Punishment and Retribution Within the Bail Process: An Analysis of the Public Confidence in the Administration of Justice Ground for Pre-Trial Detention

Marie Manikis and Jess De Santi

Abstract

This paper argues that lower courts have used their discretionary powers provided within legislation and St-Cloud to infuse a predominantly retributive interpretation into the public confidence in the administration of justice ground of pre-trial detention. This is illustrated notably by their choice of and weight afforded to the various aggravating and mitigating factors, the circumstances that relate to the commission of the offence, as well as their analysis of the length of imprisonment. This transfer of sentencing rationales, and to a greater extent, retributivism, into the third ground of pre-trial detention is used, in part, to justify pre-trial detention and can partially explain the rates of pre-trial detention. Finally, the underlying sentencing logic within the bail process can be understood within a sociological perspective, which examines the wider social functions of institutions and suggests that the bail process is an extension of punishment that serves to reinstate social order and public confidence.

Keywords: bail, pre-trial detention, confidence in the administration of justice, punishment, sentencing

Résumé

Cet article soutient que les tribunaux de première instance ont utilisé leurs pouvoirs discrétionnaires prévus par la législation et par l'arrêt St-Cloud pour diffuser une interprétation essentiellement rétributive du critère de confiance du public envers l'administration de la justice comme motif de détention provisoire. Ceci est notamment visible dans le choix des différents facteurs aggravants et atténuants et dans le poids qui leur est accordé par les tribunaux, aux circonstances liées à la commission de l'infraction, ainsi que par leur analyse de la durée de

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l'emprisonnement. Ce transfert des justifications de la peine, et plus extensivement des principes rétributivistes, vers le troisième motif de détention provisoire est utilisé, en partie, pour justifier la détention provisoire. Un tel transfert peut donc expliquer, du moins partiellement, les taux de détention provisoire. Finalement, la logique de détermination de la peine sur laquelle s'appuie le processus de mise en liberté sous caution peut être comprise à travers une perspective sociologique, qui permet d'appréhender les fonctions sociales plus larges des institutions et qui suggère que le processus de mise en liberté sous caution est une extension de la peine qui sert à rétablir l'ordre social et la confiance du public.

Mots clés: Mise en liberté sous caution, détention préventive, confiance dans l'administration de la justice, peines, condamnation

I. Introduction

Remand rates in Canada have rapidly increased. In 2016–2017, adults in remand outnumbered those in sentenced custody by a ratio of 1.5 to 1 in the provinces and territories, up from 1.2 to 1 in 2013–2014. The widening of this gap reflects both an increase in the remand population and a decrease in the sentenced population. The average number of adults in remand in 2016–2017 increased 3% when compared with the previous year and increased 7% when compared with 2012–2013.[1] The rise in remand populations is paradoxical given Canada's commitment to the presumption of innocence, the constitutional protection of the right to reasonable bail, the drop in violent crime rates since the early 1990s, and the relative decrease in custodial sentences.[2]

Bail has recently received academic attention, particularly within criminological literature. Studies demonstrate increasing remand populations in Canadian jails[3] and have attempted to explain this phenomenon, including the overuse of bail conditions and their effects on pre-trial release and administration of justice offences.[4] To date, much of the empirical research has involved either direct observation or reviewing the records of bail proceedings. Absent from this discussion is socio-legal research regarding judicial reasoning in bail decisions and their potential relationship to the rise of remand populations.

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1 Jamil Malakieh, "Adult and youth correctional statistics in Canada, 2016/2017," Statistics Canada, last modified June 29, 2018 <https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54972-eng.htm>.

2 Cheryl Marie Webster, Anthony N. Doob, and Nicole M. Myers, "The parable of Ms. Baker: Understanding pre-trial detention in Canada," *Current Issues in Criminal Justice* 21, no. 79 (2009): 79–102.

3 Ibid; Canadian Civil Liberties Association and Education Trust, *Set up to fail: Bail and the revolving door of pre-trial detention* (Canadian Civil Liberties Association, July 2014).

4 Jane B. Sprott and Jessica Sutherland, "Unintended consequences of multiple bail conditions for youth," *Canadian Journal of Criminology and Criminal Justice* 57, no. 59 (2015): 59–81; Nicole M. Myers and Sunny Dhillon, "The criminal offence of entering any Shoppers Drug Mart in Ontario: criminalizing ordinary behaviour in youth bail conditions," *Canadian Journal of Criminology and Criminal Justice* 53, no. 187 (2013): 195; Marie-Eve Sylvestre, William Damon, Nicholas Blomley, and Céline Bellot, "Spatial tactics in criminal courts and the politics of legal technicalities," *Antipode* 47, no. 5 (2015): 1346; Marie Manikis and Jess De Santi, "Punishing while presuming innocence: A study on bail conditions and administration of justice offences," *Les Cahiers de Droit* 60, no. 3 (2019): 873; Marie-Eve Sylvestre, Nicholas Blomley and Céline Bellot, *Red Zones: Criminal Law and the Territorial Governance of Marginalized People* (Cambridge: Cambridge University Press, 2020).

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This article provides a partial explanation of the rise of remand populations by analyzing judicial use of the tertiary ground for pre-trial detention, which permits detention when necessary to maintain the public's confidence in the administration of justice. There are a number of reasons as to why this ground is of particular interest in this context, including its recent addition to the law of bail in Canada, its description by legal commentators as imprecise and vague, and the fact that it is not traditionally featured in other common law jurisdictions.[5]

A previous study[6] has quantitatively examined decisions between 2002 and 2004, post-*Hall*,[7] where the Supreme Court of Canada held that section 515(10)(c) was meant to be applied sparingly. Sixty-four decisions were reviewed, of which thirty-five resulted in pre-trial detention. The study concluded that, when the public confidence ground was employed, it resulted in a denial of bail in over half of instances and was therefore not being used sparingly.[8]

To date, there are no studies that have analyzed this ground following the Supreme Court's decision in *St-Cloud*,[9] which re-interprets the application of this ground by instructing courts to use it expansively rather than sparingly.[10] This article thus contributes to the literature on bail by providing the first survey and analysis of first-instance bail decisions post *St-Cloud*. It deploys original data found within reported caselaw on the use and implementation of the tertiary ground of pre-trial detention and develops a quantitative understanding of the current use and frequency of this ground of pre-trial detention. In addition, it provides a novel qualitative analysis of first-instance bail decisions in order to further our understanding of the ways courts have interpreted and implemented legislative and Supreme Court instructions that relate to the tertiary ground. This analysis is relevant, since legislative and judicial guidance allow for broad discretionary powers that enable various interpretations that can contribute to reasonings that favour detention.[11] Thus, understanding judicial interpretations and implementation of this ground for pre-trial detention reveals important connections between underlying logics, the use of pre-trial detention, and the concept of confidence in the administration of justice. Finally, an analysis of the ways courts implement the third ground of pre-trial detention can shed light on the wider function of pre-trial detention in society.

The analysis reveals an important relationship between sentencing, particularly desert theory, and the judiciary's understanding of the confidence in the

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5 England and Wales: *Bail Reform Act 1976,* 1976 Chapter 63. New Zealand: *Bail Act 2000*, 2000 No 38. United States, federally: Amendment VIII, *Bill of Rights*, 1791 and 18 US Code Chapter 207: Release and Detention Pending Judicial Proceedings.

6 Don Stuart and Joanna Harris, "Is the public confidence ground to deny bail used sparingly?" *CR* 21, no. 6 (2004).

7 *R v Hall*, 2002 SCC 64, [2002] 3 SCR 309.

8 Myles Frederick McLellan, "Bail and the diminishing presumption of innocence" *Canadian Criminal Law Review* 15, no. 1 (2010). http://dx.doi.org/10.2139/ssrn.1901535

9 *R v St-Cloud,* 2015 SCC 27, [2015] 2 SCR 328.

10 The Court highlights that this ground "must not be interpreted narrowly (or applied sparingly) and should not be applied only in rare or exceptional circumstances or only to certain types of crimes," ibid., para 87.

11 For instance, although there are guidelines for s. 718.2(e), an analysis of court decisions is relevant to understand their implementation and their relationship to the over-representation of Indigenous people in prisons. Marie-Andrée Denis-Boileau and Marie-Eve Sylvestre, "*Ipeelee* and the duty to resist," *Canadian Criminal Law Review* 21 (2017): 286.

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administration of justice ground of pre-trial detention. More specifically, the paper highlights that, although the legislator and Supreme Court in *St-Cloud* have included guidelines that refer to sentencing, lower courts have infused a predominantly retributive interpretation into the public's confidence in the administration of justice ground. This is illustrated notably by their choice and weight afforded to the various aggravating and mitigating factors, the circumstances of the offence, as well as their analysis of the length of imprisonment. Finally, this paper suggests that the transfer of sentencing theory, and to a greater extent retributivism, into the bail context can in turn be understood within a constructivist sociological perspective, which examines the wider social functions of institutions and suggests that the bail process is an extension of punishment.

This article begins by discussing the historical evolution of the law on bail and the guidance provided by the legislature and the Supreme Court regarding the third ground of pre-trial detention. This is followed by an examination of the quantitative data on pre-trial detention rates under the third ground. It then continues with a review of sentencing theory, with a particular focus on retributive and desert-based framework to provide an analytical framework, which is in turn used to analyze the qualitative data revealed in this study. Indeed, it will be shown that some recurring features of judicial interpretations that relate to the third ground of pre-trial detention integrate a retributive, desert-based logic. This logic can partially account for the frequency of pre-trial detention that is tied to the third ground of pre-trial detention logic. Finally, the piece sheds light on the emergence of the sentencing logic into the tertiary ground by considering sociological literature on the wider societal functions of bail and pre-trial detention.

II. The Historical Evolution of the Law of Bail

2.1 The Evolution of the Law of Bail and Grounds for Pre-Trial Detention

Bail in Canada relied on the English law of bail until Parliament enacted legislation in 1869[12] that made bail discretionary for all offences. Detention was presumed unless the accused applied for bail under the *Criminal Code*, which gave no guidance to the bail judge. The primary determinant for pre-trial detention was the need to compel the accused's attendance, but courts also considered other factors, including the nature of the offence, the severity of the penalty, the evidence against the accused, and the character of the accused.[13]

The "rights-oriented" atmosphere of the 1960s and Friedland's 1965 study[14] highlighting the arbitrary and frequent use of pre-trial detention, led to the appointment of the Ouimet Committee,[15] tasked with examining Canadian criminal justice, including bail. The committee's final report in 1969 recommended that pre-trial detention only be used when necessary to ensure the appearance of the

[12] An *Act respecting the duties of Justices of the Peace, out of Sessions, in relation to persons charged with Indictable Offences*, SC 1869, c. 30.
[13] *R. v. Gottfriedson* (1906), 10 C.C.C. 239 (B.C. Co. Ct.); *Re N.* (1945), 87 C.C.C. 377 (P.E.I.S.C.).
[14] Martin L. Friedland, *Detention before trial: A study of criminal cases tried in the Toronto Magistrates' Courts* (Toronto: University of Toronto Press, 1965).
[15] Canadian Committee on Corrections, *Toward unity: Criminal justice and corrections* (Ottawa: Queen's Printer, 1969).

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accused at trial or to protect the public pending trial of the accused. However, when Parliament enacted the *Bail Reform Act* in 1972,[16] the law permitted pre-trial detention beyond the two circumstances recommended in the report, including "(1) when necessary to ensure the accused's attendance in Court; and (2) *when necessary in the public interest* or for the protection or safety of the public against the accused re-offending or interfering with the administration of justice" (emphasis added). The former aspect of the second ground—public interest—eventually became a separate third ground for denying bail.

The enactment of the *Canadian Charter of Rights and Freedoms* in the 1980s constitutionalized the right to reasonable bail and the right not to be denied bail without just cause.[17] In *Morales*, the Supreme Court struck down the "public interest" portion of section 515(10)(b) on the basis that it was vague, imprecise, and a "standardless sweep" that would permit a court to "order imprisonment whenever it sees fit."[18]

Five years later, Parliament replaced "public interest" with section 515(10)(c), which denied bail "on any other just cause being shown," when "necessary to maintain confidence in the justice system," having regard to all the circumstances of the case: "(i) the apparent strength of the prosecution's case, (ii) the gravity of the offence, (iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and (iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves a firearm, a minimum punishment of imprisonment for a term of three years or more." The Supreme Court in *Hall* found the portion of 515 (10)(c) that permits detention "on any other just cause being shown" unconstitutional, as it was vague and conferred an open-ended judicial discretion to refuse bail —inconsistent with 11(e) of the *Charter*. The rest of 515(10)(c), authorizing pre-trial detention to "maintain the confidence in the administration of justice," was maintained since it retained precision by listing specific criteria. The Court interpreted the third ground restrictively, highlighting that the "cases where it can properly be invoked [were] relatively rare" and that "the circumstances in which recourse to this ground for bail denial may not arise frequently."[19]

2.2 St-Cloud: Reinterpreting Confidence in the Administration of Justice

The Supreme Court in *St-Cloud* re-examined this ground and expanded its application while providing wide discretionary powers to lower courts. The Court specified that it should be considered a distinct and stand-alone ground and that its application should not be limited to exceptional circumstances, unexplainable crimes, or the most heinous of crimes. In particular, it specified four factors to be considered in relation to 515(10)(c), highlighting that additional circumstances relating to personal circumstances may also be relied on.[20]

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16 *Bail Reform Act*, SC 1970-71-72, c. 37.
17 *Canadian Charter of Rights and Freedoms*, s 11(e), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982*, (UK), 1982, c 11.
18 *R v Morales*, [1992] 3 SCR 711 at 732.
19 *Hall,* paras 27, 31.
20 *St-Cloud*, para 71.

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The balancing of all these factors must be guided by the perspective of the public, defined as a reasonable person properly informed about the philosophy of the legislative provisions, the values of the *Charter*, and the circumstances of the case. This reasonable person is meant to be thoughtful, not be prone to emotional reactions, have accurate knowledge of the circumstances of the case, and agree with society's fundamental values. Per the Court, "this person's confidence in the administration of justice may be undermined not only if a court declines to order detention where detention is justified having regard to the circumstances of the case, but also if it orders detention where detention is not justified."[21]

Legal literature has warned against the Court's expansive guidance regarding the tertiary ground. Rankin anticipated that, contrary to the *Bail Reform Act*'s aim to reduce the incidence of both arrest and denial of bail, this ground for pre-trial detention would inevitably increase the number of persons detained pending trial.[22] MacAlistair suggested that the tertiary ground remains a standardless and vague ground, like its predecessor, which was struck down in *Morales*.[23] These authors have also argued that because the explicitly mentioned criteria are non-exhaustive, it can lend to an open-ended inquiry into whether detention is justified. The Supreme Court subsequently reaffirmed that bail is to be granted at the earliest possible opportunity and on the least restrictive conditions.[24]

The following sections present and analyze data regarding the confidence in the administration of justice ground since *St-Cloud*. The analysis not only confirms the pitfalls that the literature warned of, but also reveals that the logic and framework of sentencing have been transferred to the bail process, favouring pre-trial detention.

III. Data Regarding the Confidence in the Administration of Justice Ground

Bail decisions are underreported relative to the frequency with which they occur. There are currently no national statistics regarding bail or judicial interim release. The Integrated Criminal Court Survey reports that final decisions were taken in 344,585 adult criminal cases in 2017–2018.[25] According to available data from the Ontario Court of Justice of cases in which a final disposition was made in 2017, 46% of cases started in bail court, and bail decisions were taken on 58% of those cases.[26] Statistics Canada notes that the proportion of criminal cases starting in bail court

21 Ibid. at para 87.
22 M. B. Rankin, "St-Cloud searching for a silver lining," *Criminal Reports* 19, no. 97 (2015).
23 D. MacAlister, "St-Cloud: expanding tertiary grounds for denying judicial interim release," *Criminal Reports* 19, no. 7 (2015).
24 *R v Antic*, 2017 SCC 27 at para 29. See also *R v Anoussis*, 2008 QCCQ 8100 at para 23. Lower courts reflect concern regarding systemic complacency towards risk aversion and onerous release conditions. *R v Tunney*, 2018 ONSC 961.
25 "Table 35-10-0027-01 Adult Criminal Courts, number of cases and charges by type of decision," Statistics Canada, last modified February 4, 2020, https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510002701.
26 Ontario Court of Justice, "Criminal Bail Statistics by Region," 2018, https://www.ontariocourts.ca/ocj/files/stats/bail/2017/2017-Bail-Region.pdf.

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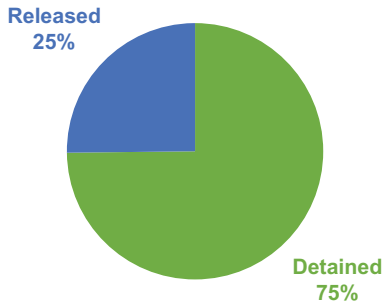

Figure I Percentage of accused released and detained at the conclusion of their bail hearings.

reached an estimated 50% of cases in 2007.[27] There are no statistics regarding the numbers or rates of contested and uncontested bail hearings.

This study collated and reviewed all published first-instance bail hearing judgments regarding adults accused of criminal offences decided since the release of *St-Cloud* until April 1, 2019, in which section 515(10)(c) was considered as grounds for detention. Four databases were used: CanLII, WestLaw, QuickLaw, and SOQUIJ. Only first-instance decisions, wherein one or more adults were charged with criminal offences, were retained.[28] In total, 111 cases met these criteria, containing the bail hearing outcomes for 138 adults.

3.1 Pre-Trial Detention Rates and the Burden of Proof under the Tertiary Ground

As illustrated in Figure I, out of 138 accused, 103 were detained at the conclusion of their bail hearings (75%) and thirty-five were released (25%). The detention to release rate is nearly 3:1 an increase from Stuart and Harris's study,[29] lending credence to the warnings voiced by legal scholars that the expansion, vagueness, and discretionary nature of the third ground, post *St-Cloud,* would increase pre-trial detention.

The burden of proof was also considered alongside these detention rates. When the onus is reversed and the accused must demonstrate that they should be released on bail, the default is that they must do so on all three grounds for detention. In the data, 114 out of 138 accused persons bore the burden of demonstrating that they should be released pending trial, which partly contributes to the connection between the third ground of pre-trial detention and the detention outcome.

Comparing the burden of proof and the outcome, Table I reveals that the accused tended not to meet their burden, while the Crown was more likely to meet theirs.

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[27] Research and Statistics Division, "Trends in bail courts across Canada," Department of Justice Canada, last modified December 17, 2018 <https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2018/dec01.html>.

[28] The first-instance requirement excludes bail reviews, appeals, and bail decisions pending an appeal, consistent with this study's aims.

[29] Stuart and Harris, "Public confidence ground."

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Table I
Burden of Proof and Outcome

	Accused	Crown	Both	Unclear
Detained	86	16	1	1
Released	28	6	0	1

Which party carried the of proof at the bail hearing and the outcome of the hearing—whether the accused individual was detained or released.

3.2 The Relationship Between the Grounds at Issue and the Outcome of Hearings

Ultimately, courts[30] decide whether to release or detain an individual facing a bail hearing. If they decide to detain an individual, they must specify their reasons under 515(10).

Table II compares the grounds at issue and invoked for each accused against the outcome of the hearing, based on the specific grounds on which the accused was detained or released. The leftmost column provides every possible combination of grounds on which an accused person could be detained that include the tertiary ground. The remaining columns provide the breakdown of accused individuals, based on each of these combinations, who were released or detained and, if detained, on which grounds.

Of the 138 accused included in this dataset, ninety-three were detained on the tertiary ground, as either the sole ground of detention or alongside the primary or secondary grounds, for a use rate of 67.4%%.[31] Focusing on the 103 accused who were detained, the rate is 90.3%.

There are two outlier cases. In one, the onus was reversed but the Crown consented to the accused's release.[32] In the other, the Crown consented to release, but the court rejected the joint submission and detained the accused on secondary and tertiary grounds.[33]

The data also reveals that the tertiary ground is more frequently used to justify detention when it is combined with one or more of the other grounds, particularly the secondary ground. Of the ninety-three accused detained on the tertiary ground, eighty were detained on multiple grounds, representing 86.0% of accused detained on tertiary grounds. Thirteen persons (14.0%) were detained solely on the tertiary ground. The tertiary ground was both the only ground at issue and the only ground on which someone was detained for three of the ninety-three detained accused (3.2%). Overall, when the tertiary ground is interpreted by courts—either on its

[30] The language of "judges," "judiciary," "courts," and "justices of the peace" is employed interchangeably since, in most provinces, they share decisional jurisdiction in bail.
[31] The sole case in which it was not clear on which ground the accused was detained was not counted amongst the 93.
[32] *R v Heffernan*, 2016 CanLII 96685 (ON SC).
[33] *R v Jameel*, 2016 BCPC 115.

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own or with other grounds—it is used much more frequently to justify pre-trial detention.

3.3 The Offences for which Accused are Detained

Since courts tend to focus on the most serious offence in cases of multiple charges, only the most serious per case were counted, measured by the longest maximum prison sentence. Where more than one offence was considered equally serious, both were counted. These were then grouped by type of offence in Table III. As demonstrated, only where the accused's most serious charge was an offence against the person does there seem to be a substantial degree of release pending trial (32.1%).

Table II

Breakdown of accused individuals, based on grounds at issue, released or detained and, if detained, on which grounds.

	Outcome					
Grounds at Issue	Released	Detained (c)	Detained (b)(c)	Detained (a)(b)(c)	Detained (not c)	Unclear
s 515(10)(a)(b)(c)	7	1	13	22	5	0
s 515(10)(b)(c)	23	8	44	0	5	1
s 515(10)(c)	4	3	0	0	0	0
s 515(10)(a)(c)	0	1	0	0	0	0
Crown Consents	1	0	1	0	0	0

S 515(10)(a): Detention is necessary to ensure the accused's attendance at court. S 515(10)(b): Detention is necessary to protect the safety of the public, including any victim or witness. S 515(10)(c): Detention is necessary to maintain confidence in the administration of justice.

Table III

Detention by type of most serious offence

	Total Cases		Detained	
Types of Offences	Number	Percentage	Number	Percentage (of all)
Offences against the person	53	38.4	36	67.9
Offences against property	11	8.0	10	90.9
Drug (CDSA) offences	44	31.9	33	75
Mixed property/person offences	7	5.1	7	100
Breaches of court orders/ Against the justice system	12	8.7	9	75
Other	9	6.5	7	77.8
Unclear	3	2.2	3	100
Total	138	100	105	76.1

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IV. Findings

The data in this section demonstrates several facets of the use of the tertiary ground. First, when s 515(10)(c) was at issue, three-quarters of cases resulted in pretrial detention (Table II). In most of these cases, the accused bore the burden of proof (Table I) and were much more likely to fail to meet their burden than the Crown was to meet the burden of demonstrating detention, despite both having to meet the same balance of probabilities standard. Second, the tertiary ground is often considered alongside other grounds of pre-trial detention, and courts often use it to justify detention alongside one or more of the other grounds. Finally, when examining the cases by most serious charge faced by each accused person, the most striking finding concerns when an accused is *not* detained. Only when an offence against the person was the most serious charge an accused individual faced did the rate of detention drop below 75%.

The following section proceeds by examining this dataset to qualitatively understand some of the underlying rationales invoked by courts when considering and discussing pre-trial detention under the tertiary ground. This complementary qualitative analysis provides a partial understanding of the ways the tertiary ground can be used to justify pre-trial detention and its contribution to the rise in remand.

4.1 Importing a Sentencing Framework at Bail as Part of Maintaining Public Confidence in the Administration of Justice

The following analysis focuses on judicial narratives relying on justices' own words. The themes explored arise from courts' explanations for their decisions to detain or release individuals. The analysis combines the survey method, in that no sampling was done of the original dataset and all 138 decisions were reviewed, with a case study method that analyzes recurring themes in judicial interpretation of the tertiary ground. Cases were selected based on the extent to which the court's interpretative reasoning was explicit on key aspects *St-Cloud* guidelines.

The qualitative analysis of the dataset reveals that a retributive logic of just deserts is predominant within the judiciary's analysis—transposing a punitive logic within this stage of the process. To illustrate this claim, this section begins by discussing retributive and consequentialist theories of punishment, as well as their conception of the principle of proportionality. In particular, it proceeds with an examination of the caselaw to illustrate and discuss the ways these frameworks, particularly retributive-based just deserts, are imported by the judiciary in their interpretation of the tertiary ground of pre-trial detention. This analysis is relevant, since, as discussed in section II, lower court judges have wide discretionary powers to interpret, create, and weigh various factors that relate to the third ground of pre-trial detention. Although, officially, the system is not meant to import a punitive logic at this stage of the process, various components illustrate that a sentencing framework is nevertheless present in judicial reasoning.

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4.1.1 Retributive and Consequentialist Justifications for Punishment and the concept of Proportionality in Sentencing

Justifications for punishment are generally classified into retributive and consequentialist, although some hybridity exists.[34] Retributive theories, including desert-based perspectives, justify punishment directly from the offence.[35] There is an obligation to punish and this punishment must be sufficiently afflictive to be just and appropriate to "speak out" against the offence. The criminal has a "right" to be punished as a rational being.[36] Guilt is a necessary condition for punishment,[37] and punishment should never be administered to promote another goal.[38] Consequentialist theories justify punishment to the extent that it creates benefits that outweigh its negative effects.[39] It is justified through the principle of utility, and can include deterrence, rehabilitation, and incapacitation.[40] These theories have been described as prospective, as the principle aim of punishment is forward looking.[41] Both theories have evolved with some mention of proportionality, but this concept was mainly developed in the 1970s academic literature and was rooted within an underlying theory of punishment.[42]

Desert theorists have given primary consideration to proportionality and rooted the concept within a retributive framework.[43] Proportionality ensures the fair expression and communicative function of punishment, conveying censure to the offender, the victim, and society.[44] It also works as a framework for desert-based calibration, focusing on its two constitutive elements: the gravity of the offence (harm component) and the level of blameworthiness (culpability) of the offender. Only aggravating and mitigating factors that relate to the individual's level of blameworthiness and to the harm that relate to the *offence* are relevant to the determination of a proportionate sentence. All other factors unrelated to harm and culpability are "extraneous"[45] and should have no bearing on proportionality. Over the years, some desert theorists have expanded their understanding of pre- and post-offence matters and the way they relate to culpability: factors such as remorse and previous convictions can be part of the

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34 Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001).
35 Ibid.
36 Mike C. Materni, "Criminal punishment and the pursuit of justice," *British Journal of American Legal Studies* 2, no. 1 (Spring 2013): 274.
37 Morris J. Fish, "An eye for an eye: Proportionality as a moral principle of punishment," *Oxford Journal of Legal Studies* 28, no. 1 (Spring 2008): 63.
38 Manson, "The justifications for punishment," in *Law of Sentencing*: 31–55.
39 Andrew von Hirsch, "Proportionality in the philosophy of punishment," *Crime and Justice* 16 (1992): 58.
40 von Hirsch, "Philosophy of punishment," 57–58; Manson, "Justifications for punishment," *Law of sentencing.*
41 Fish, "Eye for an eye," 63, 64.
42 Marie-Eve Sylvestre, "The (re)discovery of the proportionality principle in sentencing in *Ipeelee*: constitutionalization and the emergence of collective responsibility," *Supreme Court Law Review* 63, no. 2 (2013).
43 Andrew von Hirsch and Andrew Ashworth, *Proportionate sentencing* (Oxford: Oxford University Press, 2005).
44 Andrew Ashworth, "Re-evaluating the justifications for aggravation and mitigation at sentencing," in *Mitigation and Aggravation at Sentencing*, ed. Julian V. Roberts (Cambridge: Cambridge University Press, 2011).
45 Ibid.

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analysis.[46] Nevertheless, desert theorists have traditionally afforded a predominant consideration to the gravity of the offence and continue to do so.[47]

Utilitarian theorists have generally considered proportionality as a moderating principle, a ceiling requiring that a sentence not exceed what is just and appropriate to achieve their retained utilitarian aim.[48] Factors relevant to the determination of a sentence can differ from the ones relating to the offence and depend on the underlying objective of sentencing, such as deterrence, rehabilitation, reparation, or public protection.

In Canada, proportionality is the fundamental principle of sentencing under section 718.1 of the *Criminal Code*, which imports a desert-based logic by specifying that all sentences must be proportional to the gravity of the offence and the degree of responsibility of the offender. In earlier years, the courts considered proportionality primarily under a retributive approach.[49] Recently, there has been an expanded view of the factors at sentencing that are relevant to proportionality, increasingly rooted within consequentialist perspectives, notably through consideration of the collateral effects of punishment[50] and the state's contribution to the degree of responsibility.[51]

Despite this expansion of culpability within Canadian proportionality, the following discussion suggests that the bail process, under the third ground of pre-trial detention, imports predominantly traditional retributive desert-based considerations that have focused on the offence.

4.1.2 A retributive framework within bail

Although the bail process is not officially meant to be punitive, nor is it intended to be an expression of blame and censure, the discretion provided to courts under 515 (10)(c) has enabled and contributed to the implementation of a retributive desert-based approach, including its principles, language, and conceptions of blame into the bail process. This is particularly problematic considering that within a retributive-based theory, a finding of guilt is necessary to impose punishment. Additionally, courts, to some extent, also import consequentialist considerations, particularly deterrence, under the tertiary ground. The following section provides an analysis of some of the prevalent factors considered within the tertiary ground analysis and illustrates their underlying punitive logic and the ways they have contributed to pre-trial detention, including (i) the objective gravity of the offence; (ii) the circumstances of the offence (iii) the length of imprisonment, and

[46] Julian V. Roberts, "The recidivist premium: For and against," in *Mitigation and Aggravation at Sentencing*, ed. Julian V. Roberts (Cambridge: Cambridge University Press, 2011).
[47] Ibid. at 155: "since blameworthiness or culpability considerations are secondary to crime seriousness, neither the previous misconduct nor the post-offence conduct should fully eclipse the seriousness of the crime as a determinant of sentence severity."
[48] von Hirsch and Ashworth, *Proportionate Sentencing*, 5.
[49] Sylvestre, "(Re)discovery of the proportionality principle."
[50] *R v Pham*, 2013 SCC 15, [2013] 1 SCR 739.
[51] *R v Gladue*, [1999] 1 SCR 688; *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433; *R v Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 206.

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(iv) mitigating and aggravating factors in sentencing. It also discusses some of the evidentiary aspects present in this process.

4.1.2.1 Objective gravity of the offence

The Supreme Court in *St-Cloud* instructed lower courts that for the purposes of 515 (10)(c), judges must examine the "objective" gravity of the offence, but left the weight accorded to this factor to judicial discretion. When examining the objective gravity of the offence, judges are instructed to consider the maximum and minimum sentence under the *Criminal Code* for the offence. The assessment of gravity therefore relies on the severity levels for these crimes. This logic imports desert theory, including cardinal proportionality, which considers the anchoring and scaling of punishments as an important aspect of sentencing.[52] In scaling penalties, a reasonable proportion needs to be maintained between levels of punitiveness and the gravity of the criminal conduct. Further, the assessment of maximum and minimum sentences includes elements of ordinal proportionality, since judges rely on how severely crimes are sanctioned relative to each other. This borrows desert-based assumptions that there is an objective way to grade crimes in relation to each other by levels of severity.

Within the dataset, judges heavily weighed the objective seriousness of the offence, particularly in drug-trafficking cases. Forty-four of the accused faced accusations under the *Controlled Drugs and Substances Act*. Thirty-three of these persons were detained. The overwhelming majority of accused (30 out of 33) were facing drug trafficking charges, which many carry a maximum sentence of life imprisonment. To justify detention, courts referenced the reasonable, well-informed member of the public, framing drug trafficking as a vicious social problem, especially in the context of opiates and cocaine.

The focus on the seriousness of the offence in the context of the tertiary ground imports an aspect of desert-based proportionality premised on retributive grounds, and courts have contributed to this by heavily weighing this factor. This emphasis at bail is problematic given that it undermines the presumption of innocence. It also signals that confidence in the administration of justice would be diminished if a person were released following a serious offence.

4.1.3 A Parallel Between Just Deserts' Blameworthiness and Bail's "Circumstances Surrounding the Offence"

The circumstances of the offence are a relevant consideration for desert theorists in sentencing and include the moral blameworthiness of the offender and the degree of harm resulting from the offence.[53] These circumstances are construed narrowly, and, according to Ashworth, any additional circumstances are "extraneous" and thus have no bearing on proportionality. While some recent sentencing decisions in Canada have expanded the concept of proportionality to include the circumstances

[52] von Hirsch, "Philosophy of punishment;" von Hirsch and Ashworth, *Proportionate sentencing*.
[53] von Hirsch, "Philosophy of punishment."

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of the *offender*—including the offender's personal background[54]—this approach is less part of the application of the third ground of pre-trial detention in the context of bail.[55] As evidenced by the data, while bail courts also have the discretion to include the person's background, they have favoured factors considered relevant by traditional desert theorists—focusing on the gravity of the offence and blameworthiness in relation to the offence. To illustrate this argument, examples are provided.

First, factors routinely implemented by lower court decisions under the circumstances of the offence echo the non-limitative list of aggravating factors recognized at sentencing under 718.2(a) of the *Criminal Code*. These factors are primarily rooted within a just deserts retributive framework, as they relate to the individual's blameworthiness *vis-à-vis* the offence[56] and the harm created by the offence. They include "whether a firearm was used"[57] and: "the fact that the offence is a violent, heinous or hateful one, that it was committed in a context involving domestic violence, a criminal gang or a terrorist organization, or that the victim was a vulnerable person …. If the offence was committed by several people, the extent to which the accused participated…."[58]

In the dataset, courts heavily weighed aggravating considerations tied to decisions to detain before trial under the tertiary ground. For instance, the data reveals an important relationship between "whether a firearm was used" and the decision to detain. Of the 138 accused, 22 were charged with one or more firearms offences and all but one of these were detained at the conclusion of the bail hearings. All firearm offences were charged alongside at least one other offence, which was generally an offence related to membership in a criminal organization, and, most frequently, a drug related offence. In 10 of the 22 cases, the presence of a firearm was explicitly considered in the circumstances of the offence analysis under the tertiary ground, although often was only mentioned.[59]

Second, and in contrast with sentencing, mitigating circumstances are seldom recognized in bail. This is partly due to the evidentiary limitations at this stage. As highlighted by Rankin: "in most cases, the accused will not have received disclosure … or have had the opportunity to retain a lawyer. Consequently, the accused is, as a practical matter, put in a very disadvantageous position…."[60]

The limited use of mitigating factors also echoes retributivist desert-based conceptions of blame within sentencing, which favour individual responsibility

54 Sylvestre, "(Re)discovery of the proportionality principle."

55 This differs from the wording in Canadian sentencing under s. 718.2(a), which recognizes aggravating and mitigating factors relating to the offence or the *offender*. Including factors that relate to the offender can widen mitigating factors rooted in objectives outside desert. Sylvestre, "(Re)discovery of the proportionality principle."

56 E.g. *R v Fleming, Jody*, 2017 CanLII 33611 (NL PC) at para 24, the court included blame and harm: "Drug traffickers, whether dealing in cocaine or in prescription drugs, are having an adverse effect on the public."

57 *Criminal Code* RSC 1985, S. 515(10)(c)(iii).

58 *St-Cloud,* para 61.

59 *R v Adafia*, [2018] OJ No 7109 where a judge discussed the spectrum of seriousness when firearms are involved.

60 Rankin, "St-Cloud silver lining."

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and exclude other conceptions of blame and wider factors that may relate to culpability. It also echoes desert theory's predominant weight attributed to the gravity of the offence despite wider factors that may relate to culpability. This logic with respect to mitigating factors is found in the application of the tertiary ground of bail, particularly with respect to deliberations on what is deemed a serious offence. Two factors within the dataset are particularly relevant here: addiction and the accused's Indigenous background.

4.1.3.1 Addiction

Addiction is seldom accounted for under the third ground. Indeed, desert-based considerations favouring censure tend to take precedence under the third ground, and as such, the seriousness of the offence is often balanced with the degree of blameworthiness, which tends to favour seriousness and pre-trial detention. Further, desert and censure in relation to the offence are analyzed before considering other utilitarian objectives. These tendencies can be observed in the examples below.

In *Demosten*,[61] the accused had a drug addiction and faced several drug trafficking charges including selling fentanyl as oxycontin. Although the judge accepted that the accused had sought to address his addiction since his arrest and that release with a plan of serious supervision could manage the danger the accused might pose to the public, he ultimately detained the accused under 515(10)(c). In doing so, the judge emphasized the severity of trafficking fentanyl, noting that it made victims vulnerable and was associated with a lengthy sentence.

Similarly, in *MacKinnon,*[62] the accused was detained on a breach of an undertaking related to the consumption of prescription pills. In the decision to deny her release under 515(10)(c), the judge discussed the context under which the accusations occurred, highlighting the opioid epidemic in the local area of the courthouse, the prevalence of opioid users before the courts in recent months, and the accused's contribution to this situation. The gravity of the offence was central to the court's determination, along with the person's culpability in relation to this offence—importing a desert-based logic into the analysis.

In *Jorgensen*,[63] the accused was charged with possession of oxycodone for the purpose of trafficking and readily admitted to an oxycodone addiction. The judge focused on the accused's stated purpose of selling oxycodone and the wide-ranging effects of substance abuse on the person using these substances, on their family and friends, and on health and social services in ordering detention under 515(10)(c). The focus on the gravity of the offence and individual culpability in these circumstances imports desert-based considerations into the bail process.

In *Darcy Oake*,[64] the accused was arrested for drug trafficking following a near-fatal fentanyl overdose. He was released on desert and rehabilitation-based considerations. The judge noted the risk of death and the accused's efforts to address

[61] *R v Demosten*, 2017 BCPC 345.
[62] *R v MacKinnon*, 2016 CanLII 20538 (NL PC)
[63] *R v Jorgensen*, [2016] NJ No 310.
[64] *Her Majesty the Queen v Darcy Oake*, 2017 NWTSC 41.

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his addiction issues, as well as the fact that the accused appeared to be engaging in drug trafficking in furtherance of his habit, and not as a result of membership in a criminal organization. These considerations account for prospects of rehabilitation, but primarily the individual's level of culpability vis-à-vis the offence. Following a just deserts logic, the offence and culpability are predominantly analyzed before recognizing that in some instances, other objectives can be considered.

The judge in *Denny*[65] also took a rehabilitative perspective but noted that this approach was in the context of a summary offence for a breach of an undertaking relating to alcohol use, which was not deemed serious. In the decision to release the accused without conditions, the judge noted the unreasonableness of an alcohol prohibition on a person with a serious alcohol addiction. The judge highlighted the constitutional obligation for bail to be reasonable and pointed to scientific evidence showing that immediately ceasing alcohol consumption can be fatal.

In cases that integrate rehabilitative-based perspectives under the tertiary ground, courts consider the blameworthiness of the individual and the seriousness of the offence prior to the acceptance of rehabilitation, ensuring that just deserts is adequately addressed. For serious offences, or where accused are considered more blameworthy, rehabilitative considerations tend to give way to desert-based grounds, giving priority to the gravity of the offence and blameworthiness before other justifications.[66]

4.1.3.2 Indigenous Background

Desert is also implemented within the tertiary ground analysis of lower courts in their consideration of Indigenous background and the *Gladue* principles. The following section argues that a traditional retributive desert-based approach to Indigenous background is predominant in bail decisions, contrary to the underlying conception of background and responsibility developed in sentencing by the Supreme Court in *Gladue* and *Ipeelee*. This in turn is often used in great part to justify decisions to detain.

The Supreme Court in *Gladue*, and recently in *Ipeelee*, recognized a duty under 718.2(e) of the *Criminal Code* for sentencing judges to consider two sets of circumstances when crafting a sentence for an Indigenous offender: the unique systemic and background factors which may have played a part in bringing the person before the courts, and sentencing procedures and sanctions which align with the offender's Indigenous heritage or connection.[67] The Court in *Gladue* also inferred that that the duty to take into account the status of Indigenous people applies to all decision-makers with power to influence the liberty of Indigenous people in the justice system.[68]

The recognition of these factors suggests a different approach to proportionality than one based on traditional desert. Accordingly, the level of culpability is tied

[65] *R v Denny*, 2015 NSPC 49.
[66] Von Hirsch, "Philosophy of punishment," 56; Manson, *Law of sentencing*.
[67] *Ipeelee*, paras 59 and 72.
[68] *Gladue* para 65.

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to a broader form of shared responsibility, which "socializes individual choice, emphasizes the collectivization of risks and draws moral condemnation to the social, economic and political order in which social conflicts are embedded,"[69] as opposed to solely the "individualized" commission of the offence itself.

Desert theorists Roberts and Stenning, disagree with some aspects of *Gladue*.[70] While they do not oppose consideration of social deprivation or social adversity where there is a "causal chain that relates their Aboriginal status to the offence,"[71] they are apprehensive of courts considering these factors in instances where a causal link is not proven.

Von Hirsch and Ashworth's traditional desert-based theory is more restrictive and critical of considering social deprivation in sentencing.[72] They suggest that ordinarily, it is not plausible to ascribe impaired volitional capacity to socially deprived defendants, and, unless there are vital interests at play, offenders cannot claim they are less blameworthy. In many cases, the problem would be for the offender to show why his interest is of such importance as to require a special degree of moral fortitude for desistance.

In addition to raising concerns about the culpability dimension, von Hirsch and Ashworth have also addressed the issue of societal blameworthiness in contexts of social deprivation.[73] They discuss Duff's "unclean hands"[74] perspective found in *Ipeelee*, which suggests social deprivation is the fault of the state and society more generally, weakening the state's moral authority to punish offences. Von Hirsch and Ashworth highlight that this logic does not focus on the degree of social deprivation itself nor individual blameworthiness but rather on the extent to which that deprivation is due to the state's dereliction. Accordingly, they argue that, since culpability is individual, social fault should not be linked to questions of culpability and mitigation.

Despite *Ipeelee,* sentencing decisions in Canada have also exemplified some resistance towards expanded conceptions of culpability that go beyond traditional retributive desert-based approaches in Indigenous contexts.[75] As discussed below, desert is also transposed within the application of the tertiary ground of bail.

Within the dataset, fifteen accused were identified as Indigenous. In *St-Cloud*, the Court instructs judges to imagine that the reasonable, well-informed member of the public would have knowledge of the over-incarceration of Indigenous people in Canada and that this aspect would be relevant in a pre-trial detention decision. While the Court creates space to depart from a desert-based logic within the tertiary ground, this study reveals that this opportunity is rarely taken.

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69 Sylvestre, "(Re)discovery of the proportionality principle," 477.

70 Philip Stenning and Julian V. Roberts, "Empty promises: Parliament, the Supreme Court, and the sentencing of Aboriginal offenders," *Saskatchewan Law Review* 64, no. 1 (2001), 159.

71 Ibid..

72 von Hirsch and Ashworth, *Proportionate sentencing*, 65.

73 Ibid.

74 Antony Duff, "Punishment, communication, and community," in *Punishment and Political Theory,* ed. Matt Matravers (Portland: Hart, 1999).

75 Denis-Boileau and Sylvestre, "Ipeelee and the duty to resist."

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In *Penosway*,[76] the accused was charged with breaching a long-term supervision order. The judge noted that the application of *Gladue* principles within the bail process was unclear in higher courts but concluded that they could be considered. While the judge found that a well-informed public would understand that the Indigenous background of the accused should lend to a decision not to detain—to avoid uprooting and isolating the accused from their culture—the judge nevertheless detained the accused. The judge referred to the long-term supervision order breach as one of the worst types of breach, implying that, generally, the objective seriousness of an offence is important under the tertiary ground and can be balanced against and supersede *Gladue* considerations. This analysis demonstrates that the seriousness of the offence, under the discretionary analysis of the tertiary ground rooted in desert, can supersede other underlying rationales in *Gladue*.

In *Kajuatsiak,*[77] an Indigenous person was accused of breaking and entering and assault with a weapon. When considering the application of *Gladue*, the judge referred to a previous decision, where it was held that, where public safety is concerned, *Gladue* principles would find limited application.[78] The judge concluded that the Crown failed to establish that, if released, the accused would endanger the public, but nevertheless ordered pre-trial detention on the tertiary ground. Moreover, *Gladue* is only mentioned to suggest that, even when it applies, the accused was still likely to face a lengthy term of imprisonment if convicted. In this case, since the individual was not considered a threat nor detained under the secondary (public safety) ground, the grounds of detention were retributive and focused on the gravity of the offence. This interpretation incorporates desert-based retributive perspectives, which can conflict with the underlying conception of *Gladue,* and justifies detention.

Bail courts have ignored or only briefly mentioned *Gladue*. This can be seen, for example, in *Louie*[79] and *Wright*,[80] where courts either briefly refer to "additional factors" to the tertiary ground or make a mention of *Gladue* without substantive engagement or consideration. In brief, although *Gladue* is in theory recognized in the bail context, its implementation, at least under the tertiary ground, is often ignored or its weight minimized based on retributive desert-based grounds.

4.1.4 Potential Lengthiness of Imprisonment

Under 515(10)(c), courts must consider all circumstances of the case and determine the length of a potential sentence should the accused be found guilty. Two aspects from the data emerge as being particularly relevant here: the presence of prior convictions and the treatment of charges for breaches of orders. When examining those aspects, courts emphasize retribution and deterrence.

[76] *R v Penosway,* 2018 QCCQ 8863.
[77] *R v Kajuatsiak*, 2016 CanLII 760 (NL PC).
[78] *R v Rich*, 2009 NLTD 69 (CanLII).
[79] *R v Louie*, 2017 BCPC 54.
[80] *R v Wright*, [2019] OJ No 1375.

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4.1.4.1 Previous Convictions

The dataset reveals that the potential lengthiness of imprisonment is often determined by referring to the accused's previous convictions, and this factor contributes to pre-trial detention. Seventy-six accused had prior convictions; of these, fifty-eight were detained (76.3%) and eighteen were released (23.7%). For thirty-seven accused (of the seventy-six), their criminal record was mentioned under the tertiary ground, including as the reason for a potentially lengthy sentence of incarceration if convicted. Of these thirty-seven accused, thirty-two were detained (86.5%) and vie were released (13.5%). The following examples illustrate how prior convictions are treated and interpreted by courts under 515(10)(c).

In *Mills, Dion Patrick*,[81] the accused was charged with nine breaches of probation and two counts of attempting to obstruct justice. In ordering the accused's pre-trial detention on the tertiary ground, the judge noted that if found guilty, the accused would be liable to a lengthy term of imprisonment, particularly since he already had previous convictions for breaches. Similarly, in *Purcell*,[82] the accused, charged with assault causing bodily harm and mischief under $5000, had prior convictions. Noting that domestic violence was itself an aggravating circumstance under 515(10)(c), the judge highlighted the prior convictions and the accused's recent release on parole for manslaughter. The accused was detained on all three grounds. References to the similarities between previous convictions and the gravity of the new charges echoes a retributive perspective in sentencing. While not all retributive desert theorists agree on this point,[83] a recent retributive perspective suggests that previous convictions for similar crimes denotes greater culpability.[84]

Courts have also included deterrence as an underlying rationale for considering previous convictions in determining imprisonment lengths. In *Pipping*, the accused was charged with drug trafficking and firearm offences.[85] To justify detention on the tertiary ground, the judge highlighted that, given that prior incarceration for drug offences had not dissuaded the accused from his involvement in the drug trade, specific deterrence was considered relevant to the sentence. Deterrence was also discussed in *Morrison*.[86] The judge ordered pre-trial detention on the third ground and noted that, given that past incarceration was insufficient to prevent the accused from re-offending, he was likely to face a substantial term of imprisonment if found guilty. This was echoed in *Fleming, Jody*[87] (drug trafficking), *Alexander*[88]

[81] *R v Mills, Dion Patrick*, 2016 CanLII 87424 (NL PC).
[82] *R v Purcell*, 2016 CanLII 1737 (NL SC).
[83] George Fletcher, *Rethinking criminal law* (Boston: Little Brown & Company, 1978); Mirko Bagaric, *Punishment and Sentencing: A Rational Approach* (Sydney: Cavendish Publishing, 2001).
[84] Julian Roberts and Andrew von Hirsch (ed.), *Previous convictions at sentencing: Theoretical and applied perspectives* (Portland: Hart Publishing 2010). Roberts suggests that a person who commits the offence after having been charged, convicted, and sentenced should be aware of this previous legal censure and thus respect the law. Failing to do so denotes greater blameworthiness.
[85] *R v Pipping*, 2016 BCPC 485.
[86] *R v Morrison*, 2016 BCPC 176.
[87] *R v Fleming, Jody*, 2017 CanLII 33611 (NL PC).
[88] *R v Alexander*, 2015 ONCJ 585.

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(violent robbery), and *Purcell*[89] (assault causing bodily harm and domestic violence). Similarly, in *Hoang*,[90] the judge held that the accused was likely to face a lengthy imprisonment given that his new charges occurred while serving a conditional sentence.

In the context of bail, the relevance of previous convictions as an indicator of sentence length under the tertiary ground seems to be indicative of a just desert and deterrence logic in bail, which, as seen within the data, has heavily favoured detention.

4.1.4.2 Breaches of Orders

Within the data, pre-trial detention rates for breaches of orders are relatively high and can in part be explained by the ways courts use underlying sentencing rationales to determine the lengthiness of a potential custodial sentence within the tertiary ground analysis.[91] There were twelve accused whose most serious charge was either a breach of a court order or another offence against the administration of justice. Seven of the twelve were accused of breaches of bail conditions; one was accused of a breach of probation; one of a long-term supervision order, and one of a breach of bail conditions and obstructing justice. Nine of the twelve were detained and only showed cause.

In the context of charges for breaches of orders, courts interpret incarceration lengths as long, even if maximum sentences for these offences are usually either two or four years.[92] Objectively, these are not long, compared with other offences.[93] Even the long-term supervision order breach in *Penosway* discussed above carries a maximum punishment of ten years.

The terminology of lengthiness is vague and allows for wide judicial discretion that often favours detention. For instance, in *Mills, Dion Patrick*,[94] the judge noted that the maximum punishment for breach of probation was four years; nevertheless, as the accused was purportedly facing a sentence of fifteen months, the judge considered the sentence to be "lengthy" in the circumstances.

In some cases, the lengthiness of a potential imprisonment analysis focuses on the individual's initial charge that gave rise to the breach, as well as to previous charges, instead of the breaches of orders in the given case. The following cases provide some illustrations. In *Roberts*,[95] the court noted that the maximum sentence for a breach of a recognisance under 145(3) of the *Criminal Code* is two years of incarceration. It suggested that the accused would likely face a significant

89 *R v Purcell*, [2015] NJ No 453.
90 *R v Hoang*, 2016 ONCJ 518.
91 An important consideration is the burden of proof. Except for the breach of the long-term supervision order, the accused bore the burden that they should be released; only two of them showed cause.
92 For breaches of probation, under 733.1, the maximum is four years if proceeding by indictment. Breaches of a recognizance or of an undertaking carry a maximum of two years if proceeding by indictment per 145(3). A breach of a long-term supervision order carries a maximum sentence of ten years per 753.3(1).
93 First and second-degree murder, breaking and entering, and trafficking in fentanyl all carry maximum sentences of life imprisonment.
94 *Mills, Dion Patrick*.
95 *R v Roberts*, 2015 CanLII 32464 (NL PC).

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period of incarceration if convicted of the breach of recognizance offences, based on his lengthy criminal record. This illustrates the discretion provided to courts that enables them to heavily weigh the presence of a lengthy criminal record, as well as measuring the length of imprisonment in relation to a sentencing range for the offence, rather than in overall length.

Similarly, in *Barnes*,[96] the court devoted much of his analysis under 515(10)(c) to the original charges that gave rise to the breaches of recognisance, rather than to the breach itself. To determine the potential length of imprisonment for a breach of recognizance, the court did not discuss the objective gravity nor the potential sentence to be imposed in relation to this specific charge but, instead, referred to previous charges.

The ways courts interpret the potential incarceration lengths align with a retributive framework. Some of the bail literature highlights that breaches of court orders are generally perceived by judges as disrespecting the authority of courts, justifying greater severity.[97] Conceptualizing these breaches as contempt for authority and obstinacy that needs to be censured aligns with the way courts have interpreted the length of imprisonment component under 515(10)(c) in the context of breaches—justifying frequent pre-trial detention in these contexts.

V. The Tertiary Ground and Pre-Trial Detention's Social Function

The analysis above illustrates ways that lower courts have interpreted and implemented 515(10)(c) and how their underlying rationales are heavily reliant on desert-based retribution theories. While criminal justice recognizes that the official objectives of pre-trial detention are not meant to be punitive, there seems to be a disconnect between this official discourse and the implementation of 515(10)(c). Sociological perspectives, including Fauconnet's theory and Combessie's expansion, can help to contextualize and shed light on the reliance on censure and punishment prior to a finding of guilt.

Rooted within a constructivist sociological perspective, which aims to explain the societal functions of institutions, Fauconnet's theory is premised on the idea that punishment is primarily concerned with restoring the social order affected by the offence.[98] He argues that as soon as a crime occurs, responsibility arises and follows two successive phases.[99] First, the collective conscience develops a form of responsibility in response to an act considered abhorrent, but it does not attribute this responsibility to an individual: responsibility is floating ("flottante").[100] Second, responsibility is attributed to a specific person. This never occurs without

[96] *R v Barnes*, 2015 CanLII 27212 (NL PC); Marie-Eve Sylvestre, Nicholas Blomley and Céline Bellot, *Red Zones: Criminal Law and the Territorial Governance of Marginalized People* (Cambridge: Cambridge University Press, 2020).

[97] Sylvestre *et al*., "Spatial tactics in criminal courts: 1359"; Erin Murphy, "Manufacturing crime: Process, pretext and criminal justice," *Georgetown Law Journal* 97, no. 6 (August 2009): 1449.

[98] Paul Combessie, "Paul Fauconnet et l'imputation pénale de la responsabilité," in *Trois figures de l'école durkheimienne. Célestin Bouglé, Georges Davy, Paul Fauconnet*, ed. Claude Ravelet (Paris: L'Harmattan, 2007): 226.

[99] Paul Fauconnet, *La responsabilité. Étude de sociologie* (Paris: Librairie Félix Alcan, 1928): 232.

[100] Ibid. at 280.

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the first phase, suggesting that responsibility is first and foremost attached to an act considered a crime. According to Fauconnet, while societies want to attack and annihilate the crime itself, the crime cannot be undone, and thus they look for a substitute: the individual becomes the sacrificial scapegoat ("bouc émissaire")[101] of the past crime, and the inflicted punishment enables society to regain confidence in itself. Finding a person to sanction and punish is more important than culpability; the utility of punishment is not essentially in its action against accused individuals, but for its societal impact. Through society's designated process of punishment, whether symbolic or legal, the crime's wrong is compensated, the moral order is restored, and society regains its confidence and reaffirms the rule that was breached.[102]

Recent literature has highlighted that bail and pre-trial detention operate within this logic.[103] Criteria and factors retained to justify pre-trial detention operate rapidly and early in the criminal process. They do not require much evidence or tailoring to the individual.[104] This is particularly the case with the tertiary ground of pre-trial detention, which emphasizes censuring the conduct by focusing on the gravity of the offence, as well as the potential sentence for the offence, with limited evidence that relates to the offender. Hence, this process can be understood as undertaking a punitive function that targets the criminal behaviour in order to serve the establishment of social order and social confidence.

VI. Conclusion

Bail courts have incorporated and implemented a retributive, desert-based logic within their tertiary ground analysis. Indeed, the components of just deserts and the relevance of retributive censure can be seen from various aspects of tertiary ground's discretionary analysis, including the way courts have weighed and focused on the gravity of the offence, aggravating and mitigating factors that are typically found relevant by desert theorists, and the consideration and interpretation of the potential length of imprisonment. This research lends credence to the warnings voiced by Canadian scholars that the guidance of the third ground in *St-Cloud* would give rise to increased rates of pre-trial detention. Detention rates show an increase from the previous data collated under a more restrictive tertiary ground, and the interpretation of this tertiary ground within a desert-based logic is often employed to justify detention.

There are noteworthy limitations to the argument that courts rely on a just deserts framework. First, the evidentiary constraint within this early stage is an important one, which does not enable lower courts to adequately consider all relevant mitigating factors present in desert theory. Second, important consequentialist aspects are occasionally present, including deterrence and rehabilitation, when justified within

[101] Ibid. at 220.
[102] Combessie, "Paul Fauconnet" ; Fauconnet, *La responsabilité*, 223.
[103] Combessie, "Paul Fauconnet"; Manikis and De Santi, "Punishing while presuming innocence."
[104] Rankin, "St-Cloud silver lining." The Code requires that the person arrested be brought before a justice within twenty-four hours. It is common for a bail judge to hear twenty to thirty bail applications daily. This requires rapid decisions with limited information.

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a desert logic that gives primacy to desert. Third, desert theorists would not approve the importation of a desert-based framework within the bail process, since this rationale should only apply following a finding of guilt.

The focus on sentencing considerations, including desert, in the context of the tertiary ground is problematic in a system that values the presumption of innocence. The analysis suggests that courts seem to assume that the confidence of the administration of justice is upheld when a person is detained in the context of a serious offence and that various aggravating sentencing factors are present. This suggests that there are important overlaps and assumptions between bail courts' understanding of the following components: confidence in the administration of justice, notions of punishment, blame, and the use of detention.

Although contrary to the internal logic of criminal law, these assumptions can be understood by applying a sociological lens that suggests that pre-trial detention occupies a punitive function within society. In particular, the multiplication of due process measures and appeals, which delay punishment, have given rise to mechanisms that enable quick punishment, regardless of actual culpability, in order to re-establish a sense of social order and public confidence. The bail process and pre-trial detention, as rapid decisions made with limited information, operate within this logic. This is indeed seen within 515(10)(c), which is predominantly concerned with censuring the conduct by focusing on the gravity of the offence, incorporating various aggravating factors found within desert theory, limiting the use and weight of certain mitigating factors that are not accepted in desert theory, and relying on an interpretation of potential lengthiness of a sentence for the offence to justify pre-trial detention in certain contexts. Hence, the bail process, and the judicial implementation of 515(10)(c), undertake a rapid punitive function that targets criminal behaviour to establish social order and confidence within society.

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