

Ministry of the Attorney General

Kingston Police Service Board

Judicial Interim Release

Criminal Law Division

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Law of Bail

General Principles

- When a person is charged with an offence, the **police have the discretion to either release the person from their custody or bring the person before a justice of the peace or a judge for a bail hearing.**
- The **legal presumption in Canadian law (subject to exceptions) is that the accused person will be out of custody prior to trial** unless it can be shown why that should not be the case.
- Police are required to detain an accused person if they believe it is necessary to protect the safety of the public or that there is a risk of the accused person re-offending. There are also several serious offences where a police officer cannot release an accused person but rather must bring them before a court for a bail hearing.
- Where the accused person is not released by police, the law requires that the accused person be brought before a justice or a judge within 24 hours of their arrest, or as soon as possible for a bail hearing (*Criminal Code* s. 503).
- A bail hearing is not a trial to determine guilt or innocence. It is a hearing to determine whether the accused person should remain in the community while their criminal matter proceeds through the court system.
 - The rights of anyone seeking bail are enshrined in the [Charter of Rights and Freedoms](#). Section 11(e) of the *Charter* guarantees that **any person charged with an offence has the right not to be denied reasonable bail without just cause**. The concept of reasonable bail relates both to whether the person should be released and, if so, what terms of release should be imposed.
 - This right is grounded **in the presumption of innocence** as guaranteed by section 11(d) of the *Charter*.

Law of Bail

General Principles - continued

- A bail hearing can proceed as a consent release (the Prosecutor has consented to the accused person remaining in the community) or be contested (the Prosecutor is opposed to the accused person's release).
- The **decision about whether to release or detain an accused person rests solely with the presiding justice** of the peace or judge in accordance with the unique facts of each case, the relevant legal principles and case law and in consideration of arguments made by the prosecutor and defence lawyer.
- Generally, if the Prosecutor and the accused person through their counsel have agreed to a release order with specific terms, the justice of the peace or judge will make the order with no or few modifications.
- If the bail hearing is contested, the justice of the peace or judge will apply the ladder principle which requires that the accused person be released on the least restrictive form of release, with the least restrictive conditions, unless the prosecutor can establish why the court should decide otherwise.
- A surety release is considered the most restrictive forms of bail. A **surety release** involves a person making a promise to the court that they will supervise the accused person and ensure they follow their terms of release.
 - The law requires that the justice or judge must exercise restraint in the use of sureties, only ordering a surety release where satisfied it is the least onerous option in the circumstances.

Bill C-75 Amendments

- The existing **principle of restraint** was codified in Bill C-75, which **received Royal Assent on June 21, 2019**.
- The purpose of Bill C-75 was to reduce delay in the criminal justice system and make the system more modern and efficient.
- The bail-related amendments in Bill C-75 came into force in December 2019. These amendments:
 - **re-emphasized the ladder principle** (consistent with the Supreme Court of Canada's decision in *R. v. Antic*, 2017 SCC 27)
 - made it clear that **sureties should be imposed only when less onerous forms of release are inadequate**
[See Appendix A for additional amendments]
- These amendments, for the most part, simply codified and re-emphasized the principles articulated in the Supreme Court of Canada decision in *Antic*, and later affirmed in *R. v. Zora*, 2020 SCC 14.

Bail Reform: Bill C-48

- On January 13, 2023, all 13 Premiers sent a letter to Prime Minister Trudeau calling for immediate action to strengthen Canada's bail system.
- This call to action was answered - on January 4, 2024, Bill C-48 came into force, and made numerous amendments to the bail sections of the *Criminal Code*.
- The amendments included:
 - A new reverse onus provision for accused persons charged with a serious offence involving violence and the use of a weapon, where the accused person was previously convicted of an offence of the same criteria within the past 5 years. Both offences (current charge and past conviction) must be punishable by 10 years of imprisonment or more.
 - Expansion of the existing reverse onus provision for firearms offences to include other indictable offences:
 - s. 95: unlawful possession of a loaded (or easily loaded) prohibited or restricted firearm
 - s. 98: breaking and entering to steal a firearm
 - s. 98.1: robbery to steal a firearm; and
 - s. 102: making an automatic firearm
 - Expansion of the current Intimate Partner Violence reverse onus provision to include those accused persons previously *discharged* for an IPV offence (previous reverse onus only applied to those previously *convicted* of an IPV offence)
 - Clarification of the meaning of “prohibition order” – the reverse onus provision for those charged with offences involving firearms or other weapons where they are the subject of a prohibition order, now expressly includes a court's judicial interim release order that imposes a no-weapons condition.
 - A requirement that courts consider whether an accused person has a history of convictions involving violence when making a bail order and to state on the record that the safety and security of the community was considered when making a bail order.

The Ladder Principle

If the accused person is not released by police, they will be held for a show cause hearing (bail hearing) and brought before a justice or judge for one of the following bail determinations:

1. Release Order (with or without conditions)
 - The available conditions are set out in the *Criminal Code*
2. Detention Order (remanded in custody until trial).
3. No bail determination and remanded in custody (accused person chooses not to seek bail).

Crown Onus and the Ladder Principle: in most cases, the onus is on the Crown to show cause why an accused person should be detained, or a more onerous form of release should be imposed (moving up a rung on the ladder).



Reverse Onus: *Criminal Code* s. 515(6)

- In some cases, the onus is reversed, and the burden falls on the accused person to demonstrate why they should be released.
- The standard of proof on a bail hearing is a **balance of probabilities**, regardless of who bears the onus.
- Section 515(6) of the *Criminal Code* states that the onus is reversed where the accused person is charged with:
 - an **indictable offence** that is alleged to have been **committed while the accused person was on a release** in respect of another indictable offence
 - an indictable offence alleged to have been committed for the benefit of, at the direction of, or in association with, a **criminal organization**
 - an indictable offence alleged to be a **terrorism offence**
 - a designated offence under the ***Security of Information Act***
 - an offence under ss. 95, 98, 98.1, 99, 100, 102 or 103 *Criminal Code* (*updated in Bill C-48)
 - **certain serious offences alleged to have been committed with a firearm** (e.g., attempt murder, sexual assault with a weapon, robbery)
 - an offence that is alleged to **involve a weapon** (firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition, or an explosive substance), and that is alleged to have been committed **while the accused person was under a prohibition order (including a release order)** (*updated in Bill C-48)
 - an indictable offence where the **accused person is not ordinarily resident in Canada**
 - an offence in the commission of which **violence was allegedly used, threatened or attempted against an intimate partner**, and the accused person has previously been convicted or discharged of an offence in the commission of which violence was used, threatened or attempted against their intimate partner (*updated in Bill C-48)
 - a serious offence involving violence and the use of a weapon, where the accused person was previously convicted of an offence of the same criteria within the past 5 years. Both offences (current charge and past conviction) must be punishable by 10 years of imprisonment or more (*new in Bill C-48)
 - a **drug offence** under *CDSA* ss. 5-7 that is **punishable by imprisonment for life** (including conspiracy to commit such an offence)
 - an **offence involving failure to appear in court or breach of a release order** that is alleged to have been committed while the accused person was on a release pending trial or appeal

Reverse Onus – *Criminal Code* s. 469 offences

- Special rules apply to the most serious criminal offences, listed in s. 469 of the *Criminal Code*:
 - murder
 - treason
 - alarming His Majesty
 - intimidating Parliament or legislature
 - inciting to mutiny
 - piracy
 - piratical acts
 - attempting to commit any offence mentioned above, *except* murder
 - conspiring to commit any offence mentioned above
 - accessory after the fact to high treason or treason or murder
 - bribery by the holder of a judicial office
 - crimes against humanity
- Individuals charged with these offences cannot be released by police and **must be ordered detained** by a justice in the Ontario Court of Justice.
- These individuals must apply for bail in the Superior Court of Justice and, if they do, the onus is reversed, and the burden falls on the accused person to demonstrate why they should be released.

Grounds for Detention: *Criminal Code* s. 515(10)

- Regardless of who bears the onus at a bail hearing, the justice or judge considers three grounds (set out in *Criminal Code* s. 515(10) in deciding whether the detention of the accused person is justified:
 - **Primary ground:** to ensure attendance at court.
 - **Secondary ground:** to protect the public/victim, prevent the commission of further offences.
 - **Tertiary ground:** to maintain confidence in the administration of justice, which includes consideration of:
 - the apparent strength of the prosecution's case
 - the gravity of the offence
 - the circumstances surrounding the commission of the offence, including whether a firearm is used, and
 - the fact that the accused is liable, upon conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a three-year term or more.
- Each of these grounds is independent and there is no specific order or hierarchy in which they are considered.
- If the accused person is released, these grounds are also considered in deciding what terms of release should be imposed.

Conditions of Release: The Principles of Restraint and Review

- In [R. v. Zora](#), the Supreme Court of Canada held that all of those involved in the bail system (police, prosecutors, judges and justices) are to be guided by the **principle of restraint** and the **principle of review** when imposing bail conditions.
- The **principle of restraint** requires that any conditions imposed are:
 1. Clearly articulated;
 2. Minimal in number;
 3. Necessary;
 4. Reasonable;
 5. Least onerous in the circumstances and
 6. Sufficiently linked to the accused's risks regarding the statutory grounds for detention in s. 515(10) *Criminal Code*.
- The **prosecutorial responsibility of restraint** requires the prosecutor to understand and be able to explain why the proposed bail conditions meet these criteria, except in reverse onus situations.
- The **principle of review** requires everyone, especially justices and judges, to carefully scrutinize bail conditions at the release stage, even in cases where the prosecutor consents to release.

Crown Prosecution Manual: Judicial Interim Release (Bail) Directive

- The [Crown Prosecution Manual](#) contains information on the criminal process, the role of prosecutors in the criminal justice system, and directions from the Attorney General to prosecutors.
- The [Judicial Interim Release \(Bail\) Directive](#) provides direction to prosecutors specific to bail.
- The Directive affirms that accused persons will presumptively not be detained pending trial and that the default position is unconditional release. It also directs that where the prosecutor believes that the release of the accused person would jeopardize the safety or security of the victim or the public and such risk cannot be appropriately mitigated by some form of community-based release with conditions, the prosecutor **must** seek the accused person's detention.

Judicial Interim Release (Bail) Directive: Special Considerations

The Crown Prosecution Manual contains the following special considerations for bail:

- **Intimate Partner Violence Directive:**
 - The prosecutor must be conscious of the potential increased risk of harm in these cases and must seek a detention order where she considers it necessary for the safety and security of the victim or the public. Spouse/intimate partner offences are often committed in a context where there is a pattern of assaultive and controlling behaviour. Violence may go beyond physical assault and may include emotional, psychological and sexual abuse that is intended to induce fear, humiliation and powerlessness. The same general principles of bail apply to these cases, including the requirement for ongoing assessment of the strength of the Crown's case. Prosecutors should be sensitive to the needs of the victim and to the dynamics that exist in families where a partner is allegedly abused.
- **Serious Violent Crime Directive:**
 - Absent exceptional circumstances, the Prosecutor must seek a detention order for the following serious violent crimes: (1) offences involving death; (2) attempt murder; (3) aggravated sexual assault; (4) robbery with a firearm; (5) home invasion robbery; (6) carjacking.
- **Firearms Directive:**
 - In all cases involving firearms, the prosecutor must seek a detention order, absent exceptional circumstances, to ensure the safety and security of the public. If exceptional circumstances exist, the Prosecutor must obtain prior approval of the Crown Attorney or designate before recommending or consenting to any form of judicial interim release.
- **Vulnerable Populations (Judicial Interim Release (Bail) Directive):**
 - Prosecutors should recognize the circumstances of vulnerable and disadvantaged accused, including racialized populations, the homeless, the poor or those suffering from mental illness or addictions. These accused persons may not have access to the type of accommodation, resources, networks or supports that commonly exist for other members of the community. Pre-trial detention should never be used as a substitute for mental health or other social measures.
- **Indigenous Peoples Directive:**
 - Prosecutors should consider the distance and remoteness of many Indigenous communities and the barriers that this creates for access to bail hearings. In these circumstances seeking the detention of an Indigenous accused person should remain an exceptional measure, unless the release would jeopardize the safety and security of the victim or public.

Dedicated Resources: Intensive Serious Violent Crime Bail Teams

- In April 2023, the Ministry of the Attorney General invested \$26 million over three years to establish Intensive Serious Violent Crime Bail Teams.
 - Launched province-wide in September 2023, the work of these teams expanded and broadened the work of the Intensive Firearm Bail Support Teams.
- The teams, comprised of Prosecutors and business professionals, work with police services and bail compliance units (including the Bail Compliance Dashboard, where available) and have the resources to:
 - Prepare the best case possible in bail matters involving serious and violent crimes and to conduct these complex and lengthy hearings.
 - Flag high risk accused persons and ensure that all relevant materials are accessible for future use by Crowns provincially so that individuals are dealt with appropriately at the bail stage, regardless of location.
 - Launch bail review hearings if the court orders the release of an accused person who the Crown believes poses a substantial risk to public safety.
 - Consider initiating bail estreat proceedings if an accused person is charged with breaching bail conditions in the context of a serious violent offence.
 - Identify and rectify any deficiencies in the case to reduce delays and enhance the prospects for a successful prosecution after the bail stage concludes.

Dedicated Bail Resources (cont.)

- **Crown Bail Vectors:** Dedicated prosecutors give focussed and intensive attention to bail files with a view to streamlining the bail process, reducing adjournments, and encouraging early resolution of charges.
- **Bail Verification and Supervision Program (BVSP); Indigenous Bail Verification and Supervision Program (IBVSP):** These programs serve accused persons who do not present a risk to the community and who would otherwise not be released due to barriers such as lack of finances, sureties, social ties or other factors. The programs provide supervision while these people are on release and support them to access social and health services. Combined, the BVSPs and IBVSPs serve all 54 court locations.
- **Bail Bed Program (BBP); Indigenous Bail Bed Program (IBBP):** These programs provide community-based, residential supervision for accused adults who would likely otherwise be held in custody but who can be safely released with additional supports and a higher level of supervision. Particular consideration is given to vulnerable populations such as Indigenous people, racialized communities and those living with mental health and/or addictions issues. There are 5 BBPs and 4 IBBPs in the province.
- **Justice Centres:** Justice Centres, located in Kenora, Toronto Northwest, Toronto Downtown East and London, are designed to help break the cycle of reoffending, including violent reoffending, and reduce bail and remand populations. The Toronto Northwest Justice Centre deals with the most serious criminality, focussing on youth and community violence.
- **Community Justice Coordinators (CJCs):** These are dedicated resources in prioritized courthouses that aim to reduce lower severity reoffending by improving personal outcomes. CJCs create individualized plans and connect accused persons to supports and culturally relevant and/or Indigenous Justice programming in their community. This program uses a needs-based approach where accused persons improve their own individual circumstances, work toward diversion or mitigate short-sharp custodial sentences, with a view to reducing nuisance recidivism.