Bail and Release from Custody

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Bail hearings and release from custody

What is a bail hearing?

If police do not release the person who has been arrested, they must bring him before a justice for a bail hearing within 24 hours or as soon as possible. A bail hearing is a procedure where a judge or a justice of the peace determines whether a person charged with an offence should be released or held in custody pending trial.

Will I be held for a bail hearing?

If you are arrested for a criminal offence, police can release you from the place where the arrest is made or from the police station. Or they may hold you for a bail hearing later that day or the next.

Release without a bail hearing:

- **Summons, promise to appear**
  Except for murder and a few other very serious offences, a person arrested without a warrant can be released by way of a summons, appearance notice or promise to appear. Police will do so unless one or more of the following circumstances apply:
  - they need to establish your identity
  - they fear you will destroy evidence relating to their investigation
  - they fear you will continue or repeat the offence or commit other offences
  - they have reasonable grounds to believe you will not show up for court.

- **Recognizance**
  In addition to a summons or promise to appear, police may make a person's release conditional on his or her entering into a recognizance without sureties in an amount up to $500 and without deposit of money. An out-of-province resident can be asked to enter a recognizance without sureties and deposit up to $500 cash.

- **Undertaking with conditions**
  Following arrest, a person also may be released on entering an undertaking with one or more of the following terms:
  - remain within a certain area (city, country or province)
  - deposit the person's passport
  - notify police of any change in address or employment
  - abstain from communicating with any person or from going to any place
  - abstain from possessing a firearm and surrender any firearm
  - report to police at specified times
  - abstain from consuming alcohol or other intoxicating substances
  - abstain from taking drugs except in accordance with a medical prescription

More on bail hearings

Why would I be denied bail?

Detention is justified only if deemed necessary on one or more of the following grounds:

- to ensure that the accused attends court; e.g., if the accused has a history of failing to attend court or abide by other court orders
- to protect the public; e.g., an accused could be detained if he has a criminal record for similar offences; in the case of an assault or threatening charge, a history of violence against the same complainant works in favor of detention
- to maintain confidence in the administration of justice; the court will consider the apparent strength of the prosecution's case, the gravity of the offence, the circumstances surrounding its commission and the potential for a lengthy jail term

Reverse onus

The onus is generally on the Crown to show cause why the accused should not be released (a bail hearing is also called a "show cause" hearing). In some situations, the onus is switched and it is the accused who must show cause why he should not be detained. For example:

- if he is charged with an indictable offence allegedly committed while he was on a release for an earlier indictable charge that is still pending, e.g., a driver facing an impaired driving charge who is charged with a new drinking and driving offence; a person facing an assault charge who is arrested on another assault charge (if the Crown has elected summarily on the first charge, it is no longer considered indictable and it is the Crown that must show cause)
- if he is charged with an indictable offence and is not ordinarily resident in Canada
- if he is charged with failing to comply with a condition of a recognizance or undertaking, or failing to attend court or appear for fingerprinting, while he was on release for an earlier charge that is still pending
- if he is charged with trafficking or possession for the purpose of trafficking in heroin, cocaine, more than three kilograms of marijuana or hashish, or importing any amount of these drugs

Terms of release

The court can release the accused on an undertaking or upon his entering into a recognizance specifying a sum of money that is payable to the Crown if he fails to attend court or abide by the other conditions of his release (see forfeiture of bail below). Conditions can be attached to an undertaking or a recognizance.
Besides those conditions noted above in respect to an undertaking entered into at a police station, the court can impose any other reasonable condition it thinks desirable (e.g., a curfew for a youth, treatment for substance abuse in cases where drugs or alcohol are involved or counselling for anger management in assault cases).
In the case of an offence involving violence and serious drug charges, the court can prohibit the accused from possessing a firearm, ammunition and explosives. An accused who is ordered detained also can be directed to abstain from communicating with a witness.

Right to reasonable bail

The Canadian Charter of Rights and Freedoms gives everyone the right not to be denied reasonable bail without just cause. Accordingly, bail must be set at an amount within reach of the accused or his sureties. A recognizance can be with or without sureties. A surety supervises the accused and is liable for the amount of the recognizance. Unless the accused is from out of province or lives far from the place of custody, the money specified in the recognizance need not be deposited with the court.

Publication ban

It may be important to seek a publication ban on the information disclosed at a bail hearing. The accused has an automatic right to such a ban; at his request, the court must ban publication of the evidence taken, the information given, the representations made, and the reasons given by the court for its decision. The ban remains in place until the charge is disposed of. The decision granting or refusing release is not subject to the ban, nor is the identity of the accused or information journalists obtain from police.

Adjournment of bail hearing

The court can adjourn a bail hearing at the request of the Crown or accused. Unless the accused consents, an adjournment cannot exceed three days.
As a detention order can result in the accused person losing his job, it is vital to prepare carefully for a bail hearing, even if such preparation necessitates an adjournment. Be warned: if the accused is detained, it may be a week or more before a bail review can be held. By then it may be too late to save his job. A bail review can be costly. It generally costs less to hire a lawyer to prepare for a bail hearing.
As the Charter protects the accused against arbitrary detention, Crown discretion to seek an adjournment must not be abused. For example, it would be improper for the Crown to adjourn a bail hearing to pressure an accused to make a statement confessing to the crime or identifying accomplices.

Why get a Lawyer?

Should I get a lawyer when I'm arrested?

Your lawyer may be able to negotiate the terms of release from the police station or those to be recommended by police to the Crown Attorney at a bail hearing. This could be the key to obtaining a release order rather than a detention order.

Do I need a lawyer for my bail hearing?

While a state-funded lawyer (duty counsel) may be available to assist you with a bail hearing at no cost, it may be helpful to hire a lawyer for the following reasons:

- Duty counsel invariably has other cases to handle and cannot give yours all the attention it may need.
- A privately retained lawyer can take the time to carefully interview you and potential sureties, and line up treatment, if required, for psychiatric or substance abuse problems. Demonstrating that treatment is in the works will help allay possible concern that you will reoffend.
- A lawyer can help arrange letters from your school or employer and help arrange post-release accommodation. The court may fear that without proper accommodation there is increased risk you will reoffend.
- A lawyer can take steps to have police officers or other witnesses attend the bail hearing to testify about weaknesses in the Crown's case; the weaker the Crown's case, the harder to justify your detention.
- A lawyer can help prevent the imposition of unreasonable or onerous bail conditions. For example, the Crown may seek bail in an amount beyond the financial reach of your proposed sureties. Or it may seek a curfew or demand that you report frequently to a faraway police station when such terms are unjustified.

It is important to get it right the first time.

If your bail hearing is unsuccessful and you are ordered detained, you may apply to a higher court for a review of the detention order. But it may be a few weeks before a "bail review" can be launched and there is no guarantee that a higher court will order your release. And a bail review can be costly.
Securing the release of an accused can be critical to the successful defence of a charge. Often, persons who are ordered detained plead guilty because they are desperate to get out of jail.
It is much easier for an accused and his lawyer to prepare for trial if the accused is out of custody. Custody encumbers communication between the accused and his lawyer, who is restricted to jail visits at certain hours. Telephone access is not always available. In addition, jail visits may entail increased legal fees.
Further, an accused who is out of custody can participate in counselling and treatment that may help achieve a lighter sentence in the event he is found guilty or even assist in getting the Crown to drop the charges.

Sureties and Bail Forfeiture

What is a surety?

A surety is responsible to ensure that the accused attends court as required until the case is over. He or she is also responsible to ensure that the accused abides by the conditions of his release, including any reporting, curfew and non-contact clauses. The surety is the "jailer" of the accused as he or she must provide some measure of supervision over the accused's daily activities. He or she should maintain daily contact with the accused.

Criteria of surety's suitability

The following persons would not be acceptable:

- co-accused
- a minor
- a person who is already surety for another person
- counsel for the accused
- a non-resident of the province
- victim of the accused such as spouse who is complainant in a domestic assault

Because the surety is expected to supervise the accused, he or she should be someone who is able to do so. Relevant factors are how long he or she has known the accused, whether they are related, how frequently they see each other and how close they live to each other.
It is best that the surety have no criminal record. A conviction for a serious offence or one related to the administration of justice, such as for breach of a court order, could render the surety unsuitable. He or she may not be considered suitable if he or she is awaiting trial on a criminal offence.
The surety must have sufficient funds or personal assets in Ontario (i.e., the province where the accused stands charged) to cover the recognizance, that is, the amount of the bail. He or she should attend court with proof of his or her ability to do so (e.g., bankbooks, proof of property ownership), and photo ID, such as driver's licence or passport. If bringing a bankbook, make sure it's updated. It is a criminal offence to accept payment to act as a surety. Offering such payment is also an offence.

Ceasing to act as surety

A surety who has a change of heart, disapproves of the accused's conduct on release, fears the accused may abscond, or for any other reason, may apply to a judge or justice of the peace to be relieved of his or her obligations. The surety does not have to give a reason; his or her right to be relieved of his or her obligations is unconditional. If this occurs, the accused must return to custody and reapply for release; he may be able to avoid returning to custody if a judge or justice of the peace accepts a new surety in place of the old one.

Forfeiture of bail

If the accused breaches his bail conditions, the Crown can go after his surety for the money acknowledged to be owed to the Crown in the recognizance. This procedure is called estreatment of bail. A forfeiture hearing is held where the surety has an opportunity to establish why the recognizance should not be forfeited.
If the surety has taken all reasonable steps to ensure the accused keep his conditions, he or she may avoid penalty. Such steps include informing authorities immediately if the accused absconds or when the apprehension of absconding arises. If the surety made some, though insufficient, effort to discharge his or her obligations, he or she may be ordered to pay an amount less than the full recognizance.
The Crown need not establish a link between the lack of due diligence by the surety and the breach of conditions of a recognizance by an accused.

Criminal liability

In a recent Ontario case (December 2001), a mother acting as surety for her son was found guilty of breach of recognizance after her son violated a bail condition requiring that he reside with her. The court found the mother guilty as a party to the commission of the offence by her son. The son lived at the new address for a few months; his mother had visited him and phoned him there. Noting that the mother could control her son by revoking her suretyship, the court ruled that her failure to stop him from breaching the condition showed an intention to aid him in carrying out the offence.

Bail Review and Variation

Bail review

If an accused is detained at a bail hearing, he may apply to a higher court for a review of the detention order. It can take a week or longer to convene a bail review as the detainee nearly always has to first obtain a copy of the transcript of proceedings from the bail hearing. The Crown can apply to a higher court for review of an order releasing the accused.

Changing the bail conditions

The court can vary the conditions of release if the prosecutor consents. In domestic assault cases, the accused frequently seeks to delete the no-contact condition which keeps him separated from his family and compels him to take up residence outside the family home. As a matter of policy, the Crown generally will not consent to such a change. The accused's only recourse is thus a bail review. Often, an accused will plead guilty just to quicken his return home.