

The Bail Process and its Punitive Dimensions

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Introduction



- The rise of populations in remand
- Study of the implementation of administration of justice offences in Montreal (Marie Manikis and Jess De Santi, “Punishing while Presuming Innocence: A Study on Bail Conditions and Administration of Justice Offences in Quebec” (2019) *Cahiers de droit*)
- Study of the implementation of 515(10)(c) of the CrC in light of R. v. St-Cloud [2015] 2 SCR 328: pre-trial detention is justified if the detention is “necessary to maintain confidence in the administration of justice, having regard to all the circumstances (...)” (in progress)

Historical evolution of bail and pre-trial detention in Canada

- Historical grounds for pre-trial detention and release in Canada
- Ouimet Report and recommendations
- Legislative evolution, constitutional considerations and *St Cloud*

First study: implementation of bail conditions and administration of justice offences

- Contribution

- Methodology (2 steps)
 1. Observations
 2. Collating data in files

First Study: Comparing infractions

Administration of justice

- ▶ s 145(3): Every person who is at large on an undertaking or recognizance... and who fails, without lawful excuse, to comply with the condition, direction or order is guilty of:
 - ▶ **a)** an indictable offence and is liable to imprisonment for a term not exceeding two years; or
 - ▶ **b)** an offence punishable on summary conviction.

Sentencing offences

- ▶ s 733.1: An offender who is bound by a probation order and who, without reasonable excuse fails or refuses to comply with that order is guilty of:
 - ▶ **a)** an indictable offence and is liable to imprisonment for a term of not more than four years; or
 - ▶ **b)** an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months, or to a fine of not more than \$5000, or both.

First study: Data

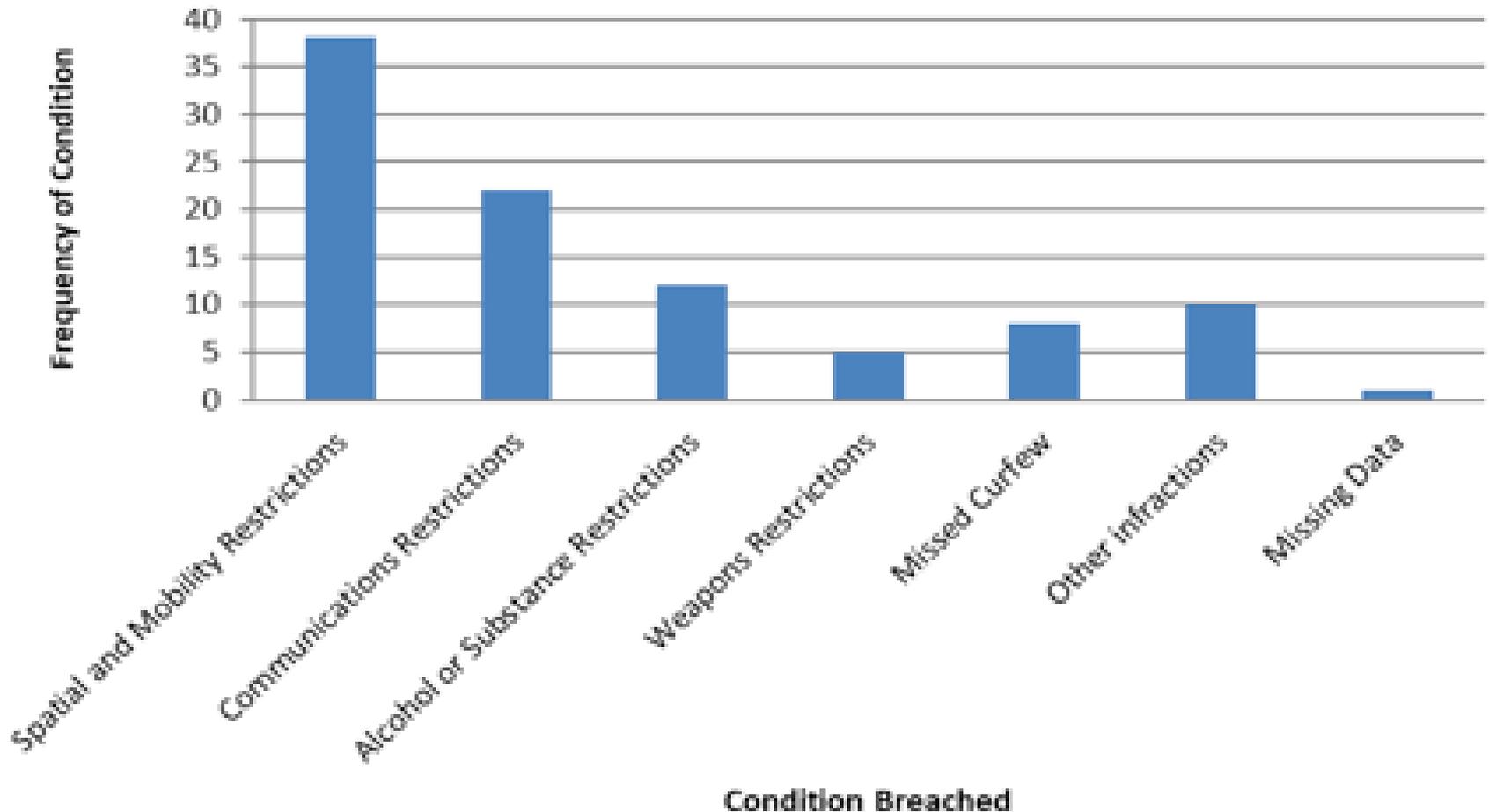
- ▶ 117 Bail Appearances observed, 112 accused persons
- ▶ In 49, the accused persons were charged with at least one administration of justice or sentencing offence
- ▶ The court files for 45 accused persons were available

First study: Data

- ▶ Out of 45 files:
 - ▶ 32 detained at the conclusion of the appearance
 - ▶ 13 released
 - ▶ 24 persons charged AOJ or sentencing + other criminal offence

First study: Data

Chart 1: Frequency of Type of Conditions Breached

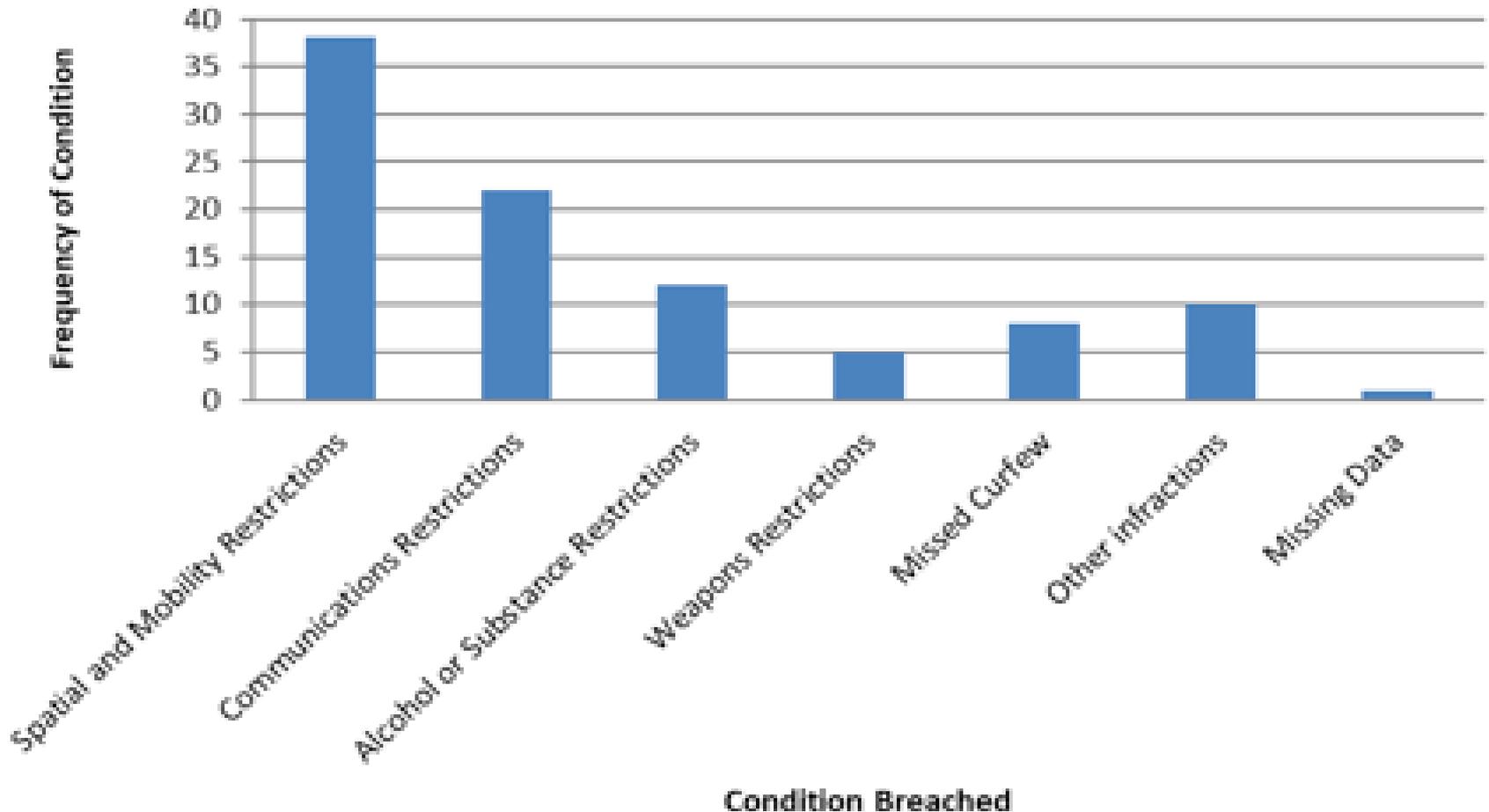


First study: Data

- ▶ Conditions imposed on the 13 released individuals:
 - ▶ Range: lowest – 2; highest – 9
 - ▶ Mean: 5.8
 - ▶ Most frequent: 5
 - ▶ **Most frequently used type of condition: spatial/ mobility restrictions; mean: 2.3 per released person**
- ▶ **11 out of 13 had previously breached one or more conditions identical to conditions imposed on them at conclusion of the hearing**

First study: Data

Chart 1: Frequency of Type of Conditions Breached



First Study: Discussion

- Aims of legislation are implemented differently on some aspects: added punitiveness
- Charge pile ups: punitiveness by law enforcement
- Untailored conditions
- Overlap of conditions
- Injection of punitiveness in the process

Second study: The relationship between punishment and pre-trial detention

- Contribution
- Methodology

The available data



- ▶ 44 cases
- ▶ detention rate of 64%
- ▶ Variations in detention by type of crime

The available data: Detention rate by type of crime

Type of offence	Detained	All
Against the person	13	27
Against property	4	5
Narcotics	5	6
Immigration	1	1
Breaches of Court Orders	5	5

Retributivism and just desert

- Duty to punish
- Punishment must be sufficiently afflictive to speak out against the offence
- Proportionality and just desert
- A more expansive vision of proportionality in Canadian sentencing

The implementation of factors that relate to the third ground: a retributive logic

- A predominant focus on the objective gravity of the offence
- The references to cardinal and ordinal proportionality in sentencing
- Drug trafficking cases

The implementation of factors that relate to the third ground: a retributive logic

- ▶ A retributive and limited approach towards the circumstances of the offence and the moral blameworthiness of the offender
- Aggravating factors are heavily relied on
- Mitigating circumstances are limited
- *Gladue* principles

The implementation of factors that relate to the third ground: a retributive logic

▶ Determining whether there will potentially be a lengthy term of imprisonment

- Previous convictions
- Breaches of orders

Concluding remarks and the social functions of pre-trial detention

- Fauconnet's constructivist perspective on punishment
- Pre-trial detention as punishment?
- Punitive dimensions of the bail process



Questions/Comments

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