**House of Commons’ Standing Committee on Justice and Human Rights**

*Study of Canada’s Bail System*

**The crisis in Canada’s bail system is not one of an overly lax or lenient system[[1]](#footnote-1)**

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**Biography**

I am an Associate Professor of criminology in the Department of Sociology at Queen’s University in Kingston, Ontario. I have been studying issues around bail and pre-trial detention for almost two decades. My work focuses on the bail process, sureties and conditions of release, court culture, organizational risk avoidance, the criminalization of non-criminal behaviour, the administration of justice and criminal law policy. Using a mixed methodological approach, I have conducted over 300 days of bail court observation, reviewed over 500 completed criminal case files and conducted hundreds of in-depth interviews with criminal justice professionals, people who have experiences with pre-trial detention and people who have acted as a surety for someone. I have published numerous peer-reviewed academic papers about bail in Canada, prepared reports about bail together with the Canadian Civil Liberties Association and Legal Aid Ontario and have presented my research at national and international conferences. My work has been cited by the Supreme Court of Canada in *R. v. Zora, 2020*, *R. v. Myers, 2019, R. v. Penunsi, 2019 and R. v. Antic 2017.*

**Principled and evidence-based law reform**

In the aftermath of a tragic incident, like the death of Constable Greg Pierzchala, it is understandable that people, especially the police, are outraged and want to know how this happened and how to prevent something like this in the future. We must be cautious to not make assumptions and generalizations about the operation of the legal system based on a single (or a small number) of incidents. It is easy to blame the law or point fingers at individual decision makers, it is more difficult to critically explore the broader systemic challenges with our bail system and recognize that a simple change to the law is unlikely to have the desired outcome of enhancing public safety.

Recently there has been swift and public condemnation of the law of bail with assumptions and assertions made that mischaracterize and/or misunderstand the law. Claims by the police and some political leaders that our bail system has become significantly more ‘lenient’ are inaccurate and are not supported by long term trends in the use of pre-trial detention or release on bail. Law reform that takes as its basis this inaccurate assertion, has the potential to cause harm to both individual accused people and the public more broadly.

Policy and law reform should be both principled and evidence based. We must resist the temptation to pursue expedient responses to tragic, high-profile incidents. When reflecting on the direction of bail reform, the fundamental principles underpinning our criminal justice system, including the presumption of innocence and the right to reasonable bail must be upheld and protected. The Supreme Court of Canada has emphasized that restraint must be exercised in the bail decision, with the starting position being accused are to be unconditionally released[[2]](#footnote-2). To hold people accountable for their actions and to sanction behaviour, we must first convict people of the offence(s) for which they are charged. It is dangerous and a slippery slope to provide additional mechanisms to punish people when they are presumed innocent of the allegations. Mistakes are made; sometimes we get it wrong. We must enhance, not diminish, efforts to maintain people’s liberty pre-trial.

**Proposed reform: Reverse onus provisions**

The bail system in Canada merits review and attention. The Premiers’ letter to the Prime Minister (13 January 2023) suggests introducing a new reverse onus provision for people charged with firearms offences who are seeking bail. Creating more reverse onus provisions, however, is unlikely to be effective in achieving the objectives of enhancing public safety. Reverse onus provisions are problematic, as they fail to acknowledge the inequality in power and resources between an accused person and the state. Reverse onus provisions also invert the foundational principle of the presumption of innocence. When a person’s liberty is at stake, the state should bear the onus of proving that detention is justified – rather than an accused person bearing the onus of demonstrating they ought to be released.

**Bail in Canada**

***1) Police reported crime rate***

Canada has experienced a generally declining overall crime rate and violent crime rate for decades. While there has recently been a slight increase in the violent crime rate, we are still experiencing an overall, long- term downward trend in violent crime, and it remains lower than it was 15 years ago[[3]](#footnote-3).

***2) Pre-trial detention***

Every year since 2005/6 across Canada there have been more people in pre-trial detention (remand) than in sentenced provincial/territorial custody after a finding of guilt[[4]](#footnote-4). In the past few years, despite decreases in the overall custodial population in the context of the pandemic, the proportions in pre-trial detention have continued to rise. In 2020/21, 67.4% of the provincial and territorial jail population across Canada was in pre-trial detention (n = 12,767). In Ontario, it was 77.0%.[[5]](#footnote-5) The rate with which we use pre-trial detention has more than doubled in the last 40 years and the number of people in pre-trial detention has quadrupled in this time.[[6]](#footnote-6)

Despite several reports and legal decisions that highlight overcrowding, violence, and deaths in pre-trial custody[[7]](#footnote-7), the pre-trial detention problem has not improved. The Canadian criminal justice system is premised on the presumption of innocence and the right to reasonable bail, but many people are serving time before they have been found guilty. Given the number, proportions and rate of people in pre-trial detention, it is clear that Canada is not “lenient” when it comes to pre-trial detention.

***3) The current law on bail***

Canadian law already provides mechanisms to keep people in pre-trial detention where necessary “for the protection or safety of the public” (commonly referred to as the secondary grounds for detention).[8](#_bookmark7) Though the original purpose/objective of bail was only to ensure an accused returned to court to face the changes against them, overtime the law has been expanded to include consideration of public safety. Indeed, Canada’s legal framework governing judicial interim release was codified through the *Bail Reform Act* in 1972. Since that time, a number of legislative amendments have made the law governing judicial interim release more stringent. Reverse onus provisions – which, as discussed above, are deeply problematic – were first introduced in 1975 and expanded through at least five different bills between 1997 and 2019.

Most recently, Bill C-75 introduced a number of legislative amendments affecting the bail system. The legislation, however, did not introduce significant substantive changes to the law of bail. Instead, for the most part, it merely codified how courts have applied long-standing, pre-existing constitutional principles such as the presumption of innocence and the right to be free from arbitrary detention to the bail context.

# *4) Bail decision-making has become more restrictive and risk-averse over time.*

The discretionary decisions made by police, prosecutors, and judicial actors related to bail and pre-trial detention have tended towards greater, not less, pre-trial restrictions on liberty. This trend has been clearly documented in numerous academic studies[[8]](#footnote-8) and has been recognized by multiple levels of government and the Supreme Court of Canada[[9]](#footnote-9).

As noted in a 2015 report “*Broken bail in Canada: How we go about fixing it*”, commissioned by the Department of Justice noted:

The bottom line is that in the last 44 years, we have seemingly moved increasingly away from the rights-protecting philosophy underlying the original *Bail Reform Act* of 1971. While Canadians may still arguably enjoy a liberal and enlightened system of bail – at least in comparison with its closest neighbour (USA) – broader comparisons with other Western democratic countries do not shed favourable light on us as a nation which genuinely values – and vigorously upholds – the presumption of innocence, restraint in the use of imprisonment and such fundamental principles as fairness and equality. Indeed, both legislative amendments and actual policy/practices over the last 4 decades would seem to suggest that we are returning – in a number of important ways – to a past in which pre- trial detention could be characterized, at least to some degree, as excessive, unfair and inequitable.[[10]](#footnote-10)

***5) Predicting risk***

Our criminal justice system cannot and should not be expected to identify, address and eliminate all future risks. There is no reliable way to predict who will go on to commit crimes in general, or serious, violent acts in particular, in the future. On the contrary, research has shown that attempts to make such predictions are unreliable and discriminatory, especially against Indigenous peoples, Black people, other racialized communities, and women.[[11]](#footnote-11) As outlined in British Columbia’s manual for Crown prosecutors:

The decision whether to oppose or consent to bail, and on what terms, requires Crown Counsel to consider and weigh the competing interests of the accused, the public, and victims. Crown Counsel cannot predict the future actions of the accused with certainty, and thus cannot eliminate all risks. This is inevitable in a justice system based on the presumption of innocence, in which every accused person has a fundamental right to reasonable bail.[[12]](#footnote-12)

A more risk-averse approach will inevitably result in more detentions – including imprisoning people who do not genuinely pose a risk to public safety.

***6) Short-term versus long-term public safety***

Keeping an accused in pre-trial detention removes them from the community and may provide some short-term public safety. That protection however is temporary and is undermined by longer-term negative public safety outcomes. Custody is criminogenic. Even short periods of time make it more, not less, likely someone will commit offences in the future.[[13]](#footnote-13) There are many reasons for this. Conditions in pre-trial detention are overcrowded, harsh and dangerous,[[14]](#footnote-14) with rehabilitative programs being virtually non- existent. Removing individuals from the broader community is intensely destabilizing, disrupting connections to the community, family and social supports.[[15]](#footnote-15)

***7) Pre-trial detention and numerous restrictive conditions of release are coercive***

Accused face pressure to agree to any bail condition requested by the Crown in order to secure release from custody – and those who are denied bail feel considerable pressure to plead guilty to their charges.[[16]](#footnote-16) Moreover, the bail decision affects the likelihood of conviction and the type of sentence imposed. Accused who are detained pending trial are more likely to receive custodial sentences and to be sentenced for longer periods.[[17]](#footnote-17)

Supervision on bail and other conditions of release are often restrictive, unrelated to the circumstances of the alleged offence,[[18]](#footnote-18) and may be being used for punitive purposes.[[19]](#footnote-19) Numerous conditions[[20]](#footnote-20) of release that are routinely imposed can be difficult or impossible to comply with for an extended period of time, setting some accused up to fail. Conditions have particularly serious impacts on marginalized people, who may find themselves legally prohibited from accessing the basic social welfare services they need to survive as a result of overlapping, stringent restrictions on location, contact and movement.[[21]](#footnote-21) As the Supreme Court of Canada affirmed in *Antic*:

Pre-trial custody “affects the mental, social, and physical life of the accused and his family” and may also have a “substantial impact on the result of the trial itself.” An accused is presumed innocent and must not find it necessary to plead guilty solely to secure his or her release, nor must an accused needlessly suffer on being released. Courts must respect the presumption of innocence, “a hallowed principle lying at the very heart of criminal law... [that] confirms our faith in humankind.”[[22]](#footnote-22)

***8) Impact on the most marginalized***

“Tightening” the bail system and increasing reliance on pre-trial detention will have discriminatory outcomes and undermine efforts to combat systemic discrimination and the legacies of colonialism. Indigenous peoples, Black people, and other racialized persons are over-policed,[[23]](#footnote-23) disproportionately detained in custody,[[24]](#footnote-24) and are more likely to spend longer periods of time in pre-trial detention.[[25]](#footnote-25) Individuals experiencing poverty, homelessness, mental health issues and/or the criminalization of drug use are among those subjected to the most intense scrutiny and surveillance by police – making them more likely to be arrested and held in custody for a bail hearing. These are the same groups that are disproportionately disadvantaged by the bail system, which often obliges accused people to show they have social supports such as a stable home, employment and family or friends with assets and no criminal record who can supervise them. In the absence of a social support network, and without accessible community services, people can languish in pre-trial detention.

Increasing pre-trial detention or undermining the principle of restraint in bail decision-making will have a disproportionate impact on a range of marginalized communities, including Black and Indigenous accused persons – undermining this government’s commitment and investments in combatting the over-representation of Black and Indigenous people in Canada’s criminal justice system.

**Directions for reform**

1. A thorough and principled review of the law that brings together justice system actors, academics, and community stakeholders to consider the purposes of bail and how to best balance rights with public safety.
2. Rather than making additional amendments to s.515 of the *Criminal Code*, reconceptualize and fully replace the law on bail with recent Supreme Court of Canada decisions in mind, to reverse the course of bail practices in Canada.
3. Explicitly outline principles, objectives, directions and rules for how decision makers are to exercise their discretion.
4. Encourage and support police in the use of their powers of release, including the use judicial referral hearings created by Bill C-75. This will result in fewer minor matters starting in bail court giving the courts more time and resources to focus on more serious or risky cases.
5. Improve efficiency in case processing and access to justice, including increasing funding for legal aid to help reduce the number of people in pre-trial detention and reduce the time people are detained or subject to conditions of release in the community.
6. Remove or restrict reverse onus provisions.
7. Develop specific, principled hurdles to detention in custody. For example, the allegations must pertain to a serious violent offence; the accused if convicted is unlikely to be sentenced to custody for more than 6-months; the accused is alleged to have committed a new substantive offence (not just an administration of justice offence) while on release for another alleged offence.
8. To facilitate release create a mechanism similar to the responsible person for youth in the Youth Criminal Justice Act (YCJA).

**The crisis in Canada’s bail system**

We are facing a crisis of bail and pre-trial detention in Canada – but it is not one of an overly lax system. Canada’s bail system is detaining more people than ever, with intensely negative outcomes for the individuals and communities that are most directly impacted by the criminal justice system. As recognized repeatedly by the Supreme Court of Canada, it is a crisis of over-detention and over- criminalization.

To enhance public safety, we must invest in what we know has an impact on crime rates – supporting people experiencing poverty and precarious housing, mental illness and substance use; enhancing social welfare supports; increasing investments in education and health care; keeping people in the community; and improving reintegration programs and supports for people released from custody.

What happened is undoubtably tragic. Incidences of repeat, violent offending are alarming. There are opportunities for reflection and change to Canada’s bail system. The question, however, is one of priority- are we more interested in short-term or long-term public safety? In considering law reform, I encourage you to uphold the principled purposes and limits of the criminal law by prioritizing the latter.

1. Some points presented have been adapted from a recent letter (27 January 2023) to The Right Honourable Justice Trudeau and The Honourable David Lametti I co-authored with the Canadian Civil Liberties Association and Canadian Association of Elizabeth Fry Societies. [↑](#footnote-ref-1)
2. *R v Antic*, 2017 SCC 27 [↑](#footnote-ref-2)
3. Statistics Canada, Table 35-10-0177-01 – Incident-based crime statistics, by detailed violations, Canada, provinces, territories, Census Metropolitan Areas and Canadian Forces Military Police (22 August 2022), online: [https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510017701.](https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510017701) [↑](#footnote-ref-3)
4. Statistics Canada, Table 35-10-0154-01 – Average counts of adults in provincial and territorial correctional programs (20 April 2022), online: [https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510015401.](https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510015401) [↑](#footnote-ref-4)
5. Ibid. [↑](#footnote-ref-5)
6. Ibid. [↑](#footnote-ref-6)
7. For example- since 2010, there have been over 280 deaths within Ontario provincial jails and prisons. In 2021, the number of people who have died in Ontario provincial custody almost doubled, from 23 deaths reported in 2020, to 41 reported last year. See Canadian Civil Liberties Association and the Tracking (in)justice: A law enforcement & criminal justice data & transparency project. December 2022. *Ontario Deaths in Custody on the Rise*, online: https://ccla.org/wp-content/uploads/2022/12/Ontario-Deaths-in-Custody-on-the-Rise-2022-8.pdf [↑](#footnote-ref-7)
8. Cheryl M Webster, Anthony N Doob & Nicole M Myers, “The Parable of Ms. Baker: Understanding Pre-Trial Detention in Canada” (2009) 21:1 *CICJ* 79; Nicole M Myers, “Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail” (2017) *Brit J Criminology* 664; Marie Manikis & Jess De Santi, “Punishing while Presuming Innocence: A Study on Bail Conditions and Administration of Justice Offences in Quebec” (2019) 60:3 *Cahiers de droit* 873. [↑](#footnote-ref-8)
9. *R v Antic*, 2017 SCC 27 at paras 64-66; *R v Myers*, 2019 SCC 18 at para 26; *R v Zora*, 2020 SCC 14 at para 76. [↑](#footnote-ref-9)
10. Cheryl M Webster, “Broken Bail in Canada: How We Might Go About Fixing It” (Research and Statistics Division, Department of Justice Canada, June 2015), online: [https://publications.gc.ca/collections/collection\_2018/jus/J4-73-2015-eng.pdf.](https://publications.gc.ca/collections/collection_2018/jus/J4-73-2015-eng.pdf) [↑](#footnote-ref-10)
11. Michael Tonry, “Predictions of Dangerousness in Sentencing: Déjà Vu All Over Again” (2019) 48 *Crime & Just* 439. [↑](#footnote-ref-11)
12. British Columbia Prosecution Service, *Crown Counsel Policy Manual: Bail – Adults* (22 November 2022), online: [https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/bai-1.pdf.](https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/bai-1.pdf) [↑](#footnote-ref-12)
13. William D Bales and Alex R Piquero, “Assessing the impact of imprisonment on recidivism” (2012) 8 *Journal of Experimental Criminology* 71-101. [↑](#footnote-ref-13)
14. Holly Pelvin, *Doing uncertain time: Understanding the experiences of punishment in pre-trial custody* (2017), online: [https://tspace.library.utoronto.ca/bitstream/1807/80896/3/Pelvin\_Holly\_201711\_PhD\_thesis.pdf;](https://tspace.library.utoronto.ca/bitstream/1807/80896/3/Pelvin_Holly_201711_PhD_thesis.pdf) Ontario Human Rights Commission, *Report on conditions of confinement at Toronto South Detention Centre*, online: [https://www.ohrc.on.ca/en/report-conditions-](https://www.ohrc.on.ca/en/report-conditions-confinement-toronto-south-detention-centre) [confinement-toronto-south-detention-centre;](https://www.ohrc.on.ca/en/report-conditions-confinement-toronto-south-detention-centre) East Coast Prison Justice Society, *Conditions of Confinement in Men’s Provincial Jails in Nova Scotia*, online: [https://www.eastcoastprisonjustice.ca/conditions-of-confinement-report.html;](https://www.eastcoastprisonjustice.ca/conditions-of-confinement-report.html) Protecteur du citoyen, “Unacceptable detention conditions” (29 November 2018), online: [https://protecteurducitoyen.qc.ca/en/news/press-releases/2017-](https://protecteurducitoyen.qc.ca/en/news/press-releases/2017-2018-annual-report-unacceptable-detention-conditions) [2018-annual-report-unacceptable-detention-conditions.](https://protecteurducitoyen.qc.ca/en/news/press-releases/2017-2018-annual-report-unacceptable-detention-conditions) [↑](#footnote-ref-14)
15. Mark T Berg & Beth M Huebner, “Reentry and the Ties that Bind: An Examination of Social Ties, Employment and Recidivism” (2011) 28:2 *JQ* 382; Daniel S Nagin, Francis T Cullen & Cheryl Lero Jonson, “Imprisonment and Reoffending” (2009) 38:1 *Crime & Just* 115. [↑](#footnote-ref-15)
16. Martin L Friedland, *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates’Courts* (Toronto: University of Toronto Press, 1965); Gail Kellough & Scot Wortley, “Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions” (2002) 42:1 *Brit J Criminology* 186. [↑](#footnote-ref-16)
17. Martin L Friedland, *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates’ Courts* (Toronto: University of Toronto Press, 1965); Pamela Koza & Anthony N Doob, “The Relationship of Pre-Trial Custody to the Outcome of a Trial” (1975) 17:4 *CLQ* 391; Mandeep K Dhami, “Conditional Bail Decision Making in the Magistrates’ Court” (2004) 43:1 *Howard J Crim Just* 27. [↑](#footnote-ref-17)
18. Nicole M Myers & Sunny Dhillon, “The Criminal Offence of Entering Any Shoppers Drug Mart in Ontario: Criminalizing Ordinary Behaviour with Youth Bail Conditions” (2013) 55:2 *Canadian J Criminology and Crim Just* 187. [↑](#footnote-ref-18)
19. Jane B Sprott & Nicole M Myers, “Set Up to Fail: The Unintended Consequences of Multiple Bail Conditions” (2011) 53:4 *Canadian J Criminology and Crim Just* 404. [↑](#footnote-ref-19)
20. On average accused (in Ontario) have 7.8 (range 1-34) conditions of release imposed see Myers, N.M. (2019). “Jailers in the Community”: Responsibilizing Private Citizens as Third-Party Police. *Canadian Journal of Criminology*, 61(1), 66-85; Myers, N.M. (2017). Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail. *British Journal of Criminology,*57(3),664-683. Deshman, A. & Myers, N. (July 2014). Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention. Canadian Civil Liberties Association and Education Trust. Final Report, 117 pages found a mean of 7.1 (range 1-34) conditions of release were imposed across the jurisdictions studied. [↑](#footnote-ref-20)
21. Marie-Ève Sylvestre, Nicholas Blomley & Céline Bellot, *Red Zones: Criminal Law and the Territorial Governance of Marginalized People* (Cambridge: Cambridge University Press, 2020). [↑](#footnote-ref-21)
22. *R v Antic*, 2017 SCC 27 at para 66, citations omitted. [↑](#footnote-ref-22)
23. Scot Wortley & Julian Tanner, “Data, denials, and confusion: The racial profiling debate in Toronto” (2003) 45:3 *Canadian J Criminology and Crim Just* 367; Akwasi Owusu-Bempah, “The usual suspects: Police stop and search practices in Canada” (2011) 21:4 *Policing and Society* 395; Scot Wortley & Julian Tanner, “Inflammatory rhetoric? Baseless accusations? A response to Gabor’s critique of racial profiling research in Canada” (2005) 47(3) *Canadian J Criminology and Crim Just* 581; Jim Rankin,

Sandro Contenta & Andrew Bailey, “Toronto marijuana arrests reveal ‘startling’ racial divide”, *Toronto Star* (6 July 2017), online: [https://www.thestar.com/news/insight/2017/07/06/toronto-marijuana-arrests-reveal-startling-racial-divide.html.](https://www.thestar.com/news/insight/2017/07/06/toronto-marijuana-arrests-reveal-startling-racial-divide.html) [↑](#footnote-ref-23)
24. John Howard Society of Canada, *Race, Crime and Justice in Canada* (19 October 2017), online: [https://johnhoward.ca/blog/race-](https://johnhoward.ca/blog/race-crime-justice-canada) [crime-justice-canada;](https://johnhoward.ca/blog/race-crime-justice-canada) Jim Rankin et al., “Singled out: An investigation into race and crime”, *Toronto Star* (19 October 2002) A1; Jim Rankin et al., “Police target black drivers”, *Toronto Star* (20 October 2002) A1. [↑](#footnote-ref-24)
25. For instance, the federal Correctional Investigator has noted that growth in the federal custodial population is driven by increases in the racialized population. Between 2003 and 2013, the Indigenous incarcerated population increased by 46.4% and the Black incarcerated population increased by 90%. *Annual Report of the Office of the Correctional Investigator* (2013), online: [https://oci-](https://oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20122013-eng.aspx?texthighlight=annual%2Breport&s3) [bec.gc.ca/cnt/rpt/annrpt/annrpt20122013-eng.aspx?texthighlight=annual+report#s3.](https://oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20122013-eng.aspx?texthighlight=annual%2Breport&s3) In Quebec, Indigenous people are twice as likely as non-Indigenous accused to make a first appearance in court from detention – and Inuit people are three times more likely.

Moreover, between 2012 and 2016, the time spent in pre-trial detention in Quebec increased 150% for Indigenous people. Marie-Ève Sylvestre and Julie Perreault, *La procédure criminelle avant procès chez les Autochtones : effets pervers et discriminatoire liés à l’arrestation, la comparution et la mise en liberté provisoire*, Commission d’enquête sur les relations entre les Autochtones et certains services publics, online: [https://www.cerp.gouv.qc.ca/fileadmin/Fichiers\_clients/Fiches\_synthese/Procedure\_criminelle\_avant\_proces\_chez\_les\_Autochtones.p](https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Fiches_synthese/Procedure_criminelle_avant_proces_chez_les_Autochtones.pdf) [df.](https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Fiches_synthese/Procedure_criminelle_avant_proces_chez_les_Autochtones.pdf) [↑](#footnote-ref-25)