the most part, during normal office hours. As their Associations made clear to the Review, most Crowns might not cherish the notion of shift work and would definitely seek extra compensation for evening and weekend assignments.

1.4.1 The 'ideal' versus the 'viable'

In a written submission, Josh Hawkes, QC, of the Alberta Crown Prosecution Service said "the issue of resources" is "critical."

> *In my view, any recommendation needs to reflect the current state of the ACPS – that is, an organization that has been coping with increases in population, some of the highest caseloads per prosecutor in the country, with no added resources and the retirement of many senior and experienced staff. The strain on the ACPS is chronic. In my view, the fact that the last bail project could not be expanded, or even continued in light of a lack of resources, is an essential observation.*

The Society of the Justices of the Peace in Alberta also referred to that short-lived initiative. It said a similar plan today "while ideal," might not be "economically viable," given the state of the provincial economy, the government's budget deficit, and the number of Crown lawyers it would take to handle this new responsibility (a common estimate heard by the Review was 20 additional provincial prosecutors).

The Society said the government would also be obliged to extend Legal Aid representation to accused at Hearing Office bail proceedings, a service not routinely provided at present. The Acting Deputy Minister of Resolution and Court Administration Services acknowledged that such a change in the Legal Aid mandate would be required. That would add to the government's bill.

Although the Edmonton Police Service also considers Crown-presenters as the ideal, "the challenge," it said, "is that the optimal solution does not often comport with the fiscal and staffing realties of provincial budgets and competing priorities."

1.4.2 'A paralyzing bottleneck'

Many stakeholders expressed the fear that greater Crown involvement in the bail process would bring delays to a system already struggling to cope with significant time and resource pressures. The Edmonton Police Service worries that changes might create "a paralyzing bottleneck of detainees caught up in the judicial interim release process."

The Camrose Police Service wonders how much extra time it would take to:

> *… ensure that a prosecutor was available, forward the information to the prosecutor, brief the prosecutor on the justification for the position on release, and present the accused before a Judge or Justice of the Peace for the hearing itself. Coming from a smaller agency's perspective, we would request careful deliberation and consideration of those factors if the bail hearing process was restrictive to Crown prosecutors only.*

In its consultation with the Review, the Calgary service said its officers make between 10,000 and 12,000 arrests every year. All detained accused must be accommodated in 20 holding cells, which, it said, are often filled to capacity. Some of the accused have physical and mental health problems that can be exacerbated in detention. A police official said two people died in custody for medical reasons during 2014. Background documents supplied to the Review indicate that in 2012, 16 detainees attempted suicide and 69 had "suicidal ideations."[53]

Moving all those people through the system and out of its cells is a top priority for the Calgary Police Service. It would support a Crown takeover of its bail responsibilities, but only "in a system where the competing goals and obligation of the CPS were not compromised."

The Edmonton Police Service has a similar number of holding cells and similar pressures and concerns regarding the accused—"the 15,000-plus"—who flow through its bail hearing process every year. Its wariness is based in part on its experience during the pilot project in 2008-2009, when Crowns temporarily took over as bail presenters during the day. "Crowns were conducting only a third to a half of the bail hearings that EPS bail officers were able to complete," it said. "This created significant delays and issues in all phases of the arrest process."

Other police services, including the Medicine Hat and Tsuu T'ina Nation police, share the concern about Crown involvement slowing the process, to the detriment of both the police and the accused. Lakeshore Police Chief Dale Cox put it this way:

> *[W]hatever decisions are made, we have to ensure that we do not further slow down the system or hinder the availability of police officers or judicial representatives to be able to carry out their daily duties. With the current process, I have had times when my police officer was tied up for hours waiting for a hearing office to call them back to hold a hearing. For a small police service like ours, this is not an option when sometimes we only have one officer working and they still need to respond to calls.*

Police certainly aren't the only ones worried about potential delays should Crowns become more involved in the bail process. "There would be a whole different dynamic," predicted defence lawyer Jason Snider during the Review's consultation with the Red Deer Criminal Defence Lawyers Association. He is

[53] Undated PowerPoint presentation, "Arrest, Release, Detention & The Calgary Police Service" by A/S/Sgt. Dunn and Cst. Sorochan

concerned that delay would be "built into the process," and would slow the release of those detained by police.

1.4.3 The plusses of police presenters

A defence counsel in Red Deer and a Legal Aid lawyer in Calgary said police are more likely to know "what went down" in an alleged offence, and would typically know more about the parties involved and the social dynamics in the community in which the offence took place.[54] The Lethbridge Police Service concurred:

> *Police Officers have a personal knowledge of the file/investigation – they have intimate knowledge of the accused and will be able to challenge the accused if he is telling lies or if there is inconsistent information provided.*

The Review spoke with a police presenter with the Edmonton Police Service who said it would be a mistake to hand the job over to Crowns. "The police perspective is very valuable," he said, and often best delivered orally rather than in writing. He also wondered whether Crowns would have time to read through the piles of bail packages that would cross their desks every day.

Crowns or police: would the outcomes be different?

Although the Camrose Police Service favours the increased involvement of Crowns in the bail system, the Service is proud of its own track record.

> *By and large, we have achieved the desired results during bail hearings. More often than not, when offenders are released we have been successful in getting relevant and enforceable bail conditions imposed on them, [reducing] the likelihood of re-offending in the community.*

If the police are achieving "acceptable" results, as the Camrose Police Service asserted, how compelling is the need for change? That question was raised by the Calgary Police Service in its submission.

> *While it may be ideal for trained Crown prosecutors to handle all bail hearings, it likely is not necessary in the Calgary jurisdiction, because of the ability of CPS to provide hearing officers that are knowledgeable in the area, have specialized training and are subject to ongoing evaluation of their work.*

Writing on behalf of the Edmonton Police Service, Inspector Malcolm Allan made this observation: People who find fault with the current system should not expect too much from greater Crown involvement.

> *[At] its core, the entire bail hearing process is really a risk management exercise where the risk would simply be displaced or transferred to the Crown rather than eliminated outright. This transference of risk to the Crown (as opposed to elimination), with no guarantee that a Crown performing this role would lead to any different outcome, is something that I respectfully suggest needs to be kept in the forefront as the entire issue of bail hearings is examined.*

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[54] That can be a double-edged sword. Native Counselling Services expressed concern that police might take a hard line with an individual because of the criminal history or reputation of other family members.

1.5 Hybrid models

Many stakeholders made the point that "who should present at bail hearings" does not necessarily require a Crown/police either/or answer. "Hybrid" models were a popular option among those concerned about the cost of having Crowns perform the presenting role at all bail hearings.

The PPSC described one alternative:

> *The current practice of police handling JP bail hearings could be improved by having resource prosecutors available on a formalized "on call" basis to provide legal advice and guidance to presenting officers, as well as instituting regular training of presenting officers where that does not presently exist. Such training exercises should be done in collaboration with Alberta Crown prosecutors as a joint initiative.*

"On-call" advice is currently provided, but on an *ad hoc* basis.

The Society of Justices of the Peace in Alberta had a similar suggestion—one that would work best, it said, if the evening and overnight shifts at the Hearing Offices were eliminated.

> *Police officers or presenters would be under the direction of a prosecutor who would review each file and determine the Crown's position and ensure all the relevant information was available to be presented.*
>
> *In the appropriate cases, the prosecutor could suggest an accused be released by the police without a JIR hearing or handle the hearing themselves. During the day, except on the weekends, court houses and prosecutors' offices are open and the prosecutor would have a much greater ability to gather relevant information.*
>
> *A prosecutor would also be in the best position to determine the Crown's position on bail [revocations] under Section 524 of the Criminal Code. Legal Aid duty counsel could also speak to those accused requesting their assistance and also the prosecutor in the appropriate cases. Many hearings might well have a 'joint submission'.*

The Edmonton Police Service also suggested an enhanced "advisory role" for Crown prosecutors, coupled with "a mandated on-going relationship between police and Crown" concerning the handling of "repeat habitual offenders" and those who have breached existing bail conditions.

The Review heard similar proposals from others. "I don't believe that all bail hearings need to be conducted by Crown," wrote a prosecutor, "but a process should be set up that can identify files that are serious for a Crown Prosecutor to conduct the bail hearing."

But not all stakeholders are enamoured of the idea of a hybrid model. An example is the Medicine Hat Police Service:

> *Moving forward it is the opinion of MHPS that all bail hearings in all circumstances in the first instance should be conducted by another entity other than police officers. …*
>
> *MHPS recommends that Alberta Justice and Solicitor General consider creating Provincial bail centers and staffing them with suitably trained personnel who will conduct all bail hearings on behalf of the Crown on matters that are not required to go directly to Provincial Court. In this concept, Police would send all prepared bail packages to the designated and trained personnel to conduct bail hearings. This new*

process will allow for greater consistency in the services provided, will help mitigate risks associated with lack of trained personnel and ultimately be more effective.

The Review will leave it to the two prosecution services and the police to determine how best to proceed, should Alberta Justice and Solicitor General choose to adopt a hybrid model. However, it adds one stipulation: "Crown positions" on judicial interim release must be determined by Crown prosecutors.

RECOMMENDATION 1: The Review recommends that Crown prosecutors replace police presenters at Hearing Office bail hearings.

RECOMMENDATION 2: The Review recommends that the provincial and federal governments provide the additional resources necessary for their respective prosecution services to properly discharge these added responsibilities.

RECOMMENDATION 3: The Review recommends that ACPS and PPSC consider using specially assigned Hearing Office and docket court prosecutors on a full-time basis.

RECOMMENDATION 4: If Alberta Justice and Solicitor General and police services wish to maintain the practice of police representing the Crown at Hearing Office bail hearings, the Minister of Justice should (1) satisfy herself that police have the requisite authority under the *Criminal Code*, and/or (2) seek an appropriate amendment to the *Criminal Code*.

RECOMMENDATION 5: If Alberta Justice and Solicitor General and police services wish to maintain the practice of police presenting at Hearing Office bail hearings, the Review recommends that the Crown's position on detention or release (including the conditions of release) be determined by a prosecutor.

RECOMMENDATION 6: The Review recommends that the ACPS and PPSC provide education to police agencies in Alberta to ensure that police are properly trained in the use of their release powers under the *Criminal Code*.

2. Who should preside at bail hearings

Some key similarities and differences between Provincial Court judges and justices of the peace are summarized in the following table.[55]

	Provincial Court Judges	**Justices of the Peace**
Minimum qualifications on appointment	Canadian citizen and a member in good standing of a Canadian law society for 10 years.	Canadian citizen and a member in good standing of the Law Society of Alberta for five years.
How selected	Interviewed and evaluated by the Judicial Council and the Provincial Court Nominating Committee. Participants	Candidates are interviewed by a panel with no set membership. The most recent panel (Dec., 2015) consisted of the

[55] Presiding JPs only.

	include Chief Justice of Alberta, Chief Justices of Court of Queen's Bench and Provincial Court, Presidents of Law Society of Alberta and Canadian Bar Association – Alberta Branch (among others). Appointed by Lieutenant Governor in Council.	Deputy Chief Judge of the Provincial Court, the province's top civil servant for court administration services, and a government human resources officer. Appointed by Lieutenant Governor in Council.
Duration of appointment	Until age 70	10 years, renewable at the recommendation of the Chief Judge of Provincial Court for up to five additional one-year terms
Salary as of Dec. 31, 2015	$286,821.00 plus pension and benefits[56]	$139,932 plus 13.1% in lieu of pension and some benefits[57]
Supervised and assigned by	Chief Judge of Provincial Court	Chief Judge of Provincial Court or her/his delegate
Restrictions on other work for part-time appointees	Cannot carry on or practice any other business, profession, trade or occupation unless otherwise authorized by the Lieutenant Governor in Council.	*Inter alia*, cannot practice criminal or family law, or appear as counsel in Provincial Court unless authorized by Lieutenant Governor in Council.
Removal from office	May be removed from office only in accordance with Part 6 of the *Judicature Act*.[58]	May be removed from office only in accordance with Part 6 of the *Judicature Act*.
Hours of work	Courts normally operate during regular business hours, five days a week.	Hearing Offices operate around the clock, every day of the year. Requires shift work (day, evening and overnight assignments).

The previous question—who should present—involved two actors with fundamentally different educational backgrounds and roles and responsibilities in the criminal justice system. That is not the case with "who should preside."

In Alberta, both judges and JPs are experienced lawyers. Their roles in the criminal justice system are fundamentally the same: to act as impartial decision-makers. Both are clearly empowered by the *Criminal Code* to preside at bail hearings. The independence and impartiality of both is protected by law.

[56] *Provincial Court Judges and Masters in Chambers Compensation Regulation.* (Consolidated up to 178/2015) https://www.canlii.org/en/ab/laws/regu/alta-reg-176-1998/latest/alta-reg-176-1998.html
[57] Salary since March 31, 2013. Will be adjusted retroactively by next Justice of the Peace Compensation Commission process. *Justice of the Peace Regulation.* (Consolidated up to 227/2014) https://www.canlii.org/en/ab/laws/regu/alta-reg-6-1999/latest/alta-reg-6-1999.html
[58] Revised Statutes of Alberta 2000, Chapter J-2

2.1 Education and experience

As noted in the above table, only people who are who are authorized to practice law in Canada may be appointed as a Provincial Court judge or justice of the peace in Alberta. Judges must have a minimum of 10 years at the bar, and JP's must have at least five years.

Most appointees exceed the minimum by a wide margin. Between April 2011 and May 2014, 28 judges were appointed to Alberta's Provincial Court. According to Alberta Justice and Solicitor General, they had an average of 27.6 years at the bar when they joined the Bench. None had fewer than 20 years' experience. Nineteen of the 28 were Queen's Counsel. "Without exception," according to the Ministry, "[t]he existing court represents an overall high standard of excellence."[59]

Most current JPs also greatly exceed the minimum of five years' experience required for appointment to that position. According to a document prepared in 2013 by the Society of the Justices of the Peace in Alberta, of the 47 JPs then serving, "only a handful" had fewer than 20 years at the bar. The average, it said, was 28 years, essentially the same length of service reported by the government for the new judges appointed to Provincial Court between 2011 and 2014.[60] The average age at the time of appointment is also similar, according to recent figures: 51 for judges,[61] 55 for justices of the peace.[62]

Alberta's JPs also compare favourably with their counterparts in other provinces. In Ontario, for example, the minimum requirement for appointment is a university degree or college diploma and "paid or volunteer work equivalent to at least 10 years of full-time experience."[63] Lawyers are eligible for appointment, of course, but in 2013 only 10 per cent of Ontario's JPs were considered "legally trained."[64] (Cameron, 2013)

The only JPs with higher minimum qualifications than Alberta's are Quebec's Magistrate Justices of the Peace, the highest of three categories of JPs in that province. They require a law degree and a minimum of 10 years of experience.[65]

Alberta Justice and Solicitor General has underlined the quality of JPs by noting that several have been appointed directly to the Provincial Court.[66]

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[59] 2013 Alberta Judicial Compensation Commission. *Submission of the Minister of Justice and Solicitor General in and for the Province of Alberta*, dated September 12, 2014. para 52. https://justice.alberta.ca/programs_services/courts/Documents/MinisterSubmission.pdf

[60] *Submission of the Society of the Justices of the Peace in Alberta to the 2009 Alberta Justices of the Peace Compensation Commission*, dated June 3, 2013. para 115. https://justice.alberta.ca/programs_services/courts/Documents/Submission-JPSociety.pdf

[61] *Submission of the Alberta Provincial Judges' Association to the 2013 Judicial Compensation Commission*, at para. 10 https://justice.alberta.ca/programs_services/courts/Documents/SubmissionofAPJAfor2013JCC%20.pdf

[62] *Submission of The Society of the Justices of the Peace in Alberta to the 2009 Alberta Justices of the Peace Compensation Commission*, *supra,* at para. 268

[63] Qualifications and Selection Criteria for a Justice of the Peace in Ontario http://www.ontariocourts.ca/ocj/jpaac/qualifications/

[64] Cameron, Jamie, "A Context of Justice: Ontario's Justices of the Peace – From the Mewett Report to the Present" (2013). Comparative Research in Law & Political Economy. Research Paper No. 44/2013. p. 16 http://digitalcommons.osgoode.yorku.ca/clpe/286

[65] From HORC cross-jurisdictional survey

[66] Submission of the Minister of Justice and Solicitor General to the 2009 Justices of the Peace Compensation Commission, at para 45. https://justice.alberta.ca/programs_services/courts/Documents/Submission-MinisterJSG.pdf

2.2 Roles in the criminal justice system

While their roles in the criminal justice system are similar and overlap in some respects, there are significant differences. For example, Provincial Court judges preside over the vast majority of criminal trials. JPs preside in Traffic Court over trials involving provincial and municipal offences. Both have jurisdiction over judicial interim release, but JPs are generally assigned only first appearances. With some exceptions, further hearings are directed to docket court where a judge presides.

Their roles differ in other respects as well. As outlined in a recruitment document prepared by the Court, unlike Provincial Court judges, JPs may not be assigned to hear, try or determine matters involving the death of any person, any complaint or information which involves a determination whether any rights under the *Canadian Charter of Rights and Freedoms* have been infringed or denied, or any issue relating to the constitutional validity of any law.[67]

As Alberta Justice and Solicitor General has pointed out, there is a "degree of comparability" between the roles, but also some "significant differences."[68] Both the government and the Provincial Court itself have reserved some important and complex matters for judges, which suggests an extra level of confidence in their capabilities.

Judicial independence

The Supreme Court of Canada has affirmed that the principle of judicial independence in section 11(d) of the *Charter of Rights and Freedoms* extends to the Provincial Court of Alberta and its judges and JPs. The section provides that:

> *11. Any person charged with an offence has the right ...*
>
> *(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;*

The Court outlined the principle in *Ell v. Alberta*, a 2003 decision concerning the independence of JPs. It said "the integrity of judicial decision making depends on an adjudicative process that is untainted by outside pressures,"[69] adding:

> *[J]udicial independence encompasses both an individual and institutional dimension. The former relates to the independence of a particular judge, and the latter to the independence of the court to which the judge is a member. Each of these dimensions depends on objective conditions or guarantees that ensure the judiciary's freedom from influence or any interference by others.*[70]

The Court said the requisite guarantees are security of tenure, financial security and administrative independence. All are now secured in both legislation and practice and through entities such as the Judicial Council and independent compensation commissions.

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[67] Provincial Court of Alberta Justice of the Peace Operations, "Duties of Justices of the Peace (JPs)." Dated November 2015. Copy provided to the Review.
[68] 2013 Alberta Judicial Compensation Commission. *Submission of the Minister of Justice and Solicitor General in and for the Province of Alberta*, dated September 12, 2014. para 98. https://justice.alberta.ca/programs_services/courts/Documents/MinisterSubmission.pdf
[69] [2003] 1 S.C.R. 857. para 21 https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2067/index.do
[70] *Ibid*., para 28

2.3 Stakeholder input

Although JPs in Alberta have significant legal education and experience, the Review heard many times that in an "ideal world," judges would preside at *all* bail hearings, and are certainly best qualified to handle the more challenging cases. On average, their legal knowledge and experience is considered unmatched by justices of the peace, whose pay and benefits, hours of work, length of tenure and status in the community are substantially less attractive to those seeking a judicial appointment.

Nevertheless, almost all stakeholders would also endorse the view expressed matter-of-factly by the Criminal Trial Lawyers' Association: "There is no reason to believe," it said, that justices of the peace are not "capable of conducting a bail hearing competently."

Both views—JPs good, judges better—are reflected in the submission from the Camrose Police Service. In its opinion, judges are best able to handle more challenging legal issues, but "with this being said, we believe that with the majority of bail hearings, the Justice of the Peace has provided us with a good level of service, and has been fair in assessing whether detention is necessary or not."

The Calgary Police Service said it, too, is supportive of the current system, in which JPs "adequately discharge" their obligations relating to bail but judges are available to handle "more serious offenders and more serious offences."

JPs certainly enjoy the confidence of the Chief Judge of the Provincial Court and the Chief Justice of the Court of Queen's Bench. In separate consultations, both said it is likely that some JPs are better than most judges when presiding at bail hearings because they have more experience doing so.

But even their supporters acknowledge a significant degree of inconsistency among JPs, stemming largely from variations in their backgrounds and training. Defence lawyer Paul Moreau offered this observation:

> *It is submitted that the present practice of having legally trained justices of the peace conduct bail hearings is an appropriate and workable practice. The major flaw in that system is the lack of specialized training provided to newly-appointed justices of the peace, an issue which could be easily rectified. It has been my experience that newer appointments are not thoroughly familiar with the provisions of Part XVI of the Criminal Code, although they gain experience quickly.*

The concern about training was raised by many other stakeholders as well. "JPs sometimes do not have a complete understanding of bail law," said the submission from the Criminal Defence Lawyers Association. Margaret Keelaghan of Calgary Legal Guidance told the Review that some JPs don't have a grasp of bail processes and are not able to articulate the decision and the supporting grounds. A prosecutor wrote about a recent case where the JP "seemed unfamiliar with reverse onus criteria other than offences under s. 145 and clearly struggled with understanding how to apply the tertiary ground."

"Some people have concerns about the qualifications and training of JPs," said a submission from a Legal Aid lawyer, "but that should be easy enough to address with communication and development of additional training if deemed necessary." That seems to be the predominant view.

During his consultation with the Review, the Chief Judge of the Provincial Court acknowledged that the Court has not placed "enough emphasis" on education in the past, but he said improvements are being made. He said the Court has a new education coordinator who has assessed the needs of judges and JPs and is developing individual training plans and a "judicial education framework." The Chief Judge also

pointed to the professional development allowances available to judges ($3,750 per annum) and JPs ($2,000 per annum), which they can use to enhance their knowledge of bail law, if they so choose.

The Chief Judge also said the demands on the Hearing Offices have been growing rapidly, and when new JPs are hired “there is a push” to get them working as soon as possible, leaving little time for initial training. Overall, he said, “we do our best.”

Due to concerns about judicial independence, courts can be reluctant to publicly disclose information about judicial training. However, the Review would like to draw attention to the 3,000-word “Justice of the Peace Education Plan” published under the auspices of the Ontario Judicial Council and presented on its website.[71] The Plan offers a comprehensive overview of training goals, methods and resources. Ontario has been particularly sensitive about the training of its JPs, most of whom had no legal training before their appointment. Nevertheless, the document does provide assurance that there *is* a comprehensive training plan, enhancing public confidence in the administration of justice.

2.4 Specialization

At the time of writing, 11 full time and 26 part-time JPs were on the rolls in Edmonton and Calgary. With few exceptions, they were on a rotation schedule, moving between Traffic Court and the Hearing Offices.

In Traffic Court, as the name implies, JPs deal primarily with traffic offences. They also hear, try and determine matters relating to a long list of provincial and municipal offences under statutes ranging from the *Amusements Act* to the *Dangerous Dogs Act*. Most of their work at the Hearing Offices relates to criminal law. The following is a partial list of their duties in that forum, as described by the Court:

- conduct judicial interim release hearings;
- receive Informations;
- consider and order process (warrant for arrest or summons);
- confirm or cancel police process;
- issue subpoenas;
- issue search, blood, tracking device, Feeney and other warrants;
- hear and determine applications for sealing orders on search warrant and related applications;
- receive Informations from private complainants.

JPs at the Hearing Offices also consider applications for and authorize child apprehensions under the *Protection of Sexually Exploited Children Act,* the *Child, Youth and Family Enhancement Act* and the *Drug-Endangered Children Act;* and consider applications for and grant "emergency protection orders" under the *Protection Against Family Violence Act.*

Some stakeholders said it might make sense if JPs were more specialized—perhaps serving in either Traffic Court or a Hearing Office, rather than rotating between the two. “I think assignment of JPs to specific tasks is a great idea,” said one prosecutor. “In the same way that lawyers tend to specialize in certain areas, it would be useful for JPs to specialize as well, as they would end up better understanding their individual roles.”

[71] http://www.ontariocourts.ca/ocj/jprc/education-plan/

Specialization has benefits and costs.[72] The benefits can include a greater depth of knowledge and skill, developed through more focused training and experience. The downsides can include less flexibility for scheduling purposes and a less attractive and stimulating work experience. The Review would encourage the Provincial Court to revisit the issue periodically, especially if JPs are asked to shoulder more of the responsibility for judicial interim release in future.

2.5 Reliance on part time JPs

As noted above, the Hearing Offices are staffed by 11 full time and 26 part-time JPs. When asked why there was such a heavy reliance on part time positions, Provincial Court Administration replied,

> *There is more flexibility in scheduling shifts, particularly during weekends and statutory holidays. Appointing part time JPs also gives members of the legal community the opportunity to perform JP duties and still maintain their own legal practice; therefore, this creates a larger pool of qualified individuals to draw from.*

However, to ensure impartiality and to avoid conflicts of interest, the pool of part time JPs expressly excludes lawyers with a criminal law practice, as it should. The Review questions whether the administration of justice would be better served with greater use of full time JPs who could concentrate more fully on judicial interim release and other matters relating to the *Criminal Code*.

2.6 JPs or judges: who do *accused* prefer?

In 2011, Alberta Solicitor General and Public Security (as it then was) conducted a survey among inmates at the Edmonton Remand Centre.[73] Those surveyed included 72 people who were in remand because they chose not to seek bail at their first appearance before a JP, preferring to have the matter put over to the next court day, when a judge would preside at their hearing.

Upon their arrival at the Centre, 14 of those individuals said they did not intend to seek bail at all. Their intention was to plead guilty or simply wait for their court date. The remaining 58 individuals were asked why they chose to postpone their bail hearing. Eighty-eight per cent said they were waiting for legal advice or representation (another argument for having duty counsel available at Hearing Office bail hearings). But 31 per cent (some inmates provided more than one reason) thought they could get a more favourable result in Provincial Court.

> *Several inmates noted that the odds of getting bail were better in front of a Judge or suggested that their lawyer could "get a better Judge". Some preferred to talk in person to a Judge rather than a Justice of the Peace on a closed circuit television screen or the telephone, feeling that they could make their case, explain themselves or show remorse more successfully in person. Other inmates had formed the impression that the Justice of the Peace always sided with the police*.[74]

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[72] An informative discussion of specialization as it relates to Alberta courts took place under the Single Trial Court initiative in 2003. See Cambridge Strategies Inc., *A Single Trial Court for Alberta: Consultation Paper*, July 4, 2003, and related documents. https://open.alberta.ca/publications/3601464

[73] Alberta Solicitor General and Public Security, *Short Term Remand Study.* November 2011. Copy provided to the Review.

[74] *Ibid*., p. 29

Whether accurate or not (the Review is unaware of any studies comparing the bail decisions of Alberta's JPs and judges), these impressions clearly have an effect on the administration of the bail system. Having prosecutors represent the Crown in all courts and Hearing Offices might reduce the perception that one forum is preferable to another.

RECOMMENDATION 7: The Review recommends the continued involvement of both Provincial Court judges and justices of the peace in Alberta's bail system.

RECOMMENDATION 8: The Review recommends that justices of the peace preside at first appearances and Provincial Court judges preside at subsequent appearances at the bail stage, wherever possible.

RECOMMENDATION 9: The Review recommends enhanced training in the law of bail be made available to judicial officers. It further recommends the public disclosure of basic information about that training, while respecting the principles of judicial independence.

3. In what forum should bail hearings take place?

To recap, the vast majority of bail hearings in Alberta take place in two forums.[75] All first appearances after arrest—about 60,000 in 2014-2015—are heard by JPs in the centralized Hearing Offices in Edmonton and Calgary, which operate around the clock. Subsequent hearings, if required, are heard during normal business hours by judges in courtrooms throughout the province (with some notable exceptions discussed below). This has been the practice since 1999, when the Hearing Offices began conducting *all* bail first appearances.[76]

The following table highlights some of the significant differences between the two forums with respect to bail hearings.

	Provincial Court (Criminal)	**Hearing Offices**
Number and location of venues	71 base or circuit locations throughout the province[77]	1 in Edmonton, 1 in Calgary
Hours of operation	Normal business hours. Circuit locations operate only on specified days.	24 hours a day, every day of the year.
Who presides	Provincial Court judges 90 full time	Justices of the peace 11 full time

[75] This discussion will not include the less common bail hearings reserved for the Court of Queen's Bench in relation to s. 469 *Criminal Code* offences.
[76] Hearing Offices have been part of Alberta's legal fabric since the mid-1970, although their mandate and operations have evolved over time.
[77] Source: Alberta Justice and Solicitor General, "Provincial Court of Alberta." https://justice.alberta.ca/programs_services/courts/Pages/provincial_court.aspx. Accessed February 2016

	20 part time	26 part time
Who represents the Crown	Provincial or federal Crown prosecutor	Police, in all but exceptional cases
Access by accused to Legal Aid duty counsel	Yes	No
Defence counsel participation	Common	Uncommon
How accused "appears" at hearing	In person or by video (CCTV)	By telephone or video (CCTV)
Public or media presence	Common	Rare in Calgary, virtually never in Edmonton
Who else is commonly present during the hearing	Court clerks, interpreters, Native Courtworkers, family members of accused or victim.	No one

All accused who "appear" at the Hearing Offices do so by CCTV or telephone.[78] CCTV is available if the accused is held in a remand centre, or in a police station in Edmonton or Calgary. In all other circumstances, the accused "appears" by phone. Bail appearances in court can be in-person or via CCTV from a remand centre. Alberta Provincial Court judges do not do bail hearings by telephone.

3.1 Court versus Hearing Office

As was the case with the last two questions—who should present and who should preside—most stakeholders have a clear preference: if money and physical resources were no object, all bail hearings would likely be held in public courtrooms in or near the community in which the alleged offence took place. That forum has more *gravitas*; it allows greater and perhaps more meaningful interaction among participants; it allows the presence of Native Courtworkers and other parties; it provides (at least currently) better access to legal representation; and it is more accessible to public attendance and scrutiny. Ideally, justice should be done and be *seen to be done* in the local community, not remotely by phone or video link with a distant and often faceless (tele-bail) person with no connection to, or perhaps understanding of, the local community.

The Hearing Offices, on the other hand, provide a more economical and, in some respects, more efficient alternative. As noted earlier, JPs are paid substantially less than Provincial Court judges. They also work in relatively modest environments. In the Edmonton Hearing Office, for example, JPs conduct bail hearings not in a courtroom but in a small office in a non-descript commercial office building. The Hearing Office JPs are concentrated in two centres rather than dispersed and isolated across the province, greatly reducing overhead costs, enhancing (presumably) their collective productivity, and allowing them to service the entire province around the clock.

[78] The Calgary Hearing Office can accommodate in-person bail hearings, and did so during the 2013 flood—a rare exception to the normal practice. The Edmonton Hearing office is not equipped to hold in-person bail hearings.

The two Hearing Offices provide a variety of centralized services vital to the administration of the criminal law. For example, in addition to presiding at bail hearings, JPs at the Hearing Offices issue search, arrest, Feeney and blood warrants to police, and orders for Child Apprehension or Emergency Protection.

3.2 Stakeholder input

Most stakeholders are generally satisfied with the current, shared division of bail responsibilities between the Hearing Offices and Provincial Court. Many told the Review that diverting Hearing Office bail hearings to the courts would cause unacceptable delays or impose unaffordable costs on a system already struggling to get by. As the Criminal Trial Lawyers' Association (CTLA) pointed out, "docket courts are frequently at capacity" already.

On the other hand, many stakeholders would oppose the diversion of all bail matters from the courts to the Hearing Offices. As mentioned above, some stakeholders believe that many bail matters—and some accused—are best put before a judge in court rather than a JP in a Hearing Office.

The CTLA described the current mix as "the optimal solution."

> *The availability of justices of the peace, as well as Provincial Court judges, is particularly important in rural areas where court may only be in session once or twice a month. The ability to conduct bail hearings via conference calls through the Calgary and Edmonton bail offices is central to the efficiency of the current system and avoids lengthy and unnecessary delays in speaking to bail.*
>
> *In larger urban centres in the province, the fact that justices of the peace handle a large number of bail hearings leaves the Provincial Court free to handle more complex matters. If some defence counsel or accused persons feel that they do not wish to have the JP preside over the bail hearing, then the current system allows for the matters to be stood down and put into Provincial Court for the morning or next day.*

While most stakeholders acknowledge the merits of the existing system, a great many have concerns and complaints about the current operation of the Hearing Offices. The complaints come mainly from police, who say they often have to stand by for hours waiting for bail hearings to take place. Other stakeholders are concerned about "tele-bail"—the conduct of bail hearings over the phone. The fact that Legal Aid is not part of the Hearing Office model is of concern to others. While some stakeholders say it is essential to run bail hearings 24/7, others question the need, cost and propriety of running bail hearings in the middle of the night. The Review itself has concerns about the lack of transparency relating to the Hearing Offices and the practical restrictions on public access to the Edmonton office.

3.3 Waiting times

Police arrange a Hearing Office bail hearing for an accused in their custody by sending a "request for service" by fax to the Hearing Office responsible for their jurisdiction (Edmonton for all locations north of Red Deer; Calgary for Red Deer and all points south). The request is placed in a queue and the police are notified when the JP is ready to proceed with the hearing. The time span between the request and the call-back can be several hours.

The delays can be caused by a variety of factors: the length of the queue; the complexity of cases higher up in the queue; the difficulty in coordinating schedules if a defence lawyer and prosecutor want to

participate in the hearing; or the JPs' duty to attend to higher-priority matters such as Emergency Protection Orders, Apprehension Orders and arrest, search, Feeney and other warrants.

Whatever the cause, the waiting is a major irritant for police.

In its consultation with the Review, the RCMP said the delay can be up to seven hours, a serious issue for detachments that might have only one officer on a particular shift. If the officer leaves the detachment to attend to other business, the return call might be missed, and the case will then be dropped to the bottom of the queue. According to the RCMP, "there is no consideration for the time of the officer" and the matter "needs to be addressed."

The John Howard Society also expressed concern about Hearing Office delays. "This has resulted in people waiting many hours in police custody before being able to speak to a justice of the peace."

The issue has also caught the attention of the Chief Federal Prosecutor in Alberta, Wes Smart.

> *Anecdotal information from discussions at Crown-Police committee meetings … and with senior police members indicates that the current model presents significant operational or logistical problems for police presenting officers. … As well, more recently, similar scheduling and delay issues have affected Counsel in instances where Counsel were required to attend.*

While the Bail Review was underway, a Hearing Office Review Committee (HORC) was conducting "an internal review of current Hearing Office processes with a view towards identification, documentation and gap analysis of best practices."[79] HORC was then gathering information and perspectives about workloads, priorities, service delivery timelines, and the possible expansion of services.

The Review was provided access to some of HORC's work product, including several tables of raw data and a brief overview of the history and current operations of the Hearing Offices. Other information was withheld from the Review for reasons never fully explained.

Through the creation of the Hearing Office Review Committee, the Provincial Court acknowledged the existence of resource and management issues relating to the operation of the Hearing Offices. The Review urges the Court and the government of Alberta to work collaboratively to improve operational efficiencies at the Hearing Offices and in the conduct of bail hearings in particular.

3.4 Video bail and tele-bail

Having the accused "appear" at the bail hearing by CCTV or telephone makes sense for several reasons. Primarily, it eliminates the time, costs and risks associated with the physical transfer of the accused from a police station or remand centre to another location, and the time and care required to check the person in and out of detention. The safety of other participants in the bail process was highlighted in 2005 when video bail was being introduced in Alberta. The then Minister of Justice and Attorney General told the Committee of Supply,

> *There have been a number of incidents that could have been prevented had video conferencing technology been in place. For example, last fall in a St. Albert court a prisoner jumped over the*

[79] *Hearing Office Review Committee (HORC) Terms of Reference*, dated May 22, 2015. HORC is composed primarily of senior managers in the provincial government and the administrative justices of the peace at the Hearing Offices.

> *rail of the prisoner's box in an attempt to escape after being denied bail, and more recently you may have heard about the inmate who threw his shoes at the judge in Calgary Provincial Court as the judge was making an order for his detention. The expanded use of video conferencing will increase security in the courtrooms because fewer prisoners will have to appear in person for routine court matters, and that means that we can prevent incidents like this. As well, there's no driving of prisoners back and forth, so there's no risk of them threatening people inside or outside the courtroom, and that helps keep Albertans safe*.[80]

The accused themselves can be less enthusiastic about video bail, as noted earlier when addressing the question of who should preside at bail hearings. Especially salient and worth repeating is the following observation from the *Short Term Remand Study*, quoted above:

> *Some [accused] preferred to talk in person to a Judge rather than a Justice of the Peace on a closed circuit television screen or the telephone, feeling that they could make their case, explain themselves or show remorse more successfully in person.*

Nevertheless, most stakeholders are comfortable with the use of CCTV in bail hearings, even if many consider it less desirable than having an accused appear in court in person.

However, many are not so sanguine about tele-bail. A member of the Criminal Defence Lawyers Association described tele-bail as "dangerous." The JP does not have the benefit of seeing the accused, and the accused can find it especially difficult to present his or her case. A provincial Crown agreed, saying "it is difficult to be an effective advocate over the telephone."

The John Howard Society called tele-bail "a very impersonal way for the judiciary to work ... If you are going to deny someone [their] freedom, you should have to look them in the eye."

The Review was told by a JP that phone connections from rural locations are often poor, making the accused difficult to understand on many occasions. The Society of the Justices of the Peace in Alberta is especially concerned about the use of tele-bail at night, when accused are more likely to be under the influence of drugs or alcohol, or to have suffered physical trauma. In its written submission, the Society said telephone hearings "make it difficult for the Justice of the Peace to assess the condition of the accused and therefore his ability to proceed at that time."

Chief Justice Wittmann of the Court of Queen's Bench also expressed concerns about tele-bail. For the decision-maker, he said, "information is key" and telephone hearings can restrict the JPs' access to information about the accused.

A particularly extreme and notorious example of the dangers inherent in tele-bail occurred in BC in 2008 when a father who had been granted bail took the lives of his three children, apparently in revenge against his spouse. A later inquiry made this observation about the earlier bail hearing.

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[80] *Alberta Hansard*. Tuesday, May 3, 2005 p. 1226
http://www.assembly.ab.ca/ISYS/LADDAR_files/docs/hansards/cpl/legislature_26/session_1/20050301_1330_01_cpl.pdf

> *The JJP [Judicial Justice of the Peace] asked if there was any friction between Schoenborn and the mother. Schoenborn answered "no" to this question. The JJP thought it was the police officer who answered "no."* [81] [emphasis added]

The response was a determining factor in the decision to release. As the inquiry remarked, "This is an inherent problem with tele-bail, which places a special responsibility on all parties to ensure there is clarity about who said what."

The Review heard from one provincial Crown who spoke of a recent tele-bail hearing in which the JP struggled to distinguish the voices of some of the participants.

3.5 24/7, 365

The *Criminal Code* requires the first appearance at the bail stage to take place within 24 hours of arrest.[82] It does not require bail hearings be run around the clock, as is currently the case in Alberta.

Stakeholders disagree about the need to run bail hearings at all hours of the day and night—a service no other jurisdiction in Canada currently provides. The closest equivalent to Alberta's Hearing Offices appears to be the Justice Centre in BC. It normally conducts bail hearings only between 8 a.m. and 11 p.m.[83]

The Criminal Trial Lawyers Association said 24/7 should be preserved.

> *The availability of a justice of the peace to conduct hearings at all hours of the day or night is important to the defence and is directly responsive to the directives found in section 515 of the Criminal Code.*

Legal Aid Alberta stressed the importance of 24/7 bail hearings in the case of young people in conflict with the law. Native Counselling Services also supports the availability of bail hearings all day, every day.

An official with the Calgary Police Service said the loss of around-the-clock bail hearings "would kill us," so great is the need to move arrested persons expeditiously out of its holding cells. Most other police services agree that 24/7 is vital.

Members of the Canadian Bar Association—Alberta, said they prefer 24/7, but would probably find it acceptable if hearings were run 15 to 18 hours a day. One member said it's unlikely that a person arrested at 8 p.m. would have a bail hearing before 4 a.m. anyway, so they might as well wait a few more hours and appear in court.

A member of the Alberta Crown Attorney's Association said getting access to information in the middle of the night can be a challenge, making it difficult at times to assess whether an accused should be released or detained, and perhaps posing a risk to public safety. All-night bail hearings might also diminish access to the proceedings by the accused's family or other interested parties.

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[81] Representative for Children and Youth, *Honouring Kaitlynne, Max and Cordon – Make Their Voices Heard Now* (2012) p. 50. https://www.rcybc.ca/sites/default/files/documents/pdf/reports_publications/honouring_kaitlynne.pdf

[82] See s. 503(1) of the *Criminal Code*. This is the case where a justice is available within a period of 24 hours after arrest. If a justice is not available within that period, the accused must be taken before a justice as soon as possible.

[83] HORC cross-jurisdictional review

But the most serious reservations about the 24-hour model comes from the JPs' Society, which is advocating for the elimination of the overnight shift.

> *JIR hearings that are conducted during the evenings or at night are at a particularly bad time for an accused. They are tired, often under the influence of alcohol or drugs and have no resources available to them. Some even refuse to come out of their cells at night to appear before the Justice of the Peace. Although Justices of the Peace advise the accused of their rights and choices in a JIR hearing and the accused acknowledges they understand, it is likely that many haven't got any idea of what it is all about.*

3.6 Access to duty counsel

At present, Legal Aid Alberta is not mandated to provide legal representation at Hearing Office bail hearings. As a result, people of modest means are almost always self-represented when they appear before a JP with their liberty at stake. The Edmonton Police Service said only 7-10% of the accused in its custody are represented by a lawyer at Hearing Office bail hearings.

As noted in a 2002 study of unrepresented accused commissioned by Justice Canada (and in the quote above from the JPs' Society), "With the exception of the criminally sophisticated, most accused have only the faintest understanding of what is happening around them in court."[84]

The problem can only be more acute when the process takes place not in a courtroom but over the phone, which is often the case for Hearing Office bail hearings. (The review heard anecdotes about individuals, appearing in court, who asked when they could have a bail hearing, only to be told they already had one through a Hearing Office.)

The submission of the JPs' Society adds this observation:

> *In many cases, the only person the accused speaks to prior to appearing before the Justice of the Peace is the police officer. What is being said? Is there misinformation that the accused is relying on or are there any improper influences at play in respect of the accused's decision whether to proceed to a hearing or not?*

The Review was told that JPs often "bend over backwards" to protect the rights of unrepresented accused, putting these impartial decision-makers in an awkward position. As the 2002 study of unrepresented accused observed,

> *[O]ur criminal justice system is built on the premise that Crown and defense function as equals, with equal legal expertise. It is not built to operate with major gaps in either access to representation or legal expertise, and does not function efficiently or well with such gaps or imbalances. Thus, the question of unrepresented and under-represented accused is not just one of preventing injustices to the individual accused – it affects the*

[84] Robert G. Hann, Joan Nuffield, Colin Meredith and Mira Svoboda, *Legal Aid Research Series Court Side Study of Adult Unrepresented Accused in the Provincial Criminal Courts Part 1: Overview Report* (2003) Report prepared for the Department of Justice Canada. p. 9. http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr03_la2-rr03_aj2/rr03_la2.pdf

entire court and everyone who functions in it, as well as other parts of the justice system.[85]

At present, anyone in Alberta who has been arrested and detained by police can seek free legal advice through a "Brydges" call-in service provided by Legal Aid Alberta.[86] In certain circumstances, Legal Aid will also provide legal *representation*, providing a lawyer to advocate on the accused's behalf in a bail hearing. There are two important provisos: the accused has to meet Legal Aid's low-income eligibility requirements, and, with few exceptions, the bail hearing has to take place in Provincial Court. As a general rule, Legal Aid representation is not provided for a bail appearance handled through the Hearing Offices, which hear *all* first appearances.

The services provided by Legal Aid are governed by an agreement between the Board of Legal Aid Alberta, the Law Society of Alberta, and Alberta Justice and Solicitor General. The funding for Legal Aid comes primarily from the provincial government (in fiscal 2015, the government provided 86 per cent of Legal Aid's total revenue).[87]

In late November 2015, while the Bail Review was underway, Legal Aid Alberta (LAA) reported that it was "experiencing record call volumes and more Albertans than ever before are qualifying for legal representation. LAA has been chronically underfunded and this additional demand for service has created an even more desperate situation."[88] It proposed that its mandate and services be "redefined."

The same day, the Alberta government announced the launch of a separate review "that will identify how to best provide legal aid services to Albertans."[89] The Bail Review is hopeful that its findings will inform that process.

3.7 Transparency and the open court principle

At the time of writing, the Hearing Offices were "virtually" invisible—the Review could find no meaningful reference to them on the websites of either the provincial government or Alberta Courts (or in any other corner of the Internet, for that matter). That was surprising given their long history and crucial role in Alberta's criminal justice system.

The problem is compounded by their low *physical* profile in the province. They exist only in Calgary and Edmonton, and their bail hearings take place almost entirely outside the public's gaze. The Hearing Office in Edmonton is located, as noted above, in a non-descript office building. Public access is possible, but hardly encouraged: there are no signs indicating that a court operates therein. A monitor is available for anyone who wishes to observe a hearing conducted by CCTV, but during the Review's visit, the monitor wasn't working and apparently hadn't been working for some time. To observe hearings, the Review's Project Lead and Project Counsel had to join the JPs in their small offices while they conducted the hearings. It was awkward for all concerned. The arrangement in Calgary is much better. The Hearing

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[85] *Ibid*., p. 12
[86] Alberta Legal Aid, Information for People Arrested/Detained. The service is named after an Alberta man acquitted of murder in 1987 because of issues relating to the right to counsel. http://www.legalaid.ab.ca/help/Pages/Info-for-People-Arrested-Detained.aspx
[87] *Legal Aid Alberta 2015 Annual Report*, p. 23 http://www.legalaid.ab.ca/about/Documents/Annual%20Report/LAA_AnnualReport_15_proof_final.pdf
[88] Alberta Legal Aid, Legal Aid Alberta service changes and review, dated November 25, 2015 http://www.legalaid.ab.ca/media/Documents/Legal%20Aid%20Alberta%20-%20Service%20Changes.pdf
[89] *Government to review legal aid services*, media release dated November 25, 2015 http://www.alberta.ca/release.cfm?xID=3890586CE95CC-A2CC-C577-E027ACC2105BFD1F

Office is located in the Calgary Court Centre and a small sign indicates that hearings are open to the public. The hearing observed by the Review was conducted in a modern courtroom with accommodation for the public and media.

In their conduct of bail hearings, the Hearing Offices function as courts, and courts are supposed to be open and accessible. As the Supreme Court of Canada said in a 2011 decision,

> *The open court principle is of crucial importance in a democratic society. It ensures that citizens have access to the courts and can, as a result, comment on how the courts operate and on proceedings that take place in them. Public access to the courts also guarantees the integrity of judicial processes inasmuch as the transparency that flows from access ensures that justice is rendered in a manner that is not arbitrary, but is in accordance with the rule of law*.[90]

A valuable first step would be the inclusion of Hearing Office information on a government or Provincial Court website. The Review would draw attention in particular to a concise but informative description, available online, of how the BC Justice Centre operates.[91]

[90] *CBC v. Canada (Attorney General)*, 2011 SCC 2. para. 1 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7914/index.do

[91] The Continuing Legal Education Society of British Columbia, *A Practical Guide to Bail Hearings at the Justice Centre*. Accessed in November 2015 http://www.cle.bc.ca/PracticePoints/CRIM/14-BailHearings.pdf

The conduct of a first appearance bail hearing

During visits to the Hearing Offices, the Review's Project Lead and Project Counsel observed three bail hearings involving three different JPs. Two were via video link (one in Edmonton and one in Calgary) and one was by telephone (Edmonton).

The hearing in Calgary was conducted in a modern courtroom set up for video hearings, with the JP on a dais. In Edmonton, the hearings were conducted from small, windowless offices, one set up for video bail, the other for tele-bail. Even in the tele-bail hearing, the JP was gowned. For the video bail, the JP faced a video screen and unobtrusive camera. The tele-bail hearing was conducted by speakerphone.

All three proceedings followed a standard format: the JP began with a self-introduction and by getting the names of the accused and the officer on the record. The JP then spoke with the accused to determine whether the person understood the nature of the proceedings. Over the following 20 to 30 minutes, the JP heard the officer describe the alleged offence, the circumstances of the arrest, and the accused's criminal history, and questioned both the officer and the accused. The JP also heard the officer state the "Crown's" position with respect to release or detention.

At the end of the process, the JPs rendered their decisions. In all three cases, the accused was ordered released.

3.8 Regional Exceptions

In most of the province, an accused or Crown at first appearance can ask that the matter be adjourned into Provincial Court, where a judge will preside. That option does not exist in three judicial districts: Grande Prairie, Peace River and Red Deer. In those districts, all contested bail hearings are directed to the Hearing Offices. Provincial Court judges in Grande Prairie and Peace River do not preside at contested bail hearings. They are concerned that presiding at the bail stage might force their recusal at a subsequent trial, a potential problem in a region with relatively few judges.

In Grande Prairie, local prosecutors address these subsequent Hearing Office bail hearings during two scheduled periods of two hours each per week at the Calgary Hearing Office. These periods are treated much like a regular sitting courtroom and bail hearings can be scheduled from docket court into sittings.

This system is not perfect – accused persons may have to wait several days for a bail hearing; there is often a great deal of waiting (beyond the 2-hour window) for all parties to be ready and available to address the hearing; the hearing is held over the phone, meaning the JP does not have the advantage of seeing the accused; the hearings are held far outside of the jurisdiction, making it difficult for parties interested in the proceedings to attend; and Legal Aid duty counsel are not always available to assist the accused.

Red Deer adopted this process in September 2015. As in Grande Prairie, the hearings frequently take a great deal of time to organize between all parties. However, the down time permits more extensive preparation, particularly for prosecutors waiting in their offices, with access to JOIN, PRISM, electronic disclosure files and the ability to e-mail other Crown offices to obtain more information.[92] Defence counsel working in Red Deer said there is a convenience to the tele-bail process: it allows them to conduct other business while waiting for the phone call from the Hearing Office. The process is operating in Red Deer on a pilot basis, and the project should be allowed to run its course, given the pressures on the court in that city.

In Peace River, contested bail hearings have not been heard in provincial court since approximately 1990. If an accused does not apply for release at first appearance, the matter is adjourned to a local docket court, where the Crown may consent to the accused's release before the Provincial Court judge. However, if the Crown is opposed to release and the accused wishes to apply for bail, the accused (or counsel) must fax the required paperwork to the Hearing Office (including the "request for service" form that all police agencies use when seeking a bail hearing). The hearing is then coordinated through the arresting police agency, not the Crown's office.

The Review was told by the Chief Regional ACPS Crown in Peace River that a self-represented accused in custody might find it "a practical impossibility" to arrange their own bail hearing in this manner.

> *They would have to have access to a Request for Justice of the [Peace] Services form and be able to contact the police. I very much doubt that any appreciable number of unrepresented prisoners would have the knowledge to do this, let alone the means.*

What usually happens, said the Chief Regional Crown, is that the accused remains in detention until a s. 525 review is triggered in the Court of Queen's Bench—which occurs after 90 days. The Review finds it disturbing that an unrepresented accused seeking release from detention would be put in such a position.

Recommendations

The Hearing Offices have come to play a large and vital role in Alberta's bail system and the criminal justice system more broadly. Although stakeholders and the Review have identified significant deficiencies in their current operation, the Review is confident that most of the deficiencies can be addressed. The Review does not believe a compelling argument exists to eliminate the model, especially given the costs and disruption that such a move would entail. At the same time, however, the Review would not favour a significant expansion of the Hearing Office role in the bail system before the current deficiencies are addressed.

RECOMMENDATION 10: The Review recommends that resource and management issues relating to wait times at the Hearing Offices be addressed as soon as possible.

RECOMMENDATION 11: The Review recommends the use of tele-bail in Alberta be eliminated as soon as practicable.

RECOMMENDATION 12: The Review recommends that Legal Aid duty counsel be made available at Hearing Office bail hearings in conjunction with greater Crown involvement.

[92] See Appendix E for further information about JOIN and PRISM.

RECOMMENDATION 13: The Review recommends that Legal Aid Alberta be provided with the additional funding required to properly discharge this added responsibility.

RECOMMENDATION 14: The Review recommends that more light be shed on the bail-hearing functions of the Hearing Offices, and that those hearings be reasonably accessible to the public.

RECOMMENDATION 15: The Review recommends a way be found to ensure that all contested bail hearings after first appearance in the Grande Prairie and Peace River districts be heard by a Provincial Court judge.

RECOMMENDATION 16: The Review recommends that the Red Deer pilot project continue and the results of the project be made public, while respecting the principles of judicial independence.

b. How best to utilize section 524 of the *Criminal Code*

Section 524 allows for the revocation of a judicial interim release order when a person on bail has, allegedly, violated the terms of release or committed an indictable offence.

If bail is revoked, the release order is cancelled and an order of detention is made. The detained person is then in a reverse onus situation and must justify why he or she ought to be released again.

If the accused *is* released, he or she will be subject to a single, new release order regardless of the number of orders the accused was originally subject to. In this way, revocation proceedings can be advantageous to the accused. This is preferable to having to carry and comply with several orders, containing multiple, and possibly conflicting, conditions – a scenario that may set the accused up for further breaches due to confusion or misunderstanding. Multiple orders can also create difficulties for police, the Crown, and probation services and create administrative problems.

Calgary South Probation Office - Snap Shot of Bail Recognizance Conditions December 2015

CONDITION	No.	%	CONDITION	No.	%
Reporting	458	100	Education/Employment	53	12
Residence Condition	367	80	Counselling	44	10
Notify PO of any changes	272	59	Sign releases/waivers	43	9
No contact	270	59	Provide proof of completion	40	9
Weapons prohibition	262	57	Restricted access to children	28	6
Abstain drugs and alcohol	230	50	Not to be at/near playground	25	5
Unique conditions	227	50	Not to possess cell phone/pager	24	5
Carry copy of Orders	208	45	Abstain drugs	13	3
Curfew restrictions	164	36	Driving prohibition	10	2
Not to be near specific area	155	34	Gambling prohibition	10	2
Remain within jurisdiction	154	34	Assessment	4	1
Answer surveillance calls	136	30	Not to associate	4	1
Not to enter bar/liquor store	134	29	Abide by rules of facility	3	1
Keep the peace	126	28	Not to possess pornography	3	1
Maintain a land line	95	21	Abstain alcohol	2	0
Not to be in vehicle w/o owner	65	14	Attend AA/NA	2	0
Appear in court when required	54	12	Take medication	2	0

The above figures were provided to the Review by the Calgary South Office of Alberta probation services.[93] On the day in December 2015 when the statistics were compiled, the office had a caseload of 458 people who had been released on bail (by either a JP or a judge) with an order to report to probation services.[94] Those 458 people were living with an aggregate total of just under 3,700 conditions, or an average of about eight each. The breach of a bail condition is a criminal offence.

1. The Bail Revocation Process

Crown prosecutors have discretion to seek bail revocation under s. 524 of the *Criminal Code*. Justices of the peace and Provincial Court judges have jurisdiction to hear a bail revocation application under s. 524(8).[95]

The revocation process has two steps. If the judicial officer hearing the application makes a finding that the accused has breached (or was about to breach) a release order[96], or has reasonable grounds to believe that the accused has committed an indictable offence, the officer must cancel the form of release and order the accused detained in custody.[97] As noted above, the onus then falls on the accused to justify why he or she ought to be released on bail again.

If the judicial officer does *not* find that a breach occurred (or was about to occur) or that an indictable offence was committed, the original order remains in force and the accused must be released.

1.1 When the accused is arrested on new charges

When an accused on bail is arrested on new indictable offence charges, it makes sense for the Crown to address the issue of bail revocation at the first appearance on the new charges. The two matters may be heard together in a consolidated hearing or separately in two consecutive hearings. It is also a more efficient use of judicial resources to have the matters heard at the same time before the same judicial officer.

As Justice Trotter has observed: "[i]t is likely fairer to the accused person, and justice is better served" if a single judicial officer addresses "the accused's overall release status, thereby avoiding the possibility of inconsistent findings."[98]

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[93] One "condition" was omitted for layout convenience: a single restriction on travel.
[94] Calgary has two other probation service offices. When these figures were compiled, the Calgary North Office had a caseload of 539 and the Calgary Core Office a caseload of 285.

[95] If an accused was previously released by a judge of the Court of Queen's Bench for a s. 469 offence, the JP or PCJ must order that the accused be taken before a Queen's Bench judge for a revocation hearing.
[96] A summons, appearance notice, promise to appear, undertaking or recognizance.
[97] Section 524(8) is mandatory in this regard. See *R. v. Fisher*, 2013 MBQB 40 (CanLII) at para. 26 http://www.canlii.org/en/mb/mbqb/doc/2013/2013mbqb40/2013mbqb40.html?autocompleteStr=R.%20v.%20Fisher%2C%202013%20MBQB%2040%20&autocompletePos=1 ; *R v. Rhodes*, 2013 MBQB 248 (CanLII) at para. 42. http://www.canlii.org/en/mb/mbqb/doc/2013/2013mbqb248/2013mbqb248.html?autocompleteStr=R%20v.%20Rhodes%2C%202013%20MBQB%20248%20&autocompletePos=1

[98] Trotter, *Law of Bail in Canada*, loose leaf, 3d ed., (Toronto: Thomson Reuter Canada Limited, 2010), s. 11(4)(e).

1.2 The use of s. 524 in Alberta

The Review asked for statistics on the use of s. 524 in Alberta, but was informed that no numbers are available—the use of the section is simply not tracked.

However, ACPS prosecutors in Calgary said bail revocation applications are "very standard" in the case of young persons.[99] There is a recognition that many young people in conflict with the law have cognitive disabilities and find it difficult to handle multiple release orders and conditions. Where the Crown is consenting to a young person's release on new charges, it is standard practice to seek revocation of any outstanding orders.

That does not seem to be the practice when the accused is an adult. Probation officers told the Review that many accused have multiple release orders, all of which have to be compared and recorded and, usually, carried at all times by the accused (a common condition in release orders). The limited use of s. 524 is also suggested by the criminal record of Shawn Rehn. His record included 12 convictions for non-compliance/breach offences but "only one apparent use" of s. 524 to revoke his bail (see Rehn Report p. 11).

There was an opportunity at Rehn's last bail hearing to make a revocation application: he was charged with an offence of failing to comply with the conditions of a recognizance under s.145(3) of the *Criminal Code*. No application was made. He was released on consent.

Not every breach necessitates invoking s. 524, such as a minor breach involving conduct that is not, in and of itself, criminal behaviour. The Crown should exercise its discretion in this regard in the same manner that applies in making a decision to prosecute an offence.

1.3 Why s. 524 is not used more frequently

As mentioned above, the most opportune time to address bail revocation is at a first appearance bail hearing relating to a new offence. In Alberta, of course, those hearings usually involve police presenters. Police consulted by the Review said officers almost never apply for bail revocation.

The Review heard that some police presenters are not familiar with s. 524 (an officer in charge at one RCMP detachment said "Tell me what that is," when asked about revocation); some do not know what documentation is required to support a revocation application or have trouble getting the documents in time for the hearing (see below); some assume that revocation will be sought at a later time by a Crown prosecutor; some have been told by JPs that they don't hear s. 524 applications, so they don't bother asking.

If the accused is released on new indictable-offence charges at first appearance, prosecutors say it is difficult to pursue revocation at a later date. The process would involve obtaining a warrant under s. 524(1) for the accused's arrest and arranging to have the accused and all existing charges brought back before the court—a relatively cumbersome and inefficient process.[100]

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[99] Defined in s. 2 of the *Youth Criminal Justice Act* as a person who is or appears to be 12 years old or older but less than 18.

[100] The Review was informed by the ACPS that this is not a common practice.

According to the ACPS, the Provincial Bench is extremely reluctant to consider such an application, given that the accused has previously been released on all charges by (an)other judicial officer(s). One provincial prosecutor said she recently tried that approach and was told by the presiding Provincial Court judge: "I am not comfortable with this procedure." The application was denied. This means that if an accused is released at the police bail stage, revocation of any previous release orders is unlikely to occur.

A police presenter can request an adjournment of the Hearing Office bail hearing[101] to allow the Crown to pursue revocation of an earlier release order at the next appearance which is usually in docket court before a Provincial Court judge. However, the Review was told that police rarely seek adjournments for *any* reason, in part because they have come to expect JPs to refuse those requests. When adjournments occur at the request of the accused, this creates an opportunity for the Crown to apply for revocation at the subsequent bail hearing, which they attempt to do, at least on occasion.

At this point, prosecutors can encounter one of the hurdles identified by police presenters: timely access to the requisite court records. Documents relating to the accused's outstanding charges and release conditions must be brought into docket court to give the presiding judge jurisdiction to hear a s. 524 application.

1.4 Access to and transfer of documents

It is up to the Crown to arrange for the transfer of court documents from one courthouse to another within the two or three days that are usually available before the next court appearance.[102] However, the Review was told by prosecutors that court staff are reluctant or unable to arrange the transfer within that time-frame.

The problem is due in large part to the fact that Alberta courts are still operating in a paper environment. It is a "huge problem," according to the Acting Assistant Deputy Minister of Resolution and Court Services. She told the Review that her division wants to move to an electronic management system, but has struggled to get the necessary resources. When she spoke with the Review in December 2015, she was developing a business case and said the conversion is likely years away.

In the meantime, the most efficient means of transferring court documents electronically appears to be by faxing or emailing scanned copies.

However, the Review was also informed by prosecutors that some Provincial Court judges insist on having the *original* court documents in front of them before they will hear an application to revoke bail. That can be especially difficult, if not impossible, to arrange so quickly if the outstanding files are held in a different jurisdiction.

The transfer of documents in the context of s. 524 revocation hearings was also identified as a "significant issue" by Ontario's Bail Experts Table. The committee expressed the view that "original documents are not required to conduct bail hearings, and that electronically transmitted documents are acceptable."[103] It recommended using electronically transmitted information wherever feasible for the purposes of the bail

[101] In relation to a new indictable offence or offences.
[102] Including the Hearing Offices.
[103] See Recommendation 12.
http://www.attorneygeneral.jus.gov.on.ca/english/jot/bail_experts_table_recommendations.pdf

process. It also urged justice participants to work together to identify and implement an appropriate, secure electronic means of transmitting documentation. The Alberta Bail Review endorses that view.

According to Associate Chief Judge of the Ontario Court of Justice, Peter DeFreitas, JPs throughout Ontario now routinely accept and act on faxed/scanned copies of paperwork for the purposes of s. 524 applications. Judge DeFreitas told the Review that the practice is subject to the consent of the parties and the JP's willingness to accept that consent. However, the cooperation of justice system participants in finding a reasonable solution appears to be working well in Ontario.

There is also case law supporting the view that original court documents are not required for the purpose of a bail revocation hearing under s. 524. See *R. v. Martel*,1982 Carswell NWT 29 and *R. v. Rhodes*, 2013 MBQB 248.

The Review also notes the following commentary by Justice Trotter:

> *While it might be unreasonable for a judge or justice acting under this section to expect that the original form of release be available, facsimile copies are probably accessible in most locations. Short of this, viva voce evidence from a police officer could establish, perhaps on reasonable and probable grounds, the existence and content of the prior release order. This would be permissible as s. 524(12) incorporates s. 518 into this process.*[104]

Crowns can also have trouble obtaining information necessary for bail revocations from prosecution files in other regional offices. Not all ACPS locations have access to PRISM[105] or maintain electronic disclosure files[106] or currently use CREF, a web-based Criminal E-file disclosure management system.

PPSC prosecutors have even more limited access to prosecution files on outstanding charges that may be required for bail revocation. While all in-house prosecutors gained access to PRISM in 2015, they cannot access electronic bail packages through this system. Also, the PPSC uses agents[107] to represent the federal Crown in regional docket courts. These agents cannot access PRISM. Nor do they have direct access to in-house electronic disclosure files of the PPSC.[108] As a result, information required by agents for bail revocation is provided on an *ad hoc* basis.

1.5 No Provincial Court venue for s. 524 revocation in some regions

Provincial prosecutors informed the Review that revocation is a serious problem for the Crown in Peace River and Grande Prairie judicial districts. It may be a potential problem in Red Deer, too. As mentioned earlier in this report, Provincial Court judges do not hear contested bail hearings in Peace River and

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[104] *Law of Bail in Canada*, loose leaf, 3d ed., (Toronto: Thomson Reuter Canada Limited, 2010), s. 11.4(c), footnote 39.

[105] PRISM is the "Prosecutor's Information System Manager" program that provides access through a hyperlink to electronic disclosure files maintained on a web-based Criminal E-file (CREF) disclosure management system. Currently only 10 ACPS offices can access PRISM. The ACPS informed the Review that ultimately all ACPS offices will use PRISM and CREF or some other form of electronic disclosure management.

106 Some ACPS offices still receive paper disclosure from police services. Other offices have developed their own electronic disclosure systems in conjunction with their local police services. The ACPS informed the Review that ultimately all ACPS offices will use PRISM and CREF or some other form of electronic disclosure management.

107 Agents are lawyers appointed to act as federal prosecutors under s. 7(2) of the *Director of Public Prosecutions Act.*

108 Agents must request and receive such information via fax or email.

Grande Prairie to avoid having to disqualify themselves from hearing the same matters at trial. As a result, all first appearance and contested bail hearings in these regions are conducted by JPs in the Hearing Offices.

In Peace River, the police conduct all first appearance and contested bail hearings through the Hearing Office. As noted earlier, the police are not making bail revocation applications. The Chief ACPS Prosecutor in Peace River said that revocations are very rarely done in the region. He could think of only a few in the last 25 years.

In Grande Prairie, police conduct first appearance bail hearings, and Crowns conduct all subsequent bail hearings, through the Calgary Hearing Office. The Review was informed that local ACPS prosecutors have tried to bring bail revocation applications before JPs. However, with one exception, all such attempts have been refused. The Review was told that the reason for refusal given by the JPs is that "they don't hear s. 524 applications." This, coupled with the fact that local Provincial Court judges will not preside at contested bail hearings, means that there is no apparent venue for bail revocation in this jurisdiction. As one prosecutor put it: "This is effectively removing s. 524 from the Crown's toolbox in these areas." The Review concludes that the administration of justice, in so far as the adjudication of bail revocation matters is concerned, is not functioning well in this part of the province.

In September 2015, the Provincial Court in Red Deer followed the Grande Prairie model of moving bail hearings out of the courtroom and into the Calgary Hearing Office. The Review was informed that the Red Deer ACPS office had not yet made a revocation application under the new protocol. Given the information provided by the ACPS that Calgary JPs refuse to hear s. 524 applications, it is reasonable to conclude that Red Deer prosecutors will have no venue for bail revocation applications either.

RECOMMENDATION 17: Prosecutors should always *consider* seeking bail revocation, as a matter of course, when an accused on bail allegedly commits indictable offences or fails to comply with a release order.

RECOMMENDATION 18: The government of Alberta should facilitate the development of an e-court documentation management system as soon as possible.

RECOMMENDATION 19: The Review recommends using electronically transmitted information wherever feasible for the purposes of the bail process.

RECOMMENDATION 20: The Review recommends that the ACPS and the PPSC develop Practice Directives to guide prosecutors on how best to address s. 524 bail revocation applications when the outstanding charges (and release orders) are in another jurisdiction.

RECOMMENDATION 21: The Review recommends that the ACPS and the PPSC receive enhanced training on the revocation procedure set out in s. 524 of the Criminal Code.

RECOMMENDATION 22: The Review recommends that the ACPS extend the availability of PRISM and CREF to all of its offices. The Review encourages the PPSC to enhance the access of in-house prosecutors and agents to the documentation required for s. 524 revocation applications.

RECOMMENDATION 23: The Review recommends that the Chief Judge of the Provincial Court clarify the role of the Hearing Offices with respect to s. 524 revocation applications.

RECOMMENDATION 24: That the Resolution and Court Administration Services Division of Alberta Justice and Solicitor General work with the Provincial Court to find a solution to the "no venue" for bail revocation problem in the Peace River, Grande Prairie and Red Deer regions as soon as possible.

c. What information should be provided in bail packages prepared by policing agencies, and how best to ensure the information's accuracy and availability?

Before addressing the specific question in this term of reference, the Review considers it important to highlight three other issues:

- some police presenters do not understand how bail packages are used by JPs;
- JPs receive the packages before the hearing and might read information that is not entered into evidence;
- the accused does not receive disclosure of the bail package.

The latter two raise serious concerns about procedural fairness.

1. How bail packages are used

Police (and Crowns in the Grande Prairie and Red Deer regions) send bail packages to the Hearing Offices along with their "request for service" form.

The Review understands that the content of these bail packages may differ depending on the police service involved and the nature of the alleged offence(s). According to the Society of Justices of the Peace in Alberta,

> *[T]hey vary from containing an Information, criminal record, prior release documents and probation orders to including prosecutor information sheets, domestic violence forms and a full position of the police on why bail should be denied.*

The Director of Provincial Court Administration said some JPs require more information than others. For example, she said, some prefer the package to include an accused's criminal record while others do not want to see the criminal record in advance of the hearing; it depends on the preference of the individual JPs.

The JPs' Society said many police presenters do not understand how information in the bail packages is used by JPs.

> *They [the police] do not understand that a 'bail package' is for the presenter to use not for the Justice of the Peace who normally will use only those portions referred to during the hearing. This is necessary in the interests of time when the accused has a 10-page criminal record but many think a Justice of the Peace reads the bail package and uses it whether or not the presenting officer has said it on the record. This is apparent when a Justice of the Peace asks if the officer is alleging a criminal record and the officer replies 'it's in the package.'*

The Calgary Police Service said its members are aware of how to properly enter information into the evidentiary record. It has an expression: "If you don't say it, it didn't happen."

The criminal record is especially important. If it isn't read into the record, it should be filed as an exhibit. However, one JP told the Review that s/he has never been asked by a police presenter to enter a criminal record into evidence.

The Review also learned that the Hearing Office administration treats these bail packages as "transitory documents." They are not placed on the court file when the hearing concludes. The Review was told they are retained for a period of three months and then shredded.

1.1 JP's advance receipt of bail packages

While the rules of evidence are more relaxed at bail hearings than at trial, the fact that JPs are routinely provided with information about the accused *before the information is part of the evidentiary record* of the bail hearing, is troubling. The JP might read information that will *not become* part of the record. As the JPs' Society noted immediately above, JPs "normally will use only those portions referred to during the hearing" (emphasis added). A judge[109] sitting on review would have no knowledge of the fact that the JP's decision might have been based on information that is not mentioned in the transcript of the hearing. The accused would be in the same position.

Providing a JP with information prior to a bail hearing that is not made part of the court record does not accord with s. 518 of the *Criminal Code*. It may also infringe an accused's right to a fair hearing under s. 11(d) of the *Charter*, depending on the facts of a case.[110]

1.2 Lack of Disclosure

Hearing Office bail hearings usually involve just three participants: the police presenter, the JP and the accused.[111] Two have copies of the bail package: the police officer and the JP. The accused does not. This is fundamentally unfair.

Lack of disclosure at Hearing Office bail hearings was a recurring theme in consultations with members of the defence bar, Native Counselling Services and others. Some presenting officers readily acknowledged that they do not provide disclosure to unrepresented accused or defence counsel. They feel quite strongly that this obligation rests with the Crown, not police. That opinion has been expressed by the Canadian Association of Chiefs of Police:

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[109] Of the Court of Queen's Bench.

[110] One way to address these concerns, would be to recommend that the bail presenter not send copies of criminal records to the Hearing Office in advance of bail hearings. This would require the bail presenter to "read into the record" the criminal record (or the part that the presenter is relying on). If the criminal record is lengthy, the hearing process could take longer to complete than at present. Another option is to send a copy of the criminal record to the Hearing Office, but the JP would examine the criminal record only during the hearing if and when the presenter refers to it. The presenter would ask that it be filed as an exhibit to form part of the evidentiary record. The Review favours the second option.

[111] As noted above, Legal Aid does not provide duty counsel for Hearing Office bail hearings. Edmonton Police Service estimates that only 7-10% of accused are represented by counsel.

The C.A.C.P. feels it is fundamentally inappropriate for the police to be providing disclosure to the defence or participating directly in associated discussions and negotiations with defence counsel.[112]

While the police have a corollary duty to provide the Crown with information required for disclosure purposes, the obligation to provide disclosure to the defence (and unrepresented accused) rests with the Crown. Prosecutors should perform this role at the bail stage, not the police.

2. Information that should be provided in bail packages prepared by police agencies

The Review is of the opinion that the following information will be sufficient for the purpose of a bail hearing in most instances.[113]

RECOMMENDATION 25: Before a bail hearing, the police should provide Crown counsel with the following information, at a minimum:

- A copy of the Information setting out the criminal charges;
- An accurate synopsis of the allegations/circumstances of the offences;
- An up-to-date criminal record, including both a CPIC print out and JOIN sheet;
- Information on outstanding charges and copies of forms of release on those charges;
- Details of the accused's personal circumstances, e.g., residence, employment, ties to the community, etc.;
- If police are recommending unusual or restrictive terms of release, or that bail be denied, the factual basis for their justification should also be included.

3. Information accuracy and availability

When attention turned to this issue, most stakeholders had one immediate comment: fix CPIC.

CPIC (Canadian Police Information Centre) is administered by the National Police Service (NPS) at RCMP Headquarters in Ottawa.[114] It is Canada's only national criminal-record database, containing information submitted by law enforcement agencies across the country. CPIC is supposed to provide those agencies with fast and easy access to a person's complete criminal record, wherever in the country the crimes occurred.

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[112] See: *The Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System.* (2006) http://www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/ecc-epd/toc-tdm.html

[113] Depending on the nature of the charges, additional information may be required, e.g., in domestic violence cases or where an accused is flagged as a high risk offender.

[114] See Appendix E for more information about CPIC.

Unfortunately, much of the information in CPIC is out of date, and has been for some time.[115] The agency is currently dealing with a data-entry backlog the RCMP said could take two more years to clear.[116]

With the exception of the RCMP (through their PROS database), police in Alberta have no access to out-of-province databases. As a result, they find it difficult to get information on recent convictions and outstanding charges (including release orders) from other jurisdictions in time for a Hearing Office bail hearing. While it is possible for police to collect information from another province on a case by case basis, the Review was left with the overall impression that this information, more often than not, is missing from bail packages.

In the meantime, a number of stakeholders said the information gap at the bail stage is posing a danger to public safety. One prosecutor told the Review "it is impossible to speak meaningfully to release when CPIC is so horrendously out of date." Another said this:

> *Fix CPIC. We have no way to know what is occurring in other provinces, and CPIC is often years out of date. We also have no way to know (unless police find out for us) whether the accused is at large on any other charges in other provinces. This is a real gap, especially for jurisdictions like mine that are on provincial borders.*

A third put it this way, only slightly tongue-in-cheek,

> *Today I could travel to Nepal, go to a bank machine in Katmandu and withdraw $100.00. I could then go to my computer, sign in to my bank account (that theoretically is on a computer in Toronto) and see that not only did I withdraw the $100, but also that my wife spent … $2.24 for coffee at Tim Horton's. Two minutes later I could book tickets for a theatre in London's West End, browse a restaurant menu in Chicago, and renew my dog licence in Edmonton. All from Katmandu.*
>
> *However, in a courtroom in Edmonton, or sitting in a police detainee management unit (as a presenting officer) I cannot get a reliable criminal record on a person that I want to detain in custody. If he has never left Alberta, then I have a shot at using scotch tape and my miserable handwriting to put something together to hand to a judge.*
>
> *There needs to be something done to increase the reliability of criminal records that are being presented in court.*

Crowns are not the only ones to complain about CPIC. According to the submission from the Society of the Justices of the Peace in Alberta, some police presenters at bail hearings "will allege the CPIC record which ends in 2007 and not check the JOIN system which would show the accused had continued to commit offences up until last week."

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[115] The Auditor General of Canada recommended in 2009 and again in 2011 that the RCMP address the CPIC backlog. See: *June 2011 Status Report of the Auditor General of Canada* http://www.oag-bvg.gc.ca/internet/English/parl_oag_201106_05_e_35373.html#appa

[116] In the interim, the RCMP said the National Police Service is giving first priority to updating criminal records of prolific/high-risk and dangerous/long term offenders. Those records can be updated on request in 2 or 3 days. The RCMP also told the Review that since 2013, police services have been able to submit fingerprints and criminal record information electronically, which has stopped the data-entry backlog from growing. It said all partner agencies in Alberta now have the capacity to submit fingerprints electronically to the NPS.

3.1 JOIN checks

JOIN is an Alberta database[117] that provides the most up-to-date information on convictions and outstanding charges in the province. CPIC records can be updated with information on JOIN for bail and disposition purposes. Most police services provide bail packages to prosecutors that contain both a CPIC printout and a JOIN tracking sheet. However, as the JPs' Society pointed out, not all police officers are routinely doing JOIN checks.

Prosecutors said this is a significant problem in the RCMP's rural detachments, forcing prosecutors to update and reconcile the criminal record information by doing their own JOIN checks. In some detachments, access to JOIN may be limited to support staff who do not work evenings or on weekends. If true, this is troubling to the Review as it suggests that some police officers may be making release decisions without the most up-to-date criminal history information—information easily available on an Alberta database.

RECOMMENDATION 26: The Review recommends that (a) bail presenters discontinue sending bail packages to the Hearing Offices and send instead only the following documents in advance of a bail hearing: a request for service form; a copy of the Information; a copy of the warrant remanding the accused; and a copy of the accused's criminal record; (b) that the criminal record not be considered by the JP until it is entered as an exhibit and becomes part of the evidentiary record.

RECOMMENDATION 27: The Review recommends that Crown counsel assume responsibility for providing disclosure at Hearing Office bail hearings.

RECOMMENDATON 28: The Review recommends that police always do a JOIN check when preparing bail packages, and that Alberta Justice and Solicitor General facilitate greater police access to the database and training in its use.

RECOMMENDATION 29: The Review recommends that police and prosecution services explore opportunities to increase information-sharing between provincial jurisdictions, including information on criminal convictions, outstanding charges and release orders.[118]

d. How the PPOP and HOM programs can be utilized effectively to ensure accurate information is available during bail proceedings

The Priority Prolific Offender Program (PPOP)

This program was created in 2008 in response to a recommendation of the Crime Reduction and Safe Communities Task Force. It said targeted action should be taken to address the serious problem of repeat offenders.

[117] See Appendix E.
[118] Adapted from a recommendation made by the Ontario Bail Experts Table, *supra*.

The PPOP uses a collaborative approach to address the behaviour of prolific offenders using a combination of monitoring, enforcement and rehabilitative strategies. It operates in Edmonton, Calgary and the surrounding areas in partnership with police agencies, prosecutors, correctional services and community service providers.

A chronic offender is generally described as a person who appears repeatedly in the courts and is charged with relatively low-level, non-violent crimes. Chronic offenders are said to commit a disproportionate number of crimes. It has been estimated that 10% to 15% of offenders are responsible for approximately 50% to 60% of all offences.[119]

The PPOP monitors a group of prolific offenders, currently capped at 80 people, as they progress through the criminal justice system. While focused on enforcement to ensure that these offenders are following the conditions of their release, the program also assists offenders by linking them to appropriate support services to address matters such as substance abuse, housing needs and mental health issues.

One of the PPOP's functions is to create comprehensive bail packages on prolific offenders. These "Comprehensive Offender Management" packages can be used at the bail, trial and sentencing stages.

The Review was told that referrals of offenders to this program are limited to those made by law enforcement and "justice professionals," including defence counsel. Following a referral, the PPOP unit gathers and reviews information on the offender and decides, on the basis of detailed criteria, whether the offender is eligible for selection as a priority prolific offender. If selected, the offender's name will be added to the PPOP list and flagged on police and correctional databases, including CPIC and JOIN.

Prolific offenders may be retired from the PPOP if they have been stable and crime-free in the community for at least one year; if their risk to reoffend has dropped significantly; or if they have become permanently incapacitated. The Review was told that approximately 300 offenders have moved through the program since 2008.

The Review was provided with a post-mortem, comprehensive, offender-management package on Shawn Rehn prepared by the PPOP team. It is an impressive package of detailed information about his criminal history that would have been useful at a bail hearing. Although Rehn met the selection criteria, no law enforcement agency or other "justice professional" had referred his name to the program.

The manager of the PPOP said the program is at capacity and is not currently looking to expand. Rather than adding more people the list, the program is working to better align the support of partner agencies to assist existing PPOP offenders. She added that the PPOP will soon undergo its third formal evaluation.

The Habitual Offender Management (HOM) Program

The RCMP's Habitual Offender Management (HOM) program was established in 2013. It is designed to identify and facilitate community intervention efforts with a small number of offenders who cause a disproportionate amount of crime in their communities. It is similar in some respects to the PPOP.

[119] Government of Alberta's *White Paper on Chronic Offender Management – Aligning Systems*, prepared by Lisa Gagner, Policy and Program Development Branch, Alberta Justice and Solicitor General, August 1, 2015. Copy provided to the Review.

According to the RCMP, the HOM strategy is to offer habitual offenders participation in tailored intervention programs through partner agencies with a view to addressing the causal factors contributing to their criminal behaviour.

Another objective of the HOM program is the preparation of comprehensive bail packages for each habitual offender selected in RCMP detachment areas. The Review was told that 195 offenders are currently on the HOM list,[120] but only 16 bail packages have been prepared since 2013. Senior managers of the RCMP in "K" Division acknowledged that this program is underfunded. However, they said a crime reduction coordinator was recently hired to provide training to RCMP members on how to prepare the program's comprehensive bail packages. The Review welcomes that initiative.

The RCMP told the Review that Shawn Rehn met the HOM criteria but was not on the HOM offender list. "There are more than a thousand Rehns in our community," it said. Creating a comprehensive bail package on every one of them would present an enormous challenge.

Stakeholder Input

Few stakeholders had comments about the PPOP and HOM, reflecting what appears to be their low profile in the bail system. One police service told the Review it had no knowledge of the PPOP. Although they can be more comprehensive, the packages are not frequently seen at bail hearings because of the relatively small number of offenders in the programs, especially in relation to the tens of thousands of bail hearings that take place every year in Alberta.

The Review supports the objectives of both programs and applauds their efforts to create enhanced bail packages. However, the core purpose of both programs goes well beyond the generation of bail packages and the mandate of this review. Therefore, the Review has no recommendations regarding PPOP and HOM.

e. Coordination of bail proceedings between offices of the ACPS and with offices of the Public Prosecution Service of Canada (PPSC)

Coordination between offices of the ACPS

Earlier in this report, the Review discussed systemic problems contributing to the ineffective use of s. 524 of the *Criminal Code*. A lack of coordination between regional ACPS offices may be part of the problem.

The ACPS has no guidelines specifying which regional office is responsible for seeking bail revocation when outstanding charges (and release orders) are in another jurisdiction. The current practice is inconsistent. This may be a contributing factor to bail revocation often not being pursued by either office.

The Review's earlier recommendation that the ACPS develop practice directives to guide prosecutors on how best to address bail revocation applications in these circumstances should address this concern.

[120] HOM offenders are flagged only on CPIC and PROS.

No other coordination issues were identified by ACPS prosecutors or other stakeholders consulted by the Review.

Coordination between offices of the provincial Crown (ACPS) and the federal Crown (PPSC)

The federal and provincial prosecution services have a long-standing arrangement that deals with the prosecution of cases involving multiple offences, some of which are normally prosecuted by the federal Crown and others normally prosecuted by the provincial Crown.[121] Under this guideline (referred to by the parties as the "major/minor agreement"), the office that has conduct of the more complex prosecution—usually the more serious charges—assumes prosecution of *all* charges. The guideline is silent on which office is to conduct bail hearings. Both parties describe the current arrangement as "informal" or "ad hoc," which is far from ideal when time for discussion and decision-making is limited at the bail stage.

The Chief Federal Prosecutor in Alberta said individual prosecutors must take the initiative to notify a counterpart in the other prosecution service of issues that may arise in such cases. He said the "rule of practice" is that the agency responsible for prosecuting the more serious charges will handle the bail matters as well, provided they are being dealt with at the same time.

Sorting out who takes the lead at the bail stage also includes determining which agency will seek bail revocation with respect to outstanding charges on each other's files. For example, should each service seek revocation on their own files (requiring a prosecutor from each service to attend a single revocation hearing) or should one service assume that responsibility for all the accused's outstanding charges? The lack of easy access to each other's files adds further complication. The Review concludes these issues are best addressed in clear written guidelines.

RECOMMENDATION 30: The Review recommends that the major/minor agreement between the ACPS and PPSC be amended to specifically address the coordination of bail hearings, including revocation applications. This will provide greater clarity to prosecutors in both agencies.

The Review understands that the current major-minor agreement between the PPSC and the ACPS is under discussion and has been for some time.

"Other areas related to the conduct of bail hearings that are appropriate"

Data collection

A major challenge faced by the Review was the absence of empirical data relating to its terms of reference. For example, "Who should conduct bail hearings and in what circumstances" is a difficult question to answer with confidence without information about bail outcomes—without knowing, for example, if it makes any practical difference who presides, who presents or in what forum the hearings take place.

[121] An example is where a charge of simple possession of marihuana (normally prosecuted by PPSC) and another charge of robbery (normally prosecuted by ACPS) arise out of the same set of circumstances.

The Review had neither the time nor the resources to generate this sort of data on its own. As a result, the Review's findings and recommendations are, in many respects, based largely on the impressions and anecdotal evidence of stakeholders. The absence of empirical data means the absence of baseline information, which makes it very difficult to determine whether changes made are having a meaningful impact. The paucity of data was highlighted in the 2007 report of the Safe Communities Task Force. It recommended that "bail application results" be tracked and reported on, and be provided to the Minister of Justice for use in identifying areas where changes are needed. The importance of information was also highlighted in 2012 by The Fourth National Criminal Justice Symposium, a gathering of 75 senior members of the criminal justice system, including police, defence counsel, prosecutors, judicial officers and government officials from senior levels across the country.

Among the Symposium's calls for action was a specific reference to information and the bail system. It is adapted here as the Albert Bail Review's final recommendation.

RECOMMENDATION 31: The Review recommends that the government of Alberta improve bail-related data collection to allow a more complete understanding of the operation and outcomes of the bail process in Alberta.

Appendix A – Institutional Stakeholders

Members of the Judiciary

Chief Justice of the Court of Queen's Bench of Alberta
Chief Judge of the Provincial Court of Alberta
Deputy Chief Judge of the Provincial Court of Alberta
Society of the Justices of the Peace in Alberta

Police Services

Blood Tribe Police Service
Calgary Police Service
Camrose Police Service
Edmonton Police Service
Edmonton Police Commission
Lacombe Police Service
Lakeshore Regional Police Service
Lethbridge Regional Police Service
Medicine Hat Police Service
Taber Police Service
Tsuu T'ina Nation Police Service
RCMP K Division

Police Associations

Alberta Federation of Police Associations
Calgary Police Association
Edmonton Police Association

Prosecution Services

Assistant Deputy Minister, Alberta Crown Prosecution Service,
Chief Federal Prosecutor for Alberta, Public Prosecution Service of Canada,

Prosecution Associations

President, Alberta Crown Attorneys' Association
Association of Justice Counsel

Defence Bar Associations

Criminal Defence Lawyers Association
Criminal Trial Lawyers Association
Red Deer Defence Lawyers Association
The Canadian Bar Association – Alberta Branch (Criminal Section)

Alberta Justice and Solicitor General

Assistant Deputy Minister, Correctional Services Division
Acting Assistant Deputy Minister, Resolution and Court Administration Services Division
Director, Provincial Court Administration Services
Director, Policy and Program Development Branch
Manager, Priority Prolific Offender Program
Probation officers in Edmonton and Calgary
High Risk Offender Unit
Public Assistance Unit

Alberta Legal Aid

President and Chief Executive Officer, Alberta Legal Aid
Youth Criminal Defence Office

First Nations Organizations

Native Counselling Services of Alberta
Tsuu T'ina Community Corrections
Yellowhead Tribal Council Community Corrections

Other Organizations

Alberta Police-Based Victim Services Association
Alberta Civil Liberties Research Centre
Calgary Legal Guidance
Canadian Civil Liberties Association
Centre to End All Sexual Exploitation (CEASE)
Elizabeth Fry Society of Alberta
Elizabeth Fry Society of Calgary
Elizabeth Fry Society of Edmonton
John Howard Society of Alberta
John Howard Society (Calgary)
John Howard Society (Edmonton)
HomeFront

Appendix B – Authority of police to act at bail hearings

Bail provisions

515(1) Order of release

Subject to this section, where an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice the justice shall, unless a plea of guilty by the accused is accepted, order, in respect of that offence, that the accused be released on his giving an undertaking without conditions, **unless the prosecutor**, having been given a reasonable opportunity to do so, **shows cause**, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made and where the justice makes an order under any other provision of this section, the order shall refer only to the particular offence for which the accused was taken before the justice.

Section 2 Definitions

> "**Prosecutor**" means the Attorney General or, where the Attorney general does not intervene, means **the person** who institutes proceedings to which this Act applies, and includes counsel acting on behalf of either of them.
>
> "**Everyone**", "person" and "owner", and similar expressions, include Her Majesty and **an organization**[1]
>
> **"organization"** means
> (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
> (b) an association of persons that
> (i) is created for a common purpose,
> (ii) has an operational structure, and
> (iii) holds itself out to the public as an association of persons;
>
> **"Attorney General"**
> (a) subject to paragraphs (b.1) to (g), with respect to proceedings to which this Act applies, means the Attorney General or Solicitor General of the province in which those proceedings are taken and includes his or her **lawful deputy**[2],

[1] Note that the definition of prosecutor was amended in R.S.C. 1985, c. 27 (1st Supp.), s. 170, and for some period of time the summary conviction definition read exactly the same as the s. 2 definition. It has since reverted to distinct definitions. Certainly the specific reversion to include "agents" separately from the section 2 definition supports the statutory interpretation notes that follow.

[2] This issue of deputy has not been fully researched yet. At time of writing I am presuming that police officers are NOT generally "deputized" in the province of Alberta.

Section 785 definition (summary conviction provisions)

> **"prosecutor"** means the Attorney General or where the Attorney General does not intervene, the **informant**, and includes counsel or an **agent** acting on behalf of either of them;

Note the differences between the two classifications (i.e. prosecutor generally and prosecutor for summary conviction trials). The section 2 definition of prosecutor explicitly does not include the word agent. Further, it uses the phrase "the person who instituted the proceedings" instead of "informant." According to Ewaschuk [3];

> **33:2010 — Ejusdem generis (class words)**
>
> A court may infer, where a statute contains general words *following* an enumeration of *specific words* belonging to a *common class* or genus, that Parliament intended to *restrict* the general words to the same class or genus as the specific words. However, the court must find that specific words form a *common class* or genus for the restrictive inference to apply.
>
> *Stouffville (Assessment Commissioner) v. Mennonite Home Assn. of York County*, [1973] S.C.R. 189, 31 D.L.R. (3d) 237
>
> A corollary to the above rule would appear to be the inclusion of particular language in one section of a statute but its omission in another section of the same statute. In such a case, it is generally *presumed* that the legislature acted intentionally and purposely in the "disparate inclusion and exclusion".
>
> *Duncan v. Walker*, 533 U.S. 1 (2001)

Also;

> **33:2047 — Means vs. includes**
>
> The term "means" in a definition provision signifies, as a general rule, that the provision is an exhaustive definition of the term defined.
>
> *Yellow Cab Ltd. v. Board of Industrial Relations*,[1980] 2 S.C.R. 761, 114 D.L.R. (3d) 427, 24 A.R. 275, 14 Alta. L.R. (2d) 39, 80 C.L.L.C. ¶14, 066

Relying on these principles of interpretation, the exclusion of "agent" from the section 2 while included in section 785 definitions means it is **excluded** from the section 2 definition. Further, the list of bodies that may act as "prosecutor" is exhaustive under section two. Presuming that the police officer in question is

[3] Ewaschuk Crim. **Criminal Pleadings and Practice in Canada** Part XIV ; Chapter 33, Statutory Interpretation.

not counsel, they must then must fall under the definition of "**the person** who institutes proceedings to which this Act applies", and the word "person" must be interpreted to include the police agency as "an organization" for the definition of prosecutor in section 2 to apply to police officers acting as prosecutors at bail hearings. This, of course, becomes complicated as one considers whether or not a specific officer can then act as that organization when institute the proceedings and whether or not another specific officer can act as that organization to act as prosecutor.

The further complication is the difference between the use of the word "informant" and "the person who institutes the proceedings." It would be clearly an error to interpret the latter phrase (from section 2) to mean, in fact, the officer who acted as the informant for the charges before the court. The principles of interpretation exclude its use under section 2. The phrase most likely (and sensibly) refers to private prosecutions.

Caselaw

It is settled that the definition of prosecutor in section 2 applies in all circumstances unless the charges before the court are being prosecuted summarily. This includes the election stage – that is, a section 785 "prosecutor" cannot make the required election to summary conviction proceedings if they do not meet the section 2 definition. Given the likely fact that most bail hearings will be for indictable or hybrid charges – which are deemed indictable until an election has been made – anyone appearing as a prosecutor for a s. 515 proceedings for hybrid or indictable matters prior to election **must** meet the section 2 definition. (The section 785 definition would apply for summary conviction matters, including provincial offences and by-laws. For the purposes of the following analysis, hybrid and indictable matters are the focus.)

While many cases that consider the definition of prosecutor and police officers, there is no in-depth judicial assessment of the various relevant words in the definition. Ultimately the cases conclude (in a shallow way) that police officers in general do NOT meet the definition of prosecutor. The implicit exception the cases make is for the actual informant for summary conviction matters.

R. v. Bradley (1975), 24 C.C.C. (2d) 482

If the definition of "prosecutor" in s. 2 applied, the question would not be open to doubt; that definition expressly refers to **intervention by the Attorney General**. Where Pt. XXIV has a definition, to be used "in this Part", of the same word for which a differently worded definition is found in s. 2, the definition in Pt. XXIV governs all uses of the word in that part. The definition in s. 2 applies everywhere else in the *Code*. The only word defined in both places is "prosecutor".

R. v. Edmunds [1981] 1 S.C.R. 233

The accused, charged with breaking and entering and committing (an indictable offence) elected trial by "magistrate without a jury". At the conclusion of the case for the Crown, defence counsel moved to have

the case dismissed, on the ground that the prosecutor, an R.C.M.P. officer, was not a proper representative of the Crown. The motion was dismissed, the accused was convicted and his conviction was upheld by a majority of the Newfoundland Court of Appeal. He further appealed to the Supreme Court of Canada. The focus of the argument was whether or not the proceedings before a magistrate's court made the summary conviction sections (and thus, the 785 definition, which was the same as it is now) applicable. From the dissent:

> 13 I share the view expressed by Morgan J.A. that the applicable definition of "prosecutor", as found in the Code, depends not upon the nature of the charge but on the nature of the proceedings, and it follows that, although the charge in the present case involves the commission of an indictable offence, the fact that the evidence was presented as part of the proceedings in a summary conviction court carries with it the meaning of "prosecutor" as defined in the summary conviction provisions of the Criminal Code (Pt. XXIV).

However, from the majority decision:

> **20 It was agreed that the police officer conducting the proceedings in the case at bar did not come within the definition of s. 2 of the Code. By reason of the inclusion in the definition in s. 720(1) of the word "agents", he did qualify under that section. The question to be decided, then, is whether or not the definition in Pt. XXIV of the Code can be applied to the police officer who conducted the prosecution of this case.**

While it was agreed between counsel and not argued, the SCC implicitly accepted that the section 2 definition of prosecutor does **not** include police officers, and then turned their attention to the application of the summary conviction sections to indictable offences where a lower court election was made. (The SCC found that the police officer could not properly act as a prosecutor for an indictable matter and ordered a new trial. However, as indicated above, no actual analysis of whether or not section 2 might be applied.)

R. v. O'Dea [1977] CarswellNfld 1, 2 C.R. (3d) 15 (Nfld. Prov. Ct.)

The issue arose at the accused's first appearance on strictly indictable matters that an RCMP officer was appearing for the Crown. Objection was made by defence counsel. The court found that the differences between the two definitions of prosecutor in the Criminal Code was crucial.

> 21 It is to be noted that the definition of prosecutor for summary conviction offences is much broader and means "an informant or the Attorney General or their respective

> Counsel or agents"; (Criminal Code, s. 720). For indictable offences the term "agent" is not present. On that basis it is reasonable to conclude that whereas non-counsel may appear for the Crown on summary conviction offences, only the Attorney General or Counsel may appear on indictable matters.
>
> 24 The Criminal Code has defined prosecutor and sets out what the prosecutor may do in several instances some of which are following:
>
> 1. judicial interim release, s. 457.1, s. 457.3, etc.
>
> 2. remands for psychiatric examination, s. 465
>
> 3. preliminary enquiries, s. 470
>
> 4. trials of indictable offences before a Magistrate, s. 487
>
> 25 In all the above sections the Code employs the term "prosecutor" which has been defined in s.2 of the Code.

The court found that the definition under section 2 did not include the police officer.

> 36 While strictly speaking Corporal McDonald had no rightful status as a prosecutor on an indictable offence, the Magistrate has a pre-existing discretionary power to allow a person other than as specified in the Code or Law Society Act to appear before him. (*O'Toole vs Scott and Another*, [1965] 2 All E.R. 240 (P.C.), *Bayne v. The Queen* (1971) 14 C.R.N.S. 130 (Alta. S.C.)).
>
> 37 In particular I refer to a decision quoted in the *O'Toole* case, *Collier vs Hicks* (1831), 2B & AD. 663 wherein it was stated by Lord Tenterden C.J. at p. 668
>
> > but whether any persons, and who shall be allowed to take part in the proceedings, must depend on the discretion of the Magistrates; who, like other Judges, must have the power to regulate the proceedings of their own Courts.

It is interesting to note that the court then exercised this jurisdiction and found that the officer would continue to be allowed to appear as prosecutor.

R. v. Castonguay (1994) CarswellBC 2841 (prov ct)

This case focuses on the authority to release and the definitions of the provincial Offence Act. However the court makes this comment:

> 19 I hold that the provisions of Section 515 of the *Criminal Code* apply to fill the lacuna in the *Offence Act* where a person has been brought before a justice pursuant to a warrant for his arrest.
>
> 515(1)
>
> Subject to this section, where an accused who is charged with an offence ... is taken before a justice, the justice shall, unless a plea of guilty is accepted, order, in respect of that offence, that the accused be released on his giving an undertaking without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified ... [my emphasis].
>
> [The definition of a prosecutor in S. 2 of the Code is such as to **exclude** the arresting officer unless she or he happens to be the person who swore the information].

R. v. C. (N.) 1997 CarswellOnt 2882, 35 W.C.B. (2d) 344 (provincial court)

The accused was charged with a hybrid offence. At the time a student-at-law purported to represent the Crown, an election had not been made. Since the proceedings were indictable prior to the Crown election, a student-at-law could not make the election on behalf of the Crown. The student-at-law was not entitled to act as prosecutor. It was contrary to the proper administration of justice for a Crown Attorney to delegate to a non-lawyer the prosecution of criminal code offences, in which the liberty of the accused was at stake.

The court compared the two different definitions of prosecutor. The court took careful note that at the time the student appeared elections had not been made. The charge was a theft under and thus, prior to elections, deemed to be indictable. As such the definition of prosecutor that allowed for agents to appear in the summary conviction section of the code did **not** apply and the student did not meet the definition under section 2.

Conclusions

The case law is very clear on a particular point: the s. 785 definition of prosecutor cannot apply to any matter unless it is a strictly summary conviction offence or until the charge is formally elected so by a prosecutor (using the section 2 definition). Given that the gross majority of police bail hearings in Alberta occur at the first appearance – that is, before any elections have been made – most hearings occurring with police appearing are deemed indictable and only the section 2 definition can be relied upon.

The cases that consider the section 2 definition of prosecutor and applying it to police officers unfortunately do not engage an in-depth analysis of the definition. There appears to be a casual presumption that police are excluded from that definition. However that particular conclusion is very common, and uncontradicted in all cases.

Presuming that police generally are not deputies of the Attorney General of Alberta (see footnote above), and the presenting officers are not counsel, they must fall under the portion of the definition "**the person** who institutes proceedings". It might be arguable that the informant would qualify as "prosecutor" (despite the difference in section 785 that specifically uses the term "informant") but do police officers generally meet the definition? The current practice is that virtually any officer might appear as prosecutor at a bail hearing, and certainly it would be extremely complicated for police to continue acting as prosecutors but only allowing individual informants to appear.

To address the issue generally, considering the following:

> Person can mean "organization";
> A police agency meets the definition of "organization";
> Thus, it might be arguable that the policy agency itself "instituted the proceedings" and is then also a prosecutor.

Even if this is considered, the issue then becomes "can an individual who is employed by the agency then act on behalf of the agency using that blanket authority?" In truth, the reverse would also have to be true; that is, the informant who swears the information would have to be acting as "the organization" as well, and then by perverse reasoning find that both the informant and the presenting officer are indivisible from the organization and then qualify as prosecutors.

According to the case law and the Criminal Code police officers (other than the actual informant, which is arguable) do not meet the definition of s. 2 of the Criminal Code and thus do not have standing to appear at most bail hearings in Alberta.

Appendix C – EPS – Police acting as Prosecutors in Bail Hearings in Alberta

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LEGAL OPINION:

ANALYSIS OF THE LEGAL BASIS FOR THE MEMBERS OF THE EPS APPEARING AS PROSECUTORS FOR THE PURPOSES OF INTERIM JUDICIAL RELEASE, AKA 'BAIL HEARINGS'.

Prepared/Submitted February 1, 2016
for**:**

Geoff Crowe
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ISSUE: This legal opinion addresses the question of whether the *Criminal Code* authorizes police officers to handle matters relating to Judicial Interim Release, or more informally, 'bail.' The specific issues of whether they may be considered "prosecutors" by virtue of falling under the category of *persons instituting proceedings* under section 2 of the *Code,* or alternatively, whether they may act as prosecutors by acting as *lawful deputies* of the Attorney General, are addressed.

SYNOPSIS:

There are two questions that arise when considering police officers acting as prosecutors for the purposes of Judicial Interim Release. First, is this authorized under the *Criminal Code*, RSC 1985, c C-46 (the "Code"), and any relevant provincial legislation, as informed by the case law? And, second, is it appropriate, given the unique roles of police and crown prosecutors in the justice system?

Because the Judicial Interim release provisions of the *Code* specify that it is a "prosecutor" who must deal with 'bail' hearings, a police officer must be considered a prosecutor for the purposes of that *part* of the *Code* in order to act on behalf of the Attorney General. I cannot point to any reported cases discussing this unique role of police officers acting in bail hearings, but there are decisions where the Courts have ruled on challenges to a police officer's authority to act as a prosecutor in other circumstances. These cases consider terms including, "lawful deputy", and "the person who institutes proceedings", making the reasons relevant to the present issue. Essentially, they stand for the principle that a police officer may act as a prosecutor in a bail hearing relating to a *summary conviction offence*; this, given that police officers have actually prosecuted entire cases in that context.

This authority to prosecutor offences does not, however, appear to extend to the prosecution of indictable offences. This, of course, means that the law does not contemplate police officers appearing in bail hearings where an accused is charged with an indictable offence, even though it may be tempting to classify this as an administrative act, short of dealing with more complex matters relating to trial. Regardless of the type of offence involved, a police officer must still be properly appointed by the Attorney General, or someone clothed with his or her authority, in order to lawfully prosecute offences.

Even if police may act as prosecutors, there is also the issue of whether having police officers attend bail hearings as prosecutors is actually appropriate. The Supreme Court of Canada has applied what is known as the 'doctine of prosecutorial discretion' in ruling that Courts have no ability to review decisions made in the course of prosecutors exercising a power that falls within the "core of the Attorney General's office" ; [*Kreiger, infra*]. And bail decisions have essentially been deemed by the Courts as involving an exercise of core prosecutorial discretion.

Crown prosecutors are shown deference by the courts for reasons relating to independence, but also because of the unique role they play in the administration of justice, and the level of knowledge, ethics, and training they bring to that role. Given the quasi-judicial role attributed to the crown prosecutor within the criminal justice system as contrasted with the predominantly investigative role and keeping-the-peace obligations of the police, the practice of

having police prosecute offences is, at best, questionable. Interestingly enough, the practice seems directly at odds with the discussion of principles set out in the Government of Alberta's website with respect to the distinct roles of crown prosecutors and police.

RELEVANT LEGISLATION (INCLUDES):

Criminal Code, RSC 1985, c C-46 ("the *Code*")

Interpretation

Definitions

2. In this Act,

"Attorney General"

- *(a) subject to paragraphs (b.1) to (g), with respect to proceedings to which this Act applies,* means the Attorney General or Solicitor General of the province in which those proceedings are taken *and includes his or her lawful deputy,*

. . .

"peace officer" includes

. . .

- (*c*) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process, …

. . .

"prosecutor" means the Attorney General *or, where the Attorney General does not intervene, means the person who institutes proceedings to which this Act applies, and includes counsel acting on behalf of either of them*;

. . .

Judicial Interim Release

Order of release

- 515. (1) Subject to this section, where an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, order, in respect of that offence, that the accused be released on his giving an undertaking without conditions, unless *the prosecutor*, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made and where the justice makes an order under any other provision of this section, the order shall refer only to the particular offence for which the accused was taken before the justice.

. . .

Justification for detention in custody

(10) *For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds*:

. . .

- (*c*) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including
    - *(i) the apparent strength of the prosecution's case*,

. . .

PART XXVII

Summary Convictions

Interpretation:

Definitions

785. In this Part,

. . .

"informant" means a person who lays an information;

. . .

"prosecutor" means the Attorney General or, where the Attorney General does not intervene, *the informant*, and includes counsel *or an agent* acting on behalf of either of them;

LEGAL DEFINITIONS:

"Deputy"

". . . A substitute; a person duly authorized by an officer to exercise some or all of the functions pertaining to the office, in the place and stead of the latter. One appointed to substitute for another with power to act for him in his name or behalf…" [*Black's Law Dictionary with Pronunciations*, Sixth Edition]

According to *The Law Dictionary Featuring Black's Law Dictionary Free Online Legal Dictionary* 2nd Ed. http://thelawdictionary.org/deputy/]

. . . And there is a distinction in doing an act by an agent and by a deputy. An agent can only bind his principal when he does the act in the name of the principal. But a deputy

may do the act and sign his own name, and it binds his principal; for a deputy has, in law, the whole power of his principal. . . ."

"Lawful"

Black's Law Dictionary with Pronunciations, Sixth Edition defines "lawful" by comparing it with "legal":

> ... The principal distinction between the terms "lawful" and "legal" is that the former contemplates the substance of law, the latter the form of law. To say of an act that it is "lawful" implies that it is authorized, sanctioned, or at any rate not forbidden, by law. ... Further, the word "lawful" more clearly implies an ethical content than does "legal." The latter goes no further than to denote compliance, with positive, technical, or formal rules; while the former usually imports a moral substance or ethical permissibility. . . ."

ANALYSIS

Can a police officer be a prosecutor by virtue of being appointed a "lawful deputy" of the Attorney General?

1. The decision of *R. v. Blundon,* 1987 CanLII 5179 (NL SCTD) ("*Blundon*") indicates that a police officer may be appointed *by* a lawful deputy (not as one), and thereby be considered a prosecuting *agent* of the Attorney General. According to *Blundon*, however, the scope of the officer's prosecutorial authority is restricted to summary conviction proceedings because of the relatively narrow wording of "prosecutor" in s. 2 of the *Code*, relative to that in what was then section 720 (now, s. 785).

2. In *Blundon*, the Court sets out the facts and history of the relevant proceedings in the first eleven paragraphs of the decision. For accuracy, I have reproduced them below, instead of paraphrasing.

> [1] Bartlett, J.: This is an application made by the Attorney General of Newfoundland for orders in the nature of certiorari quashing the orders of dismissal made by Provincial Court judge at Clarenville, Newfoundland; and mandamus compelling the Provincial Court judge to proceed with the trial of the charge with Cst. Donald J. MacDonald, or any other agent duly appointed by the Attorney General of Newfoundland for the purpose of prosecuting summary conviction offences under the *Criminal Code*, appearing as prosecutor.
>
> [2] The facts are straightforward and may be summarized as follows: The accused, Edward George Blundon, was charged on the information of Constable Donald J. MacDonald, a member of the Royal Canadian Mounted Police, Clarenville, that he, as informant, that he has reason to believe and does believe that Edward Blundon of 151 Memorial Drive, Clarenville, Newfoundland:
>
> "on or about the 16th day of February, A.D. 1986, at or near Clarenville, in the Province of Newfoundland, did without reasonable excuse fail to comply with a demand made to

him by Constable S.B. Pattison, a Peace Officer, to provide then or as soon thereafter as was practicable, samples of his breath as in the opinion of a qualified technician are necessary to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in his blood, contrary to s. 238(5) of the *Criminal Code*, punishable by s. 239(1) of the *Criminal Code*."

[3] The information of Constable MacDonald was sworn to on the 20th day of February, A.D. 1986.

[4] The defendant first appeared on March 18, 1986, and entered a plea of not guilty. A trial date was set for May 14, 1986.

[5] On the date of May 14, 1986, the prosecutor who appeared was the informant on the original information, Constable MacDonald. No lawyer for the Attorney General or the Deputy Attorney General appeared on May 14, the date set for trial.

[6] On that date, Constable MacDonald indicated that he was appointed prosecutor for the purposes of the proceedings. The prosecutor, at that time, laid a second charge against Mr. Blundon as follows:

> "The accused, Edward George Blundon, was charged on the information of Constable Donald J. MacDonald, a member of the Royal Canadian Mounted Police, Clarenville, that he, as informant, says that he has reason to believe and does believe that Edward George Blundon of Clarenville, Newfoundland, that 'on or about the 16th day of February, A.D. 1986, at or near Clarenville, in the Province of Newfoundland, while his ability to drive a motor vehicle was impaired by alcohol or a drug, did unlawfully drive a motor vehicle contrary to s. 237(a) of the *Criminal Code*, punishable by s. 239(1) of the *Criminal Code*.'"

[7] The information was sworn to by Constable MacDonald on the 15th day of April, A.D. 1986, before Mrs. Reid, J.P. The accused entered a plea of not guilty to the second charge. At that point, a motion for dismissal was made by counsel for the defendant that both counts be dismissed for lack of prosecution.

[8] The informant to both of the informations was the Constable requesting to prosecute, being Constable Donald J. MacDonald. Constable MacDonald produced a letter of appointment signed by Mr. Ronald J. Richards, Deputy Attorney General of the Province of Newfoundland. The defendant takes issue that the Deputy Attorney General has any authority to appoint prosecutors under the *Criminal Code* and more specifically, as it relates to s. 720 of the *Criminal Code*.

[9] The defence took issue with Constable MacDonald being able to prosecute and made application to the trial judge for a remedy under s. 24(1) of the *Charter*, to wit: a dismissal of the charges, arguing to the effect that the defendant's *Charter* rights under s. 7 and/or s. 15 of the *Charter* had been or were being denied or infringed and that an appropriate and just remedy in the circumstances would be a dismissal of the charges.

[10] The offences with which the defendant has been charged are "dual procedure" in nature. See s. 239(1) of the *Criminal Code*.

[11] The Crown, not having elected to proceed by indictment, is deemed to have elected to proceed by summary conviction. See s. 27(l)(a) of the *Interpretation Act*,

R.S.C. 1970, c. 1-23; *R. v. Squires* (1984), 51 Nfld. & P.E.I.R. 46; 150 A.P.R. 46 (Nfld. Dist. Ct.) per Cummings, D.C.J., (as he then was) at 52-55; *R. v. Robert* (1974), 13 C.C.C.(2d) 43, at 44 per Gale, C.J.O.; *R. v. Bouchard* (1976), 10 Nfld. & P.E.I.R. 131; 17 A.P.R. 131, per Steele, D.C.J., (as he then was) at page 142 (confirmed by the Nfld. Court of Appeal, 10 Nfld. & P.E.I.R. 409; 17 A.P.R. 409).

3. The legal analysis in *Blundon* includes consideration of the definition sections that are relevant to the present opinion:

> [13] The definition of "prosecutor" for the purposes of summary conviction proceedings is set out in s. 720 of Part XXIV of the *Criminal Code* as follows:
>
> "720(1) In this Part
>
> 'prosecutor' means the Attorney General or where the Attorney General does not intervene, the informant, and includes counsel or an agent acting on behalf of either of them;"
>
> [14] The definition of "Attorney General" for purposes of the *Criminal Code* is set out in s. 2 of the *Criminal Code* as follows:
>
> "2. In this Act
>
> 'Attorney General'
>
> (a) with respect to proceedings to which this Act applies, means the Attorney General or Solicitor General of the Province in which said proceedings are taken and includes his lawful deputy" (emphasis added)
>
> [15] Clearly then Mr. Richards, being the lawful deputy of the Attorney General, has full authority to appoint an "agent" to be a "prosecutor" under s. 720 of the *Code* and has in fact so appointed Cst. MacDonald.
>
> [16] While s. 2 of the *Criminal Code* also sets out a definition of "prosecutor" the s. 720 definition is broader in scope and applies only to summary conviction proceedings while the s. 2 definition is narrower and applies to all non-summary conviction proceedings (i.e. only indictable proceedings). See *R. v. Edmunds*, 1981 CanLII 173 (SCC), [1981] 1 S.C.R. 233; 35 N.R. 611; 29 Nfld. & P.E.I.R. 345; 82 A.P.R. 345 (S.C.C.) at p. 350-351 (in Nfld. & P.E.I.R.; A.P.R.).
>
> [17] Since by virtue of S.C. 1985, c. s. 169(1) (in force December 2, 1985) Parliament saw fit to re-enact the definition of "prosecutor" in s. 720 of *the Code* as set out above while retaining the s. 2 definition instead of merely repealing the s. 720 definition of "prosecutor" Parliament clearly intended to provide for and reconfirm the legitimacy of prosecutions of summary conviction matters by "agents" who need not be "counsel".
>
> [18] In addition to his status as "agent" of the "Attorney General", Cst. MacDonald was the "informant" as defined in s. 720 of the *Code* and was thus doubly clothed with authority to act as "prosecutor" under s. 720.
>
> . . .

[34] Constable MacDonald produced his authority to act as agent for the court upon request and nothing further was required.

[35] I am satisfied that he was duly appointed as an agent under s. 720 of the *Criminal Code* and that no breach of the defendant's rights has been established such as would justify a remedy under s. 24(1) of the *Charter*.

4. The *Blundon* decision was appealed. In *R. v. Blundon*, 1988 CarswellNfld 323, 220 A.P.R. 152, 71 Nfld. & P.E.I.R. 152 (hereinafter, "*Blundon 2*"), Morgan J.A. (on behalf of the Court) dismissed the appeal. The short 7 paragraph judgment sets out the history of the case, and makes it clear that having a police officer act as a prosecutor for the purposes of summary conviction offences does not violate the *Charter*. The reasons of Morgan, J.A., in their concise entirety, are set out below.

> 1 This appeal raises the same issues as those considered by this Court in *R. v. Clancy Joseph White* (unreported), which was heard at the same time, namely: whether the appointment of a police officer as agent of the Attorney General in the prosecution of summary conviction offences contravenes ss. 7 or 15 of the Canadian Charter on Rights and Freedoms.
>
> 2 The appeal is taken from the decision of Bartlett, J. allowing the application of the Crown for the issuance of prerogative writs of *certiorari* and *mandamus* quashing the orders of dismissal made by Provincial Court Judge Culton and directing the judge to proceed with the charges against the accused, the appellant herein, with Constable Donald J. MacDonald, or any other agent duly appointed by the Attorney General of Newfoundland, appearing as prosecutor.
>
> 3 The accused was charged with committing a breach of s. 238 (5) of the Criminal *Code* (failing to comply with a demand to provide samples of breath), and also with committing a breach of s. 237(1), (driving a vehicle while his ability to drive was impaired by alcohol); both charges to be heard under Part XXIV of the *Code*.
>
> 4 At the hearing before Provincial Court Judge Culton, the Crown was represented by Constable Donald J. MacDonald, a duly appointed agent of the Attorney General. All Crown witnesses were present and Constable MacDonald was ready to proceed with the trial. The charges were read to the accused and he entered a plea of not guilty to each. Before any witness was called to give evidence, counsel for the accused moved that the information be dismissed for want of prosecution on the ground that the appointment of a police officer as prosecutor contravenes ss. 7 and 15 of the Charter. Culton, P.C.J. acceded to that motion and stated:
>
> > I find that the presence of a police prosecutor is a violation of the principle of fundamental justice and offend section 7 of the Charter. I further find that using a Crown Prosecutor in St. John's while using police prosecutors in other areas is a denial to "equal benefit and equal protection" as guaranteed by Section 15(1) of the Charter.
> >
> > Therefore under Section 24(1) of the Charter, the informations are dismissed.
>
> 5 In directing that the Informations be returned to the Provincial Court and for the trial to proceed with Constable MacDonald or any other duly appointed agent appearing

as prosecutor, Bartlett, J. held that the appointment of Constable MacDonald or any other duly appointed of Constable MacDonald as prosecutor was not an infringement or denial of the accused's rights guaranteed by s. 7 or s. 15 of the Charter.

6 For the reasons given in *R. v. Clancy Joseph White*, we are in agreement with the findings of Bartlett, J. and hold that the appointment of Constable MacDonald or any police officer, as agent of the Attorney General, to act as prosecutor in this case did not violate the accused's rights guaranteed by ss. 7 or 15 of the Charter.

7 The appeal is accordingly dismissed.

5. One factor that is not comprehensively addressed in *Blundon 2* is what the Court of Appeal made of Bartlett J.'s finding that "[i]n addition to his status as 'agent' of the 'Attorney General', Cst. MacDonald was the 'informant' as defined in s. 720 of the *Code*, and was thus doubly clothed to act as 'prosecutor' under s. 720.";[*Blundon*, para. 18]. The Court of Appeal's disposition of the case appears restricted to situations where police constables are appointed to act as prosecutors by the Attorney General (because the constable's status as an informer is not discussed in *Blundon 2*).

6. It is important to recognize that this broader definition of "prosecutor" which includes the word, "informant", is restricted to the part of the *Code* dealing with Summary Conviction Proceedings. Further, the present wording of the definition of "prosecutor" under s. 2 of the *Code* does not include the term, "agent." This, in turn, suggests that when an accused is charged with an indictable offence, a police officer cannot act as a prosecutor. Further, any police officer attending a bail hearing as a prosecutor must be appointed as an agent by the Attorney General. Note that my interpretation is in keeping with interpreting the phrase, "the person who institutes proceedings to which this Act applies", as meaning someone who brings a private prosecution – and this is the context in which it is commonly cited in the case law.

7. In short, the principles set out in the relevant cases are inconsistent with the interpretation that a police officer acting during a bail hearing is a "lawful deputy" of the Attorney General. A police officer can be appointed *through* a lawful deputy of the Attorney General, as demonstrated by the reasons in *Blundon*, for instance, where the Court held that the Deputy Attorney General of Newfoundland was a "lawful deputy" of the Attorney General under s. 2, who had the power to appoint an agent under the Summary Conviction Proceedings part of the *Code*. The case law and government policy consistently refer to crown counsel as "agents" of the Attorney General. The lawful deputy is the *means* to appointing crown prosecutors and other *agents* of the Attorney General, where the Attorney General delegates that authority. But the wording of the definitions of "prosecutor" in the *Code* informs *who* can be so appointed.

8. Observe that *Schedule 9* of the *Government Organization Act*, RSA 2000, Ch. G-10, ("GOA") expressly provides for Alberta's lieutenant governor in Council to appoint a "lawful deputy" to the Justice Minister, and stipulates that this applies to federal Acts. The *GOA* makes it clear that the Minister has authority over the bail process. The *GOA* also specifies that the Minister (or the Deputy Attorney General) is the superintendant of all matters *relating* to the administration of justice that are within provincial jurisdiction, and that the Minister has authority to *appoint counsel* to "conduct criminal business":

Administration of justice

1(1) The Minister is by virtue of the Minister's office Her Majesty's Attorney General in and for the Province of Alberta.

(2) Except as otherwise provided in this section, the deputy appointed for the Minister under section 4 of this Act is the Deputy Attorney General.

(3) If the Lieutenant Governor in Council considers it advisable, the Lieutenant Governor in Council may, in accordance with the *Public Service Act*, appoint a person other than the deputy of the Minister as Deputy Attorney General.

(4) The Deputy Attorney General referred to in subsection (2) or appointed under subsection (3)

(a) is the deputy of the Minister in the Minister's capacity as Attorney General in and for the Province of Alberta, and

(b) *is a lawful deputy of the Attorney General in and for the Province of Alberta under the Criminal Code (Canada) or any other Act or any regulation of Canada.*

Powers and duties of Minister

2 The Minister

(a) is the official legal advisor of the Lieutenant Governor;

. . .

(c) shall superintend all matters relating to the administration of justice in Alberta that are within the powers or jurisdiction of the Legislature or the Government;

(d) shall advise on legislative acts and proceedings of the Legislature and generally advise the Crown on matters of law referred to the Minister by the Crown;

(e) shall exercise the powers and is charged with the duties attached to the offices of the Attorney General and Solicitor General of England by law or usage insofar as those powers and duties are applicable in the Province of Alberta;

(f) shall advise the heads of the several departments of the Government on matters of law connected with them respectively;

(g) shall settle instruments issued under the Great Seal of the Province;

(h) shall regulate and conduct litigation for or against the Crown or a public department in respect of subjects within the authority or jurisdiction of the Legislature;

(i) is charged generally with any duties that may be at any time assigned to the Minister by law or by the Lieutenant Governor in Council;

(j) is responsible for the conduct of the following matters, the enumeration of which shall not be taken to restrict the general nature of any provision of this Schedule:

(i) the recommendation of the appointment of and the giving of advice to sheriffs, registrars, judicial officers, medical examiners, notaries public and commissioners for oaths;

(ii) the consideration of applications for bail and attendance on such applications;

(iii) the consideration and argument of appeals from convictions and acquittals of persons charged with indictable offences;

(iv) the hearing of applications for the granting of fiats regarding petitions of right, criminal information, indictments, actions to set aside Crown patents, actions to recover fines and penalties and other actions of a similar nature;

(v) the consideration of applications for the remission of fines and penalties;

(vi) the appointment of counsel for the conduct of criminal business;

(vii) the regulation of the work of official court reporters;

(viii) the supervision of the offices of the courts of law in Alberta;

(ix) the consideration of proposed legislation and other matters of a public nature;

(x) the drawing of special conveyances and instruments of a similar nature relating to the sale or purchase of property under any Act relating to public works or otherwise.

[emphasis, mine].

9. This is one instance where a lawful deputy is contemplated within the Alberta legislation. The question is how far this type of delegation might find its way 'down the ranks.' In *R. Home & Pitfield Foods Limited*, 1982 ABCA 202 (CanLII) ("*Home*"), appeal to the Supreme Court of Canada dismissed with reasons) Mr. Justice Kerans recognizes the principle set out by the Supreme Court of Canada in f *R. v. Harrison* 1976 CanLII 3 (SCC) that "a delegation of administrative duties by a minister is to be expected in this day and age." [Home, para 11]. Kerans J., however, opined that "the limits of that rule must be recognized; [*Home*, para. 11]. In favouring a restrictive interpretation of the term "lawful deputy", Kerans J. opines (at paragraph 19 of *Home*), that "[i]t is arguable that a 'lawful deputy' can only be another person of cabinet rank to whom the Attorney General might delegate his duties."

10. In *Home*, the Court makes a distinction between the Attorney General's designation of administrative powers, versus quasi judicial ones, in interpreting *Harrison, infra*. The recent case of *R v Gambilla*, 2015 ABQB 41 (CanLII) ("Gambilla"), summarizes the reasoning in *Home*

quite well, and suggests that this distinction between administrative duties and quasi-judicial powers, is no longer determinative, given legislation that followed those decisions. The relevant legal analysis, as set out in the reasons of Gambilla reads, in part:

> [11] In *R v Harrison*, 1976 CanLII 3 (SCC), [1976] 1 SCR 238, [1976] 3 WWR 536 [*Harrison*], the Supreme Court of Canada was dealing with*Criminal Code*, RSC 1970, c C-34, s 605(1) [now, as amended, *Criminal Code*, RSC 1985, c C-46, s 676(1)], which allowed the Attorney General "or counsel instructed by him for the purpose" to appeal to the court of appeal. Dickson J, as he then was, summarized the facts before the court as follows:
>
> The notice of appeal had been signed "J. E. Spencer, Counsel for the Attorney General". Mr. Spencer's authority was derived from a letter bearing the letterhead "Attorney General, Province of British Columbia", signed by an official of that department, Mr. N. A. McDiarmid, "Director, Criminal Law". The respondent Harrison argued successfully before the Court of Appeal that in order to comply with s. 605(1) of the Code, Mr. Spencer's instructions must come directly from the Attorney General or from the Deputy Attorney General of the province: *Harrison* at para 2.
>
> [12] In finding that JE Spencer had the necessary authority to appeal to the court of appeal, Dickson J held that the maxim *delagatus non potest delegare* may be "displaced by the language, scope or object of a particular administrative scheme" and, in fact, held that the power of an appointed official to delegate their powers is "often implicit in a scheme empowering a minister to act": *Harrison* at para 13.
>
> [13] Dickson J went on to say the following:
>
> > Thus, where the exercise of a discretionary power is entrusted to a minister of the Crown it may be presumed that the acts will be performed not by the Minister in person but by responsible officials in his department: *Carltona Ltd. v. Commrs. of Works*, [1943] 2 All E.R. 560. The tasks of a minister of the Crown in modern times are so many and varied that it is unreasonable to expect them to be performed personally. It is to be supposed that the minister will select deputies and departmental officials of experience and competence, and that such appointees, for whose conduct the minister is accountable to the legislature, will act on behalf of the minister, within the bounds of their respective grants of authority, in the discharge of ministerial responsibilities. Any other approach would but lead to administrative chaos and inefficiency.
>
> [14] After *Harrison*, the Alberta Court of Appeal rendered a decision in *R v Horne & Pitfield Foods Ltd* (1982), 1982 ABCA 202 (CanLII), 20 Alta LR (2d) 289, 39 AR 428, [1982] 5 WWR 162 (CA) [*Horne*, cited to WWR]. In that case, the Alberta Court of Appeal was considering section 16 of the *Lord's Day Act*, RSC 1970, c L-13, which provided as follows:
>
> 16. No action or prosecution for a violation of this Act shall be commenced without the leave of the Attorney-General, or his lawful deputy, for the province in which the offence is alleged to have been committed ... [Emphasis added].
>
> [15] The provincial court judge before whom the fiat permitting the prosecution dismissed it summarily. The Court of Queen's Bench upheld the dismissal. The fiat was

adequate in form. The issue concerned the authority of the person who signed it. Emil JF Gamache, QC, signed as "Acting Deputy Attorney-General of Alberta." By a ministerial order signed on 11 January 1981 by the Attorney General of Alberta, Neil S Crawford, QC, Mr Gamache had been appointed "fourth ... Acting Deputy Attorney-General during the absence of Ross Walkerdine Paisley, Deputy Attorney-General".

[16] Kerans JA held that this was not sufficient to give Mr Gamache the necessary authority, as contemplated by the legislation. He said the following:

> I note that the Supreme Court recently has said that a delegation of administrative duties by a minister is to be expected in this age: see *R. v. Harrison*, 1976 CanLII 3 (SCC), [1977] 1 S.C.R. 238, [1976] 3 W.W.R. 536, 28 C.C.C. (2d) 279 at 284-85, 66 D.L.R. (3d) 660, 8 N.R. 47. But the limits of that rule must be recognized. In *Re Criminal Code* [(1910), 43 S.C.R. 434, 16 C.C.C. 459] at p. 479 Anglin J. described the fiat power (and the power to prefer a direct indictment) as quasi-judicial, not administrative. The decision to grant or withhold access to the courts is not a mere administrative act: *Horne* at 165.

[17] Thus, it seemed, courts had to determine whether the authorized act was quasi-judicial (or *a fortiori* judicial), or administrative. See e.g. *R v Cleveland* (1986), 1986 CanLII 3196 (SK QB), 49 Sask R 96 (QB). Whether as a result of *Horne*, or some other reason, Parliament amended the *Interpretation Act*. In the version that appears in RSC 1985, the opening words of *Interpretation Act* s 24(2) read as follows:

> (2) Words directing or empowering a minister of the Crown to do an act or thing, or otherwise applying to that minister by his name of office, include ...

[18] In the *Miscellaneous Statute Law Amendment Act, 1991*, SC 1992, c 1, s 89, Parliament amended the opening words of *Interpretation Act* s 24(2) by repealing the previous wording, and replacing it with the following:

> (2) Words directing or empowering a minister of the Crown to do an act or thing, regardless of whether the act or thing is administrative, legislative or judicial, or otherwise applying to that minister as the holder of the office, include ... [Emphasis added].

[19] This amendment clarifies the broadness of the principle that Dickson J enunciated in *Harrison*, as narrowed in *Horne*.

. . .

[21] In *Harrison*, Dickson J added a *caveat* to applying the principle he enunciated in that case. He said the following:

> Technical challenges to jurisdiction based upon alleged insufficiency of signature to notices of appeal can be wasteful of time and money. If, however, objection be taken which raises ground for doubt as to authority, the question arises as to how far one must go, and what evidence must be adduced, to establish authority. The answer will depend on the circumstances of the particular case. Without attempting to lay down any general rule, it would normally be sufficient if counsel produces a letter which he can say he received and believes to be signed by the

> Attorney General or Deputy Attorney General or an officer of the department whom he understands to have requisite authority to institute criminal appeals … [Citation excluded].

11. The Minister then, clearly has the authority to appoint a legal deputy, regardless of the nature of the actual power delegated. Further, the power to delegate their powers is "often implicit in a scheme empowering a minister to act", *supra*. But, this idea that an agent would be able to produce 'proof' of their delegation persists. This has been an important factual issue in cases where the lack of proof that an individual has been appointed a lawful deputy determines the outcome; see, for instance, *R. v. Huculak*, 1969 CanLII 626 (SK CA) where the question of whether an individual was actually a qualified breath technician as defined in the *Code* was before the Court.

How does the definition of "Prosecutor" in the *Code* restrict a Police Officer's ability to be appointed as Agent of the Attorney General?

12. I do not view the term, "lawful deputy" in the definition of Attorney General as extending to a police officer acting as a prosecutor, given the legislation, and cannot find a situation where this idea is supported by the relevant case law. The definition of "prosecutor" must be read in conjunction with that of "Attorney General", in order to ascertain who a "prosecutor" is for the purposes of the *Code*.

13. From a practical point of view, a police officer appointed as a lawful deputy of the Attorney General would have the power to appoint another agent of the Attorney General. It is difficult to contemplate how a police officer would be conceived to be 'above' crown counsel in this respect. A crown prosecutor is consistently referred to as an *agent* of the Attorney General, and a "lawful deputy", as demonstrated in *Blundon*, has the authority to appoint an agent on the Attorney General's behalf.

14. My opinion that it is not in keeping with the *Code*, nor the case law, to find that a police officer would be appointed a lawful deputy of the Attorney General fits squarely with the reasons of *Edmunds, infra*. Again, it is critical to recognize that section 2 of the *Code* defines a "prosecutor" as *including* counsel acting on behalf of the Attorney General, or counsel acting on behalf of a person who institutes proceedings *where* the Attorney General does not intervene. As discussed in *Blundon*, the wording in section 2 of the *Code* is narrower, given that the terms "agent," and "informant" are utilized in Part XXVII (Summary Convictions), but not in part 2. Blundon cites *Edmunds* in declaring that the definition of prosecutor in s. 2 of the *Code* only applies to indictable proceedings.

15. The majority in *Edmunds v. The Queen*, [1981] 1 SCR 233, 1981 CanLII 173 (SCC) ("Edmunds") held that a police officer could not fit within the definition of prosecutor under s. 2 of the *Code* because the definition of prosecutor relating to summary conviction offences had no application to prosecutions for indictable offences. The Court considered the definitions of "Attorney General" and "Prosecutor" in the *Code*, but essentially restricted the meaning of prosecutor with respect to police officers to one that included the term, "agent." In *Edmunds*, the headnote to the decision succinctly summarizes the critical facts and legal issues facing the court, and the ultimate reasons for the majority's decision to dismiss the appeal:

> The appellant was charged with "breaking and entering" contrary to the provisions of s. 306(1)(*b*) of the *Criminal Code*. The prosecutor who conducted the trial was a member of the R.C.M.P. At the close of the Crown's case, defence counsel put

forward a motion for dismissal on the basis that the Crown was not properly represented. The motion was eventually dismissed. The accused called no evidence and was found guilty. The Court of Appeal by a majority dismissed his appeal.

Held (Ritchie J. *dissenting*): The appeal is allowed.

Per Laskin C.J. and Martland, Estey and McIntyre JJ.: It was agreed that the police officer conducting the proceedings did not come within the definition of "prosecutor" in s. 2 of the *Code*. However, as, by reason of the inclusion in the definition in s. 720 of the word "agents" he did qualify under that section, the question to be decided is whether or not that definition, in Part XXIV of the *Code,* can be applied to the police officer who conducted the prosecution of this case.

The appellant being charged with an indictable offence, the procedure applicable to his trial was that provided in Part XVI of the *Code*. The fact the accused elected for trial by magistrate under s. 484(2) did not remove the proceedings from Part XVI. The fact that s. 487 directs the magistrate "acting under this part" to take evidence in accordance with Part XV cannot convert the proceedings into summary conviction proceedings and thereby change the nature of the offence, nor can it convert the magistrate into a summary conviction court under Part XXIV with a lesser jurisdiction than he is specifically given in Part XVI.

16. In delivering the judgment for Laskin C.J. and Martland, Estey and McIntyre JJ., Justice McIntyre J. specified that the police officer who had conducted the prosecution was not the informant, and not a member of the bar. The relevant definitions considered in *Edmund* are similar to those currently in force, as discussed by McIntyre J. at page 235:

The *Criminal Code* provides two definitions of the term "prosecutor". In section 2 "prosecutor" is defined for application "In this Act" in these terms:

> "prosecutor" means the Attorney General or, where the Attorney General does not intervene, means the person who institutes proceedings to which this Act applies, and includes counsel acting on behalf of either of them;

In section 720 of Part XXIV of the *Code* for application "In this Part" the term is defined as:

> "prosecutor" means an informant or the Attorney General or their respective counsel or agents;

17. In *Edmunds*, McIntyre J. recognizes that the officer who was pivotal to the outcome of that case did not fall under s. 2, but that he could fall under the term "agent" in s. 720, and that the question was whether that definition could apply to the officer who conducted the prosecution. Ultimately, the Court answered that question in the negative, stipulating (in part) that regardless of the appellant's election to proceed by magistrate without a jury, an "election of a more summary form of trial", the offence remained an indictable one. The crux of the decision is set out at pages 238 to 240, of *Edmunds*, as follows:

I have been at some pains to illustrate the difference between proceedings under Part XVI, and those under Part XXIV, because the judgment of Morgan J.A., one of the majority in the Court of Appeal, seems to be predicated upon the assumption that the

election for trial by magistrate under s. 484(2) removed the proceedings from Part XVI and placed them in a summary conviction court under Part XXIV. He said:

> *[Page 239]*
>
> Once an accused elects to be tried by a Magistrate under the provisions of Sec. 484, the Magistrate obtains jurisdiction to hear the matter. The accused is then tried in a "summary jurisdiction court" and the evidence taken in the same manner as if he were charged with an offence punishable on summary conviction. Though he is liable to a greater punishment if convicted.
>
> He therefore considered that the definition of "prosecutor" in Part XXIV would apply and permit the police officer to prosecute. He found support for this view in the fact that s. 487 directs the Part XVI magistrate, conducting a trial of an indictable offence after election, to take evidence in accordance with Part XV, a similar direction to that given a magistrate acting under Part XXIV.
>
> I am unable to agree with those conclusions. . . . For the reasons which I have tried to outline, I am of the view that Part XVI proceedings and Part XXIV proceedings stand upon separate footings. Indictable offences are not triable under the provisions of Part XXIV save where the *Criminal Code* provides that the offence may be either indictable or punishable on summary conviction, and the Crown chooses to proceed by summary conviction. The offence charged here was simply indictable. It remains so notwithstanding the election and is not triable under Part XXIV of the *Code*. It follows then that the definition of "prosecutor" from that part of the *Code* can have no application in this case and, in
>
> *[Page 240]*
>
> my view, the Court of Appeal was in error in so applying it.

18. Does this relatively narrower definition of "prosecutor" mean that a Police Officer cannot act as a prosecutor in bail hearings where an accused is charged with an indictable offence? In my opinion, yes. True, a police officer speaking to bail is arguably at a stage short of actually trying the case, but the Judicial Interim Release part of the *Code* dictates that a prosecutor handle bail proceedings – it contains no tailored definition of prosecutor. If a police constable cannot prosecute an indictable offence, presumably this applies at *all* stages of the prosecution - period. And, as discussed later in this opinion, exercise of discretion at the stage of bail has been identified by the courts as something akin to one of the 'core' functions of the crown prosecutor, as protected by the doctrine of prosecutorial discretion.

19. This issue of matters preliminary to trying a case was touched upon by the provincial court Judge, in *R. v. Downey*, 1996 CarswellNS 580 (Nova Scotia Provincial Court), in *obiter dictum* (*Downey*). In *Downey*, the issue before the court was whether the fact that the accused was not heard during the 'show cause' hearing served to invalidate the conditions of release; the Justice of the Peace in that case had accepted the conditions as drafted by the Police Officer and presented them to the accused for his signature. The definition of Prosecutor under s. 2 of the *Code* was considered by the Judge, but the written reasons do not go further than as to speculate upon the meaning of *Edmunds*. The relevant remarks of Judge Curran state:

> Other Issues

> 12 1. While this matter was being argued, I referred counsel to the words of s.515 that it is "the prosecutor" who must show cause. There was no evidence that a crown attorney took part in the proceedings which resulted in the undertaking. Mr. Hoskins referred to the definition of prosecutor in s.2 of the *Criminal Code*:
>
> > "Prosecutor" means the Attorney General or, where the Attorney General does not intervene, means the person who institutes proceedings to which this Act applies, and includes counsel acting on behalf of either of them.
> >
> > In this case, Constable Morris was the informant, the person who initiated the proceedings.
>
> 13 Whether or not Constable Morris could be said to have been the prosecutor in this case depends of the meaning of the phrase "where the Attorney General does not intervene". Does the Attorney General have to have the opportunity to intervene and decline it, or may the informant be the prosecutor until the Attorney General intervenes? I don't believe that issue has been expressly decided, but it seems to be implied in the decision of *R. v. Edmunds* (1981), 21 C.R. (3d) 168 (S.C.C.), that an informant may prosecute *until* the Attorney General steps in.

20. These reasons do not acknowledge the fact that an "informant" is not specifically mentioned in the definition of s. 2 of the *Code*, whereas it is mentioned in the summary conviction part of the *Code* – a factor that formed the basis for the decision in *Edmunds*. These reasons given *in obiter* in *Downey* raise the question of who the phrase, "person who institutes the proceedings", is meant to include. That is, is it meant to apply only to private prosecutions? In my mind, to determine that the "person" in s. 2 contemplates police officers appointed by the Attorney General would mean disregarding the Supreme Court of Canada's reasons in *Edmunds*. This, given that the majority in *Edmunds* specifically considered this definition, and held that a police officer could not be a prosecutor for the purposes of indicatable offences. Yes, a police officer can prosecute an offence, but the context is significant. And a police officer prosecuting until crown counsel steps in would *not* be initiating a private prosecution.

Who is the "person who institutes proceedings" in the context of the *Code*'s s. 2 definition of Attorney General?

21. Both definitions of "prosecutor" (s. 2 and s. 785) contemplate a situation where the Attorney General does not intervene. An "informant" is a prosecutor under s. 785 (the Summary Convictions part) of the *Code*, where it is also defined: "'informant' means a person who lays an information". "Person" is not defined in the *Code*, so the definition in the federal *Interpretation Act,* R.S.C. 1985 C I-21, applies: "person", or any word or expression descriptive of a person, includes a corporation". I note that in *R. v. Peel Regional Police Service*, 2000 Carswell Ont 4406 (Ontario Superior Court of Justice) the court held that "that the Police Service, . . .[although] an unincorporated association, is nevertheless a legal personality or entity of sufficient substance and definition to be the subject of a criminal contempt charge." Yet, this is not helpful as to the scope of the word, "person", under s. 2.

22. If we observe the remarks of the Court in *Downey* (in obiter), one must define the phrase, "where the Attorney General does not intervene", in order to determine the meaning of "the person who institutes proceedings." So, where does the Attorney General intervene? The

power of the Attorney General to intervene has been recognized in case law as including "the power to stay or withdraw, or in rare cases, carry the prosecution forward": [*Kostuch v. Kowalski* 1990 Carswell Alta 124 (AB Prov. Crt), para 33]. The *Code* utilizes the word, "intervene" in the following contexts:

> s. 485.1, Recommencement where dismissal for want of prosecution;
>
> s. 507, Referral when private prosecution;
>
> s. 574, Private Prosecutor requires consent;
>
> s. 577, Direct Indictments;
>
> s. 579.01 When Attorney General does not stay proceedings;
>
> s. 579.1 Intervention by Attorney General of Canada;

23. The power of the Attorney general to intervene so as to control a private prosecution is discussed in the March, 2004 Article entitled, *Challenging the Intervention and Stay of an Environmental Private Prosecution,* by Keith Ferguson, [2004 by Thomson Canada Limited; 13 J. Env. L. & Prac. 153 *Journal of Environmental Law and Practice*].

> . . .
>
> As summarized by Vancise J.A. in *Osiowy*:
>
> It is settled that an individual has the right to initiate a private prosecution. It is also settled that the Attorney-Generalhas the right to intervene and take control of a private prosecution. Included in the right to intervene and take control is the power to direct a stay pursuant to [what is now s. 579 of the *Criminal Code*]. It follows, then, that a private informant has the right to initiate proceedings, but that right does not give him the liberty to continue the proceedings should the Attorney-General decide to intervene and invoke [s. 579(1)] and direct the entry of a stay of proceedings. Once the Attorney-General or counsel on his behalf intervenes and assumes control of the prosecution, that counsel's rights are paramount to the private person's or his counsel's rights.[16]
>
> The courts have ruled that under s. 579 the court has no jurisdiction to refuse entry of a stay.[17] Section 579.1 of the *Criminal Code* and the federal *Interpretation Act*[18] extend the right to bring a private prosecution and the right of the Attorney General to intervene and stay to offences under any other federal legislation (unless that other legislation specifies otherwise).[19] Note that "clear and specific language is necessary if an enactment **157* is to exclude the operation of the *Criminal Code* and abolish private prosecutions under a federal statute."[20] Provincial legislation contains similar provisions concerning the ability to bring a private prosecution and authorizing the Attorney General to intervene and stay.[21]

24. The case law indicates that the meaning of "prosecutor", as worded in both s. 2 of the *Code* and s. 785, allows someone other than the Attorney General to prosecute a case. This, as articulated in the recent Alberta Court of Queen's Bench judgment of *Steele v. Alberta* 2014

Carswell Alta 360 (AB.Q.B.), wherein Justice Gates cites from reasons of the Supreme Court of Canada on this issue:

> 72 I accept the Applicant's contention that the right of a private citizen to lay an information is a fundamental part of the criminal justice system: *R. v. Dowson*, [1983] 2 S.C.R. 144 (S.C.C.), at 155, (1983), 49 N.R. 57 (S.C.C.). I also accept that the definition of "prosecutor" in both s. 2 and s. 785(1) of the *Criminal Code* clearly contemplate that a prosecution may be initiated and conducted by a person other than the Attorney General. In *McHale*, Watt J.A. explained:
>
> 37 The *Criminal Code* makes room for both private and public prosecutors in indictable and summary conviction proceedings. Section 2 of the *Criminal Code* exhaustibly defines "prosecutor" as "the Attorney General" or, where the Attorney General has not intervened, as "the person who institutes proceedings to which this Act applies, and includes counsel acting on behalf of either of them". For summary conviction proceedings, s. 785(1) defines "prosecutor" as "the Attorney General or, where the Attorney General does not intervene, the informant, and includes counsel or an agent acting on behalf of either of them".
>
> 73 While both a private prosecutor and a public prosecutor have the statutory authority to initiate and conduct a prosecution, the Attorney General has a supervisory responsibility for the conduct of *all* prosecutions, however initiated. The Supreme Court of Canada in *Dowson* at 155 cited with approval the following passage from the decision of the Ontario Court of Appeal in the same matter: "The right of a private citizen to lay an information, *and the right and duty of the Attorney-General to supervise criminal prosecutions are both fundamental parts of our criminal justice system*." [emphasis adde 72 I accept the Applicant's contention that the right of a private citizen to lay an information is a fundamental part of the criminal justice system: *R. v. Dowson*, [1983] 2 S.C.R. 144 (S.C.C.), at 155, (1983), 49 N.R. 57 (S.C.C.). I also accept that the definition of "prosecutor" in both s. 2 and s. 785(1) of the *Criminal Code* clearly contemplate that a prosecution may be initiated and conducted by a person other than the Attorney General. In *McHale*, Watt J.A. explained:
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73 While both a private prosecutor and a public prosecutor have the statutory authority to initiate and conduct a prosecution, the Attorney General has a supervisory responsibility for the conduct of *all* prosecutions, however initiated. The Supreme Court of Canada in *Dowson* at 155 cited with approval the following passage from the decision of the Ontario Court of Appeal in the same matter: "The right of a private citizen to lay an information, *and the right and duty of the Attorney-General to supervise criminal prosecutions are both fundamental parts of our criminal justice system*." [emphasis added]

25. It appears that situations where the Attorney general does not intervene are those where a private prosecution is initiated, and conducted by a private person; a situation that does *not* appear to occur very often, given what is referred to by Ferguson (the author of the article cited at paragraph 23, *supra*) as Alberta's near 'blanket policy' to intervene in private prosecutions. I note that the role of the Crown in this respect is set out on the *Alberta Justice and Solicitor General* Website (hereinafter, *ABJ website*), where it is specified that this decision is made on a case by case basis. The ABJ *website* states, in part:

> As a general rule, the Crown as represented by the Attorney General reviews all prosecutions of a criminal or quasi-criminal nature, except those undertaken by the Attorney General of Canada.
>
> In the context of a private prosecution, s. 507.1 of the *Criminal Code* requires a justice who receives an Information laid by a private informant to refer it to a provincial court judge or a designated justice who shall consider whether to compel the appearance of the accused to answer the charge on the Information.
>
> Subsection 507.1(3)(a) requires that the judge or designated justice may issue a summons or a warrant only if he or she has heard and considered the allegations of the informant and the evidence of witnesses.
>
> Subsection 507.1(3)(d) provides that the judge or designated justice may issue process only if he or she "has given the Attorney General an opportunity to attend the hearing under paragraph (a) and to cross-examine and call witnesses and to present any relevant evidence at the hearing."
>
> These provisions provide a judicial screening process so that the justice system is not burdened with vexatious litigation and innocent persons are protected from the stigma of having to appear in court on such matters.
>
> *Although the Crown has an unfettered right to intervene at any stage in any private prosecution, the decision to intervene must be made on a case-by-case basis*, mindful of the principles outlined in the *Code* of Conduct for Crown Prosecutors.
>
> ; [published May 20, 2008 under**:** *The Exercise of Discretion by Crown Prosecutors when dealing with Privately Laid Informations*] ;[link:

https://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Pages/private_prosecutions.aspx]

Can certain duties assigned to "prosecutors" in the *Code* be considered Administrative, and thereby, something 'short of prosecuting'?

26. In *R. v. Parsons*, 1984 CarswellNfld 68 (Nfld C.A.) ("Parsons"), *Mifflin, C.J.N* delivered the judgment for the Court of Appeal. Ultimately the Court categorized an act performed by a police officer as an *administrative* one, so as to find that a police officer had the authority to act as agent for the Attorney General for the purposes of communicating the crown's election. The appellate Court sets out the relevant circumstances before it, stating:

> . . ."Constable Doody informed the Court that the Crown was electing to proceed by way of indictment and requested that the respondent be put to his election.
>
> 4 At this stage, counsel for the respondent made a motion that the charge be dismissed for want of prosecution on the ground that there was no prosecutor present as defined by Section 2 of the Criminal *Code* as that Section is interpreted in *R. v. Edmunds*, [1981] 1 S.C.R. 233; thus, the offence, being an indictable offence, could not be prosecuted by a police officer.

[emphasis mine]. The grounds of appeal are set out by the Justice at paragraph 9 of *Parsons*:

> 10 The grounds of appeal are:
>
> 1. That the learned Provincial Court Judge erred in law in holding that Cst. Archibald J. Doody, *a member of the Royal Canadian Mounted Police, could not appear on behalf of the Crown as informant on an indictable offence at any stage of the proceedings;*
>
> 2. That the learned Provincial Court Judge erred in law in holding that *Cst. Archibald J. Doody, a member of the Royal Canadian Mounted Police, as informant was not within the definition of "prosecutor" as defined by section 2 of the Criminal Code of Canada as "he who institutes proceedings";*
>
> 3. That the learned Provincial Court Judge erred in law in holding that Cst. Archibald J. Doody, a member of the Royal Canadian Mounted Police, had no authority to elect as to how the Crown was proceeding in relation to a hybrid offence there being no evidence that a Crown Counsel had not given Cst. Doody instructions as to how to proceed;
>
> 4. And such other and further grounds as Counsel may advise and the Court permit.

27. In *Parsons*, the Court finds that the constable was engaged in something short of prosecuting, while expressly stating that it does *not* find it necessary to consider the grounds of appeal in detail, as follows:

> 12 In my view there is no doubt that Provincial Court Judge Kennedy erred in dismissing the charge. However, I do not find it necessary to consider the grounds of appeal in detail. The fact that Section 27(1)(a) of the Interpretation Act deems an offence to be indictable, if the enactment provides that the offender may be prosecuted for that offence by

> indictment, does not of itself mean that the judge was at that stage trying an indictable offence and that the police officer was prosecuting such an offence. To the contrary, Provincial Court Judge Kennedy was not at that time sitting as a magistrate (within the meaning of the Criminal *Code*), but merely as a justice. He therefore had not, and could not, assume jurisdiction over the matter until the Crown had elected as to how it intended to proceed and the accused had made his election as to mode of trial, if the Crown's decision was to proceed by way of indictment. Even then, the Provincial Court would not gain jurisdiction unless the accused elected trial by a magistrate, thereby fixing the tribunal and conferring exclusive jurisdiction upon it.
>
> 13 Furthermore, the Attorney General's right to elect whether to prosecute a matter such as this one by way of summary conviction or as an indictable *offence is solely the prerogative of the Attorney General and is, in my view, an administrative act which may be communicated to the court by any agent of the Attorney General. That agent is not at that stage a prosecutor.*

[emphasis mine].

28. The problematic aspect of the *Parsons* decision in terms of applying the end result to the question before us is this failure to address the grounds of appeal in detail. Grounds 1 and 2, as cited from the decision, were apparently decided in *Edmunds* by the Supreme Court of Canada. The Supreme Court refused leave to appeal *Parsons*; [*R. v. Parsons*, 1984 WL451256 S.C.C. Nov. 22, 1984]. This reasoning in Parsons *may* support the view that a police officer could appear as agent for the attorney General in a bail hearing where an accused is charged with an indictable offence – *if* that act was considered an administrative one.

29. In my view, even if *Parsons* is good law (and there is not much in the way of judicial consideration of the decision), the case is distinguishable on its facts to the extent that the case law, and the policy of the province Alberta, indicates that the Crown cannot be said to be performing an administrative act in addressing Bail. Section 515.10(c), for instance, requires that the strength of the Crown's case factor into the question of whether or not an accused be detained in custody.

30. Again, there is no 'agent' or 'informant' contemplated in the definition of "prosecutor" in s. 2 of the *Code*. *Parsons* seems to dispense with the distinction made in *Edmunds* by considering the type of act engaged in by the prosecutor with respect to an indictable offence – a tactic that, in my opinion, that is outside of *Edmunds*, and the wording of the *Code*. The *Code* defines the term "prosecutor" in particular, restrictive manner.

An 'agent' of the Attorney General must be Properly Appointed

31. It must be kept in mind that the case law requires that an agent of the Attorney General be *properly* appointed by someone who actually *possesses the authority* to delegate that power. In *R. v. C. (N.),* 1997 Carswell Ont 2882 (Ontario Court of Justice, Provincial Division) for instance, Judge Cohen rejected the idea that a non-lawyer could be delegated the authority to

prosecute an offence by a Crown Attorney for reasons including those set out at paragraphs 12 an 13:

> It is evident that any delegation of a prosecution by the Attorney General, or by the Crown Attorney, to an agent, must be consistent with the proper administration of criminal justice. In my view, it is is contrary to the proper administration of justice for a Crown Attorney to delegate to a non-lawyer, the prosecution of criminal *Code* offences, in which the liberty of the subject is at stake, as well a host of other potentially serious consequences. I set out my reasons for this conclusion below in the context of the *Young Offenders Act*. My point here is that the decision in *Luz* does not stand for the principle that a Crown Attorney can delegate a prosecution without any restriction on his right to do so.
>
> 13 In the case at bar, I have no evidence that the Attorney General appointed the student at law as his agent for the prosecution, and I find that the Crown Attorney's delegation of the prosecution to a non-lawyer exceeded the limits of his authority. Even had there been evidence in the case before me that the student-at-law was a duly appointed Provincial Prosecutor appearing as agent for the Attorney General, I find that the Court has the discretion to refuse to grant audience to a student-at-law or other non-lawyer prosecutor. This discretion arises by virtue of the Youth Court's jurisdiction under the *Young Offenders Act*, as well as the Court's jurisdiction under the Charter.

The Court went on to opine that,

> The court's concern that "discretions left to the Crown are being properly exercised" arises at all stages of the prosecution, including at trial. The withdrawal of charges, the selection of which charges will proceed, the calling of witnesses, the examination and cross-examination of witnesses, the presentation of legal argument and submissions on sentence, are all matters calling for the exercise of discretion. Such discretion requires a level of judgment, knowledge and experience which, in my view, cannot reasonably be expected of an articled law student.

32. The issue of proper appointment was an issue in In *R. v. Hart*, (1986) CanLII 2404 (NL CA) (*Hart 2*), wherein the majority allowed the crown's appeal, rejecting the broad principle that having police prosecute summary conviction offences violated the *Charter*, yet finding that that the police officer in question was not properly authorized to prosecute the case forming the basis for the appeal. The history of the '*Hart* case', and the critical legal principles informing it are aptly summarized in *Blundon*:

> [19] In *R. v. Hart* (1985), 53 Nfld. & P.E.I.R. 300; 156 A.P.R. 300, (S.C. T.D.) at the Provincial Court level as well as the Supreme Court, Trial Division level (per Steele, J.) it was found that the practice of police prosecuting summary conviction offences offended s. 11(d) of the *Charter*. On Appeal to the Court of Appeal the majority (Mifflin, C.J.N., (as he then was) and Morgan, J.A. [see: (1985), 1986 CanLII 2404 (NL CA), 58 Nfld. & P.E.I.R. 190; 174 A.P.R. 190]) held that police advocacy does not "per se" infringe s. 11(d) of the *Charter* and allowed the Crown's appeal from the order of the trial judge declaring

that the appointments of police officers as agents of the Attorney General in the prosecution of summary conviction offences contravened s. 11(d) of the *Charter*.

[20] The decision of the Newfoundland Court of Appeal in *Hart* has not been overturned or disapproved of by the Supreme Court of Canada, nor departed from by the Court of Appeal in any subsequent decision of that court, and thus the ratio decidendi of their decision by virtue of the principle of stare decisis is binding upon the Provincial Court in this province. See *R. v. Maher*, an unreported decision of the Newfoundland Court of Appeal (1984 No. 142, April 10, 1986, filed April 25, 1986 [see: (1986), 1986 CanLII 2418 (NL CA), 59 Nfld. & P.E.I.R. 91; 178 A.P.R. 91]), a decision of that court rendered subsequent to their decision in *Hart*, where at pages 4-5 Mr. Justice Morgan, speaking for the court in a unanimous decision stated

> "The decision of this court in *Hart* is, of course, binding on all Provincial Court judges and it is not now open to them to determine whether the granting of the right of audience to a police officer, properly appointed as agent of the Attorney General to act as prosecutor in a summary conviction matter is constitutional or not. Moreover, a police officer, so appointed, must be accepted as a prosecutor in all proceedings governed by Part XXIV of the *Criminal Code*."

33. It is important to recognize that Chief Justice Mifflin sets out a general principle with respect to the Charter in *Hart 2*, holding that having police prosecute summary conviction offences does not offend the *Charter per se*, while also specifying that the proper appointment of the officer in the circumstances is fatal to the outcome of the particular case. This is made clear at paragraph 29 of the reasons of Mifflin CJN:

> 29 In summary, as, in my view, a police officer acting as prosecutor does not bring about an unfair hearing by an impartial and independent court, I would, under ordinary circumstances, allow the appeal and grant the order for mandamus. *In the present case the appointment of the police officer as agent of the Attorney General was not properly made. I would accordingly dismiss the appeal for this reason. However, I would make it abundantly clear that, in any summary offence prosecution, the trial judge hearing the case must proceed with the case in the situation where an agent has been properly appointed by the Attorney General. In that sense, the appeal by the Crown, in my view, succeeds.*

[my emphasis].

34. Morgan, J.A. concurred with the reasons of Chief Justice Mifflin, in *Hart 2*, again, allowing the appeal on the broader constitutional issue, while finding a fatal error to the appeal because of the facts before the Court:

> [30] Morgan, J.A.: For the reasons given by Chief Justice Mifflin I am of the opinion that, in so far as this appeal relates to the specific facts in issue, it should be dismissed.
>
> [31] On the broader issue touching the constitutionality of the right of the Attorney General to appoint police officers as prosecutors in summary conviction offences I agree, for the reasons stated by the Chief Justice, that police advocacy does not

"per se" infringe any rights guaranteed by the *Charter* and the trial judge's decision in that regard should be set aside.

[32] I would accordingly dismiss the appeal from the trial judge's refusal to grant the order of mandamus requested and allow the appeal from his order declaring that the appointment of police officers as agents of the Attorney General in the prosecution of summary conviction offences contravenes s. 11 (d) of the *Charter*.

35. So what was this fatal defect in appointment referenced in *Hart 2*? The inherent defect in the authority of the police officer, and the Provincial Court Judge's error in glossing over it, is discussed by Justice Steele of the (lower court) Supreme Court trial division in *R. v. Hart*,1985 Carswell Nfld 18, [1985] N.J. No. 112, 156 A.P.R. 300, 15 C.R.R. 193, 45 C.R. (3d) 387, 53 Nfld. & P.E.I.R. 300 as follows:

Constable A.J. Doody, a member of the Royal Canadian Mounted Police, swore an Information against one Leonard Hart alleging a breach of Section 236(1) of the Criminal *Code* of Canada. The Crown elected to proceed by way of summary conviction; and Cst. S.B. MacNeil, a member of the Royal Canadian Mounted Police, was to represent the Attorney General at the trial of the matter.

. . .

11 Section 720(1) of the Criminal *Code* appears in Pt. XXIV — Summary Convictions — and states in part that, "prosecutor" means an informant or the Attorney General or their respective counsel or agents. In his oral judgment His Honour Judge Peddle stated:

In my view, a police officer qualifies as an agent of the Attorney General under section 720, and as such, is permitted to prosecute summary conviction matters.
The law permits this and we have tolerated it. Furthermore, I do not agree with Defence Counsel in his position that it is necessary for Cst. MacNeil to establish his agency beyond the statement that he is appearing as such. Other jurisdictions may require more, based on their experience.

With respect I question Judge Peddle's conclusions. When defence counsel made his application in Provincial Court pursuant to s. 24 of the Charter he requested the opportunity to cross-examine Constable MacNeil who was appearing as the prosecutor. During the cross-examination Constable MacNeil stated that he had not received any instructions, authority or appointment, orally or in writing, from the Minister of Justice to conduct that prosecution or any other prosecutions.

12 In his affidavit, Ronald G. Penney, Deputy Minister of Justice and Deputy Attorney General of Newfoundland deposes that certain officers of the R.C.M.P. have been assigned by *their superiors* to act as agents of the Attorney General of Newfoundland for the purpose of representing the Crown as prosecutors in summary conviction trials; further, that the practice of having members of the R.C.M.P. act as prosecutors has long been standard policy and that such practice has always been carried on with the full consent of the Attorney General of Newfoundland. In R. v. Harrison, [1977] 1 S.C.R. 238, [1976] 3 W.W.R. 536, 28 C.C.C. (2d) 279, 66 D.L.R. (3d) 660, 8 N.R. 47 the Supreme Court of Canada considered, inter alia, whether the Attorney General must personally instruct counsel. That case involved an appeal by the Crown from an accused's acquittal

and the issue was the sufficiency of the signature on the notice of appeal. At p. 285 [C.C.C.] Dickson J. (as he then was) stated that in the absence of direct challenge no evidence need be adduced to confirm the authority of counsel who appeals on behalf of the Crown and describes himself as "counsel for" or "counsel instructed by" or "agent for" the Attorney General or in words to like effect. Further, that advocates are officers of the Court and it is to be taken, in the normal course, that when a counsel states he is acting with authority of the Attorney General he is indeed clothed with that authority. At p. 286 the learned Justice stated:

> If, however, objection be taken which raises ground for doubt as to authority, the question arises as to how far one must go, and what evidence must be adduced, to establish authority. The answer will depend on the circumstances of the particular case. Without attempting to lay down any general rule, it would normally be sufficient if counsel produces a letter which he can say he received and believes to be signed by the Attorney-General or Deputy Attorney-General or an officer of the Department whom he understands to have requisite authority to institute criminal appeals ...

13 In the present case we are dealing with authority to prosecute not authority to appeal but the two are comparable. However, in Harrison the Court was speaking of counsel who are officers of the Court, with all that that status entails whereas in our case an R.C.M.P. officer is not an officer of the Court. Further, it appears that the Attorney General of Newfoundland has never given express authority, verbally or in writing, to any R.C.M.P. officer to act as agent for the prosecution of summary conviction matters and I must assume that he had no idea that Constable MacNeil was a prosecutor and acting as his agent. It is an arguable point therefore whether Constable MacNeil was an agent of the Attorney General pursuant to s. 720 of the Criminal *Code* for purposes of the prosecution of the case. The point is debatable but if there was a defect in the appointment (and I make no finding) it can be easily remedied. For purposes of this hearing I will accept Judge Peddle's finding that an R.C.M.P. officer qualifies as an agent of the Attorney General under s. 720 and I shall proceed on that assumption.

36. One question that arises in light of *Hart 2* is whether there is a mechanism in place whereby members of the EPS who are acting as prosecutors for the purpose of Judicial Interim Release are appointed. I have not uncovered any legislation or policy that relates to this question, and there does not appear to be anything in the *Police Act*, R.S.A. 2000, c. P-17 ("Police Act") or the *Regulations* that touches on this issue. This could, of course, be accomplished by an internal process, as evidenced in some of the related cases. Certainly, the *Police Act* does not authorize police officers to act as prosecutors, nor discuss them having any related role within the court system.

37. I note that in the context of addressing the "recent shooting of RCMP Const. David Wynn", in the February 6th, 2015 edition of the *Alberta Police Report* ("APA"), the point is made that bail hearings are not identified as a police responsibility by the government of Alberta.; [http://www.albertapolicereport.ca/2015/02/06/edmonton-police-service-examines-bail-hearing-process/]. Contrast this with the website for Ontario's Municipal Police Service, where it is expressly stated that members deal with 'show cause' hearings.

Is it Appropriate to have Police act as Prosecutors?

38. The Canadian courts have articulated an inability to review decisions made by the crown prosecutor - citing the doctrine of prosecutorial discretion - when a crown prosecutor is making decisions in the context of what courts have deemed one of the core elements of prosecutorial discretion. The leading case on prosecutorial discretion is *R. v. Kreiger,* [2002] 3 S.C.R. 372, 2002 SCC 65 (CanLII) ("Kreiger"), and although bail was not expressly defined as being within the 'core functions' of the crown in that case, the Court was clear that its list was not exhaustive (see para 46 of *Kreiger*). Later decisions have indicated that decisions relating to bail so fall under that umbrella; [see for instance, *R. v. Tkachuk* [2001] AJ No. 1277]. Crown prosecutors are shown deference by the courts for reasons relating to independence, but also because of the unique, and unbiased role they play in the administration of justice, and the level of knowledge, ethics, and training they bring to that role.

39. There is nothing on the *Alberta Justice and Solicitor General* website (hereinafter, "ABJ website") within the Government of Alberta's *Crown Prosecutor's Policy Manual,* or the *Law Enforcement Framework (2010)* (both published on-line) which refers to or anticipates police appearing in bail hearings. *The ABJ website* sets out a very detailed discussion of the role of crown prosecutors in Alberta's justice system. A Crown Prosecutor's manual, though admittedly not law, has been created and is discussed in detail, as follows:

> . . . a Code of Conduct for Crown Prosecutors and a series of guidelines and practice memoranda has been created. Collectively referred to as the Crown Prosecutors' Policy Manual, these documents constitute the Attorney General's instructions to all Crown Prosecutors, and are designed to guide Crown Prosecutors as they make discretionary decisions in respect of specific prosecutions. The Crown Prosecutors' Policy Manual represents an ongoing commitment by the Criminal Justice Division to integrity, excellence, accountability and professionalism. For the Manual to be effective, all those acting on behalf of the Attorney General of Alberta must adhere to its guidelines and directions. Such adherence will help to ensure that prosecutions in Alberta are conducted objectively and fairly, and with transparency and consistency. The Code of Conduct for Crown Prosecutors is integral to the Crown Prosecutors' Policy Manual and merits specific mention. This document describes concepts and principles that are at the very core of the considerable public duties and responsibilities of all Crown Prosecutors. As such, these concepts and principles form the foundation of the more specific policy documents that guide Crown Prosecutors in fulfilling these duties and responsibilities. (To be clear, however, the Crown Prosecutors' Policy Manual does not have the status of law. It does not in any way override the Canadian Charter of Rights and Freedoms or any governing legislation, and it is not intended to provide legal advice to members of the public or to create any rights enforceable at law in any legal proceeding.) ….

;[https://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Documents/Preface_to_Crown_Prosecutors_Manual.pdf]

40. I find it interesting that the Alberta Court of Appeal is cited on the *ABJ website* under the heading, *Code of Conduct for Crown Prosecutors*, for the principle that the doctrine of prosecutorial discretion extends to a prosecutor's decisions relating to bail; there is also *great* emphasis placed on maintaining the distinct roles of the crown prosecutor and police officers.

Further, decisions relating to a prosecution should purportedly only be made by "qualified prosecutors":

> *Independence of Crown Prosecutors*
>
> As the Attorney General's agents, Crown prosecutors enjoy the same level of independence as does the Attorney General. The Supreme Court of Canada has referred to this concept as follows:
>
> > *The prosecutor must assess, in good faith and without any motive but the furtherance of the administration of justice, whether the presumption of innocence can be rebutted in a court of law. This is a practical decision based on the prosecutor's experience and knowledge, and on his or her assessment of all the potentially relevant evidence.24 [emphasis added]*
>
> Moreover, the Alberta Court of Appeal has also considered the notion of prosecutorial independence and prosecutorial discretion. It has stated that the authority or responsibility for deciding whether a prosecution should proceed, and if so, on what terms:
>
> > *can only be discharged by qualified prosecutors who have the training, judgment and courage to make the necessary decisions inherent in every prosecution. For example, whether to proceed, and if so on what charge, whether to oppose bail, whether to seek a particular sentence and whether to appeal. Many times these decisions will be difficult and even unpopular, but the responsibility for making them must always rest with the Crown and not with victims of crime, or other interested parties.*
>
> *Abdication of this prosecutorial responsibility to others who are interested in the outcome of the case, but have little or no understanding of the complexities, or even the basic tenets of our justice system, is wrong, and represents a serious threat to the fair administration of criminal justice.25*
>
> . . . Any erosion (or perceived erosion) of a Crown prosecutor's independence is a threat to the proper exercise of prosecutorial discretion and to the fair administration of justice.

> In this regard, the relationship between investigators and Crown prosecutors merits specific comment. Although Crown prosecutors work closely with investigators, the separation between their respective roles is of fundamental importance to the proper administration of justice. Investigators investigate alleged offences and lay charges when they believe on reasonable grounds that an offence has been committed. Crown prosecutors do not simply and uncritically inherit and pursue the investigator's brief; rather, they must carefully review all charges, and must scrutinize the potential evidence and potential defence theories to ensure the requisite standard for initiating or continuing a prosecution is, and continues to be, met. A distinct line between these two functions, which allows both the investigators and Crown prosecutors to exercise discretion independently and objectively, forms part of a system of checks and balances. This independence of roles and responsibilities, upon which the justice system depends, must be respected and maintained. . . .

;[emphasis in original; in the original, note *25* cites *R. v. Tkachuk* [2001] AJ No. 1277 at paras. 24-28 (CA) (QL)]

41. Under the heading, *Crown Prosecutors Exercise Discretion*, the *ABJ website* cites the Supreme Court for the principle that police officer and crown attorneys are 'not the same', and that this motivates the types of decisions they make:

> As to the importance of prosecutorial discretion to the administration of justice, the Supreme Court has also stated:
>
> > *In the criminal law process prosecutorial discretion exists throughout the entire process, from the initial investigation stage through to the conclusion of the trial. The people involved in the process, be they police officers ... or other individuals charged with the responsibility of investigating breaches of various laws, or Crown Attorneys, are not the same nor will they necessarily act in the same way in exercising the discretion they have. This may lead to a situation where one person is charged with an offence, while another in seemingly identical circumstances is not; one person is prosecuted by indictment, another by summary conviction; one person is dealt with under one provision of a particular statute while another is dealt with under a different, perhaps harsher provision.*[21]

[note 21 in the original cites *Nelles v. Ontario* [1989] 2 SCR 170 at para. 40].

42. Finally, under the heading, *Delegation to Agents of the Attorney General* (again on the *ABJ website*), agents appointed to prosecute criminal offences are identified only as crown attorneys and assistant crown attorneys:

> *The Attorney-General is the chief law officer of the Crown and a member of the Cabinet. He heads a ministry of the government that exercises the authority over the administration of justice and the constitution and the maintenance and organization of the courts that is conferred upon the provincial government by the constitution.... [T]he Attorney-General is the prosecutor and hence, in effect, a litigant in every criminal case except.... In practice, the Attorney-General acts in individual cases through the numerous Crown Attorneys and Assistant Crown Attorneys who are appointed as his agents to prosecute for criminal offences on his behalf.17 [emphasis added]*

The concept of *delegation* is qualified in critical two respects. First, the employment of agents does not detract from the ultimate accountability of the Attorney General for decisions made in respect of individual prosecutions. The interplay of the concepts of delegation and the Attorney General's accountability has been explained as follows:

> *Under our system, the Attorney General is ultimately responsible to the people while local Crown Attorneys are granted a broad and generous area of unfettered discretion in criminal prosecutions. Subject only to very wide and general guidelines as to policy, the Crown Attorney is free to decide whether or not to launch a prosecution, the manner in which it will be prosecuted and how he will handle the matter at trial.18*

Second, delegation (together with the previously described concepts) commands that, in appointing agents, the Attorney General must ensure that these agents are:

1. empowered to carry out the Attorney General's prosecutorial duties and responsibilities;
2. able to and are directed to perform their duties independent of political or other improper external influences;
3. able to exercise prosecutorial discretion; and
4. accountable to the Attorney General for their decisions.

[where note 18 cites p. 227 of the Royal Commission on the Donald Marshall, Jr. Prosecution (Commissioners' Report, Volume 1: Findings and Recommendations, 1989) (the "Marshall Report")]

43. In my opinion, it seems unlikely that police officers acting as prosecutors could meet the requirements of point "3" cited immediately above. The cases discussing prosecutorial discretion seem to imply that this principle applies to actual lawyers. With respect to point "4," one must keep in mind that police answer to their own internal disciplinary proceedings in accordance with the *Police Act* and the *Regulations*. This, as stipulated in *R. v. McCarthy* 2008 ABQB 14 (CanLII) [2008] 7 WWR 547; 439 AR 321; 87 Alta LR (4th) 362; [2008] AJ No 27

(QL) in the context of discussing whether the City of Edmonton Police and Alberta Crown Prosecutors are separate for the purposes of disclosure:

> [18] In terms of governance structure, the EPS is a creature of statute governed by the *Police Act*, R.S.A. 2000, c. P-17 (the "Act"). Although s. 2(2) of the Act provides that all police services act under the direction of the Minister of Justice and Attorney General, when the Act is read in its entirety it is clear that police services, such as the EPS, are not merely an extension of the Attorney General: *Szczerba*, at para. 46.
>
> [19] Specifically, s. 28 of the Act vests responsibility for oversight of the EPS in the Edmonton Police Commission (the "Commission"), not the Minister of Justice or the Attorney General. In terms of the operative chain of command, the EPS Chief of Police is chosen by and accountable to the Commission, which in turn is appointed by and accountable to the Edmonton City Council. Neither the Minister of Justice or Attorney General plays an oversight role. Further, individual police officers are municipal not provincial employees and, pursuant to s. 39 of the Act, it is the municipality, in this case the City of Edmonton, that is liable for the actions of the Commission, the EPS and its officers.
>
> [20] By contrast, Crown prosecutors are employed by and work for the Ministry of Justice. They are provincial employees and report to the Attorney General, who in turn is accountable to the Legislature. Clearly, the Crown and EPS are not different arms of the same organization, but rather are separate and independent entities with different reporting structures and accountabilities.

44. With respect to the issue of police officers being 'able to carry out 'prosecutorial responsibilities', the fact, alone, that the strength of the Crown's case is relevant to whether an accused may be detained indicates that a knowledge particular to crown counsel is more than desirable - it is demanded by legislation. I am unclear as to how the detailed analysis of the role of the Crown Prosecutor as set out on the 'Alberta Justice' website accommodates having police act as prosecutors for the purposes of bail hearings, i.e., it makes it seem inappropriate. The fact is that reasons given for permitting police to be prosecutors for the purpose of summary conviction offences by the Courts center mainly on resource-based considerations. In my mind, this does not address the problems inherent in continuing to have police employed in the role of prosecutor, particularly given my opinion that the *Code* does not even contemplate this practice with respect to indictable offences.

45. The statement made on behalf of the Edmonton Police Service in response to the tragic death of Constable Wynn in the February on-line publication of the *APA* reflects the fact that the degree of training involved in having police appear to address matters of bail means this is not simply a cursory function. Rather,

> EPS officers participating in bail hearings are provided with a training and mentorship period, followed by observation from other officers more experienced in the process. Bail officers in training must demonstrate competency in the role prior to conducting bail hearings. That being said, the presence of a defence lawyer can result in an unbalanced

hearing. Police officers are not equipped with the background and expertise in statutory and case law that defence lawyers typically possess.

CONCLUSION:

46. A police officer cannot be a prosecutor for the purpose of bail hearings by virtue of being considered a "lawful deputy" of the "Attorney General" under section 2 of the Code; nor is a police officer "a person who institutes proceedings" under the section 2 definition of "prosecutor". Police officers can be appointed as *agents* of the Attorney General for the purposes of summary conviction proceedings, because of the definition of "prosecutor" under s. 785. This, in turn, means that police *could* act as prosecutors within the confines of matters of *Judicial Interim Release*, in cases where an accused is not charged with an indictable offence.

47. The policy set out by this province, combined with the cases discussing deference to prosecutorial discretion, however, are incongruent with police taking on this role. The justification having police act as prosecutors is one of limited resources in terms of numbers of crown prosecutors. This is not a proper basis for having officers take on a role that is beyond the scope of their legislated responsibilities, and their area of expertise.

Appendix D – The 2008-2009 ACPS Bail Project

Background

In the fall of 2008 the ACPS began a province-wide pilot project with prosecutors acting as presenters for all bail hearings held during regular business hours in Alberta.

Previously, a smaller project had been undertaken by a single ACPS office in Wetaskiwin with much reported success. In 2007 Alberta's Crime Reduction and Safe Communities Task Force recommended that Crown prosecutors be more directly involved in the bail application process at the front end of the bail system. In May 2008 then-Justice Minister Allison Redford announced that prosecutors would begin conducting all bail hearings in Alberta. As a result of that announcement, the ACPS developed a province-wide version of the smaller project.

How the pilot project worked

The initial process of the project involved two day shifts running Monday to Friday, running from 7:00 a.m. to 3:15 p.m. and 8:30 a.m. to 4:30 p.m. in both Edmonton and Calgary. After 4:30 p.m. on weekdays, and on holidays and weekends, the police continued their role as presenters at bail hearings.

Edmonton prosecutors received all bail files from Red Deer and north, Calgary received all files from agencies south of Red Deer. Bail files were provided by fax from the arresting agencies. A room was set aside for each prosecutor acting as the bail crown. In each room a TV screen or telephone was connected to the hearing office, only the JP could manage the connection. The prosecutors used their own laptops and the phone line in the bail room to facilitate communication with legal aid duty counsel or defence counsel. Bail hearings were conducted in this way for all Criminal Code offences, Traffic Safety Act and bylaw offences, as well as simple drug matters. For more complex drug matters the arresting officer continued to present (with the expectation that PPSC would eventually join the project). The EPS and CPS bails were done via videoconference. All others were done over the phone.

The project was also staffed by clerks who managed the files, disclosure and the docket list. The docket list recorded arrest times so that those statutory time limits could be observed. If counsel was known or duty counsel indicated, the prosecutor would e-mail or phone the other party to communicate the Crown's position on bail. When all parties were ready to proceed, the prosecutor would alert the arrest processing unit of the police agency and provide them with a list of names of prisoners to be brought to the hearing room that was also connected via CCTV or telephone to the hearing office. After the hearing the prosecutor was required to fill out a "result of JIRH form" and return it to the clerk to add to the file that would then go to the docket prosecutor.

At times the package of information required by the hearing office had not been provided by the police. In that case the prosecutor would fax the required package. The ACPS direction was to include the following:

- Fax Cover Sheet, Information (if new charges), Criminal Record, Summary of Outstanding Warrants (first page(s) with list of offences only), Warrants that match the Summary of Outstanding Warrants, any Probation Orders/Recognizance, Notice to Parent (if youth), Request to Hold.

During the initiation of the project there was concern by Crown Prosecutors regarding the prospect of a sudden change to their working schedules. Prosecutors expressed concern about being required to work those hours and about their safety and security working downtown late at night. Ultimately the project ended before evening or overnight shifts were added.

The pilot project was suspended as of October 1, 2009 in response to fiscal pressures and a hiring freeze imposed throughout the Alberta government. Police agencies agreed to immediately resume presentation at all JP bail hearings in Alberta.

In 2009 the ACPS estimated that twenty prosecutor positions would be required to take over all bail hearings in the province. While it was a stated goal of Alberta Justice at the time[4] to re-institute the project when economic pressures allowed, it has not since been re-instated.

[4]E-mail of Gord Wong, then-chief of Calgary General Prosecutions, dated September 25, 2009.

Appendix E – Prosecutor Information in Alberta

CPIC

The Canadian Police Information Centre (CPIC) is the central police database where Canada's law enforcement agencies can access information on a number of matters. There are approximately 3 million files generated each year and is the responsibility of the originating agency to ensure the data integrity of each file.

CPIC is broken down into four data banks: Investigative, Identification, Intelligence and Ancillary that contain information on persons with outstanding warrants, probation and parole status, or who are flagged as Special Interest to Police (SIP), or subject to judicial orders (including bail orders), as well as information about an individual's criminal record.

Criminal record checks from CPIC are usually done by any arresting agency and the convictions record is printed and included in bail packages. The CPIC convictions record is the only national record of an accused's criminal history accessible to police and, ultimately, prosecution agencies. There is no other national database available to Alberta police to inform the bail process. While it is possible for police and prosecution services to gather criminal history information from other provinces on a case-by-case basis, CPIC is the only central collection of criminal record information for out-of-province criminal records for an individual accused.

JOIN (Justice Online Information Management) program

JOIN is the database that manages all criminal files in the Alberta courts. When charges are laid a file is created in JOIN, which automatically assigns the court file number and creates the paper Information that is then sworn and becomes part of the court record. This is normally done by the police agency laying the charge. JOIN is the program that creates all Informations in Alberta including Queen's Bench, Provincial Court, Summary Conviction Appeals, Youth Court Informations and Court of Appeal files. These documents are then printed and sworn.

From JOIN to paper

Each court file begins with a paper Information and actions and endorsements are kept on that paper file. JOIN does not have capacity to manage scanned documents nor is it used to transfer Informations and other documents on court files to and from other court locations in the province. It is important to understand that only the initial text of the Information is created on JOIN – the document is not otherwise managed by the system after it is printed and sworn. This creates a situation where information needed anywhere in the province is treated as though it exists in a physical form that must be accessed and transferred in that way. There is no province-wide electronic database of court documents required for bail revocation (or other proceedings). In the context of bail revocation applications, an Information, release order and the endorsements on the court file in one jurisdiction must be located and transmitted (by fax or by attaching scanned copies to an email) by that court to a Hearing Office or another court if the outstanding charges originate in different jurisdictions.

All court appearances are maintained in JOIN, as well as witness lists, upcoming scheduled matters, and dispositions. JOIN is the primary source of outstanding charge information for accused persons in Alberta, as well as the most up-to-date Alberta criminal history. It is common to update CPIC records with recent offences in Alberta both for bail and disposition purposes using the data from JOIN.

JOIN also contains detailed bail information for all files, including the cash bail amount, bail assignment, surety information, financial activity, release conditions and any amendments and warrant status.

PRISM

PRISM is the Prosecutor's Information System Manager program. PRISM is currently implemented in 10 ACPS office locations, ultimately to be installed in every ACPS office. PRISM offers users different types of notes to record the outcomes of court appearances and to add notes and memos to the PRISM file.

All PRISM notes are stored in the File Activity tab of the file and are listed chronologically with the latest entry on the top of the page. These notes can be instructions for a docket prosecutor, a file note (for example a note of a discussion with defence counsel), reasons for remand, early case resolution (ECR), final disposition and bail notes; The notes function allows a prosecutor to record information such as reasons for and position on release.

PRISM also has communication functionality. An e-mail can be sent from PRISM to an assigned Crown or other recipient of choice. The sent e-mail is logged in File Activity as well as in the sender's Outlook Sent Mail box. These e-mails are automatically populated with case information like the accused's name and next court appearance. These emails are frequently used when an accused appears in court and outstanding charges are noted – the assigned prosecutor is alerted that they may wish to consider a revocation proceeding. Offices that maintain electronic files can hyperlink the disclosure file in PRISM – the file details are then a click away from the PRISM profile of the accused. This includes past files that are stored digitally.

CREF

Electronic storage of prosecution files and disclosure exists in various forms in Alberta. Some offices still receive and disclose police files in paper format. Many offices use paper files for day-to-day court appearances and trials. Others use a combination of paper and electronic file management.

The Criminal E-file (CREF) program is fully implemented in Edmonton General Prosecutions and implementation is underway in Calgary General Prosecutions. With this system, files are uploaded by the police to a secure webserver. They are downloaded by prosecutions and stored for prosecution use. Disclosure versions of those police files are then uploaded to a secure server to allow registered counsel access their client's files using their secure password. Other prosecution offices in Alberta use their own form of electronic file exchange from local police agencies (via hard drive or manual upload). Some offices receive paper disclosure and scan and create their own electronic files.

An ACPS office that uses both PRISM and electronic disclosure management has increased ease of access to outstanding files. As an accused's PRISM file can directly link to current and past disclosure files, gathering details of an offender's history is easier and less time-consuming than other processes. Ramona Robbins, Chief Crown of the Medicine Hat office (which has used electronic disclosure management for several years as of writing) informed the review that direct and easy access to the full prosecution files of an accused has greatly improved her ability to present at bail hearings. Brandy Shaw, Chief Crown prosecutor in Hinton also noted that electronic file access and sharing has improved her office's bail process as well. She noted that her ability to communicate with other offices through PRISM has increased access to information throughout the province, and that by being able to access other office's police files directly she is better able to make assessments regarding release and revocation.

ACPS

Information management and sharing is an ongoing project within ACPS. For the ACPS, PPSC, police and the courts, the JOIN program is the primary data storage for file information. PRISM is used by ACPS to extend the information input and communication functionality that does not exist in JOIN. PRISM is not accessible to the courts or police. As mentioned above, CREF is an electronic disclosure system that receives, manages and discloses police disclosure files. In offices that use both PRISM and CREF, the disclosure file is accessible through a hyperlink in the PRISM file page.

Ultimately all ACPS offices will use PRISM and CREF (or some other form of electronic disclosure management). Some offices have developed their own electronic disclosure system working with their local police forces. Some offices continue to receive paper disclosure from police services.

PPSC

The PPSC in Alberta has offices in both Edmonton and Calgary. Those prosecutors maintain conduct through those offices of all PPSC files in Alberta. The PPSC uses agents to appear in the regional docket courts; these agents speak to adjournments, setting of dates and bail. The process of obtaining files initially from the police varies between Edmonton, Calgary and the regions, as does the management and access to that information.

- In Calgary the files from Calgary Police Service (CPS) come to the PPSC via a live link (web-enabled). The PPSC's physical file folder contains just key contents of the digital file from the CPS. (e.g., charge, record, circumstances of offence). The full content of the file is stored digitally on the server in Calgary. Prosecutors have access to the files on this server only in their offices, not through a remote link in the courtroom. Agents do not have access to these files.
- In Edmonton the files from the Edmonton Police Service (EPS) are provided in hard copy, arriving every day in the mail slot at the courthouse. They are retrieved daily by the docket prosecutor and brought back to the office. When the file folder is created it contains the entire paper file from EPS. PPSC staff convert the paper to digital copies that are on the server. Redacting is done digitally as well.
- The PPSC records keeping system is call "GC docs". At the same time the physical file is created (for both cities) an iCase digital file is created. Certain tombstone data is store in iCase – for example the accused's name and charges. This system does not store copies of the disclosure file or links to the files stored on the server.
- Information and disclosure files about prior/outstanding charges for a particular accused are not entered. That information must be obtained through a JOIN search. That is done when the file is created and the docket prosecutor will see the list of old and outstanding files.
- The clerks may also try to contact the police or Crowns from other locations to obtain information from their previous files with an accused.
- As of 2015 the PPSC has access to GOA and PRISM files. However PPSC prosecutors cannot access ACPS disclosure files through PRISM.