Changes to Bail:

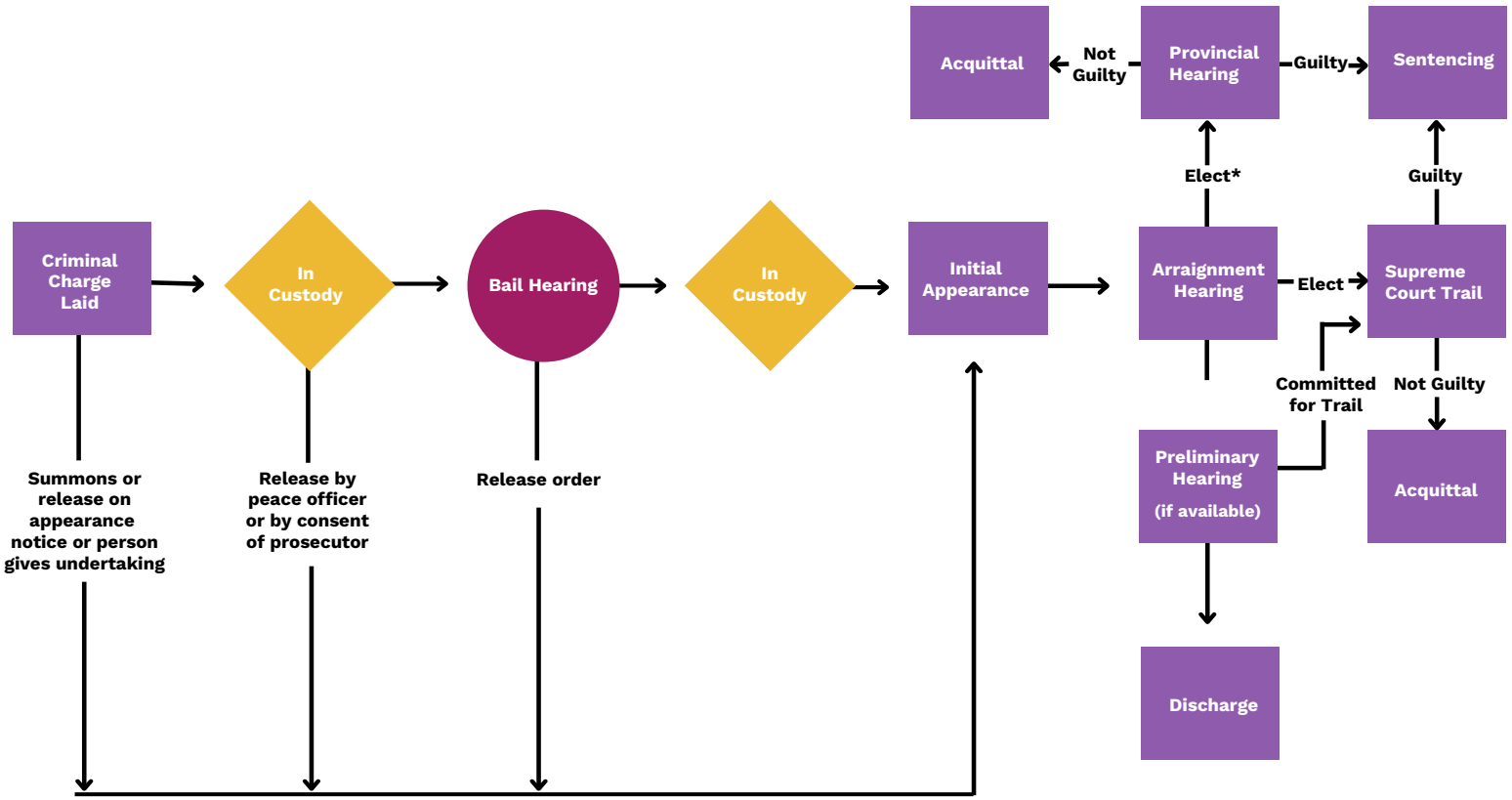
Information for Anti-Violence Workers

Introduction

Many are aware that significant changes to the Criminal Code of Canada were passed in June 2019 (Bill C-75), including amendments that have impacted bail hearings. Under the Criminal Code of Canada (Criminal Code), judicial interim release (commonly referred to as 'bail') is an accused's release from a form of custody pending the outcome of the charges against them. When an accused is charged with an offence under the Criminal Code, and is held in custody by police who have chosen not to release on a promise to appear in court at a later date or an undertaking (an agreement to follow instructions in a release document-such as not contacting a victim), the accused must be brought before a judge who will determine if they should be held in custody or released on bail, pending trial.

Judicial interim release (bail) occurs when a judge releases an accused from custody into the community in exchange for a promise to adhere to specified conditions.

At a bail hearing, Crown Counsel will present the alleged offences of the accused, any previous criminal convictions and any risks the accused presents in the circumstances, such as the potential of harm to a victim if an accused is released into the community. The defence lawyer will also have an opportunity inform the judge about the accused, including information about their background, connections within the community (such as employment or family) and will likely propose release conditions as an alternative to detention.



Reference: https://www.provincialcourt.bc.ca/types-of-cases/criminal-and-youth/bail-hearing

When determining whether to detain the accused in custody or release into the community with conditions, a judge is required to consider three things:

- the chance the accused person will not attend court dates (called “the primary ground”)
- whether they are likely to commit crimes if released or are dangerous to the public (“the secondary ground”)
- in some cases, whether release on bail would cause people to lose faith in the administration of justice (“the tertiary ground”)

After a bail hearing is complete, an accused can either be detained into custody or released into the community. If the accused is not detained, the form of release decided by the court will depend upon the nature of the alleged offence, the background of the accused and the risks that arise in the circumstances. For example, if there is a likelihood the accused will not attend upcoming court dates, a judge may choose to impose a “recognizance” as part of release conditions, which means that the accused may incur a financial penalty if they do not attend court or abide by the conditions of release.

Bail and Section 515 of the Criminal Code:

Section 515 of the Criminal Code contains the rules that govern judicial interim release (bail). If released on bail, an accused will be subject to terms of release (bail conditions). Those conditions must be justified by the nature of the offence. When the offence relates to intimate partner violence, there is often a condition that bars the accused from contacting their victim/survivor.

Bail conditions prohibit certain behaviours from the accused when released from custody. Section 515 (4) of the Criminal Code allows the court to impose certain conditions upon release such as:

- Requiring the accused to report to the authorities, such as a peace officer or a bail supervisor at a specified time
- Requiring the accused to remain within a specified territorial jurisdiction

- Requiring the accused to avoid any type of communication with a victim, whether directly or indirectly
- Requiring the accused to avoid places specifically mentioned in the order, such as victims’ residence or place of work
- Requiring the accused to abstain from possessing any firearm

In a sequence of cases, and most recently affirmed in R v. Zora, 2020 SCC 14 the Supreme Court of Canada established that while protection of the public and the maintenance of confidence in the administration of justice can justify pre-trial detention, the Court affirmed in R v. Antic, 2017 SCC 27 that release on an undertaking (or promise to appear in court at the designated time) at the earliest reasonable opportunity and on the least restrictive grounds is the favoured approach. The Court has followed this reasoning in subsequent cases, stating that the assumption is unconditional release, placing the burden on Crown to demonstrate cause where a more restrictive form of release is requested. This is known as the ladder principle: justices should start at the bottom rung of the ladder, with the least amount of supervision (such as unconditional release) and escalate up each rung of the ladder to more restrictive forms of release (such as house arrest at the top of the ladder) only where the Crown demonstrates why a less onerous form is inappropriate in the circumstances.

In R v. Zora, the Court further considered how the imposition of common conditions for bail such as drug abstinence, rehabilitative interventions and other broad conditions unrelated to risks posed by the accused may disproportionately affect vulnerable and marginalized groups, including Indigenous people, as well as those who are racialized, poor and homeless, and such conditions must be reasonable and achievable for the individual. The Court has set out the basic questions that structure the analysis:

- If released without conditions, would the accused pose any specific statutory risks that justify imposing any bail conditions?
- Is this condition necessary?
- Is this condition reasonable?
- Is this condition sufficiently linked to the grounds of detention under s.515(10)(c)?
- What is the cumulative effect of all of the conditions?

Amendments to the Criminal Code contained in Bill C-75-specifically, sections 515 (1) to 515 (2.1) now include the ladder principle articulated in the above cases. Section 515 (1) provides that that release at the earliest opportunity and on the least onerous conditions is favoured over detention. This means that an accused will likely be released on conditions which prohibit contact with the victim and may have to report to an authority such as a bail supervisor regularly, rather than remanded into custody. It is important to note that Section 515 (3) of the Code specifies that violence against an intimate partner as well as previous criminal convictions under the Code are factors that must be taken into consideration during the bail hearing in determining release of the accused. Section 515 (6)(b.1) also contains a "reverse onus" clause where the alleged offence is against an intimate partner and the accused has a previous conviction for violence against an intimate partner. When an individual is charged with "reverse onus offences", including offences involving violence against an intimate partner (when the accused person has a previous conviction

involving violence against an intimate partner), this section of the Criminal Code requires that they be kept in custody unless the accused can establish that their detention is not justified. Typically, the Crown is required to demonstrate detention is required; in "reverse onus" offences, this burden is shifted to the accused to show why they should be released.

Crown Counsel, who prosecute all offences and appeals in British Columbia that arise under Canada's Criminal Code are guided by the Crown Counsel Policy Manual. The Manual "provides both general and situation-specific guidance to Crown Counsel in the exercise of their discretion, including on fundamental prosecution considerations such as charge assessment, alternative measures, bail, and resolution discussions"

BC Prosecution Services Policy regarding bail was updated in January 2021 to reflect case law and changes to the Criminal Code. Crown Counsel Policy Bail-Adults states that Crown Counsel's position on bail must be consistent with the "principle of restraint" codified in section 493.1 of the Criminal Code (earliest release with the least onerous conditions) and that:

When proposing bail conditions, Crown Counsel should take into account the circumstances of the alleged offence and all known risk factors and seek the least restrictive bail conditions that appropriately address the risk posed by the accused.

[1] BC Prosecution Service, Crown Counsel Policy Manual https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/ prosecution-service/crown-counsel-policy-manual/bai-1.pd

When Crown is seeking bail conditions for an accused, those conditions must relate directly to the risk to others posed by the accused and not be arbitrary in nature. For example, if there is a risk that the accused may commit further violence against a victim or others, the proposed bail conditions must address that risk. This could be through a "no-contact" order, prohibitions on the possession of firearms or refraining from attending the victim's home or place of work.

BC Prosecution Services Policy further states that:

Crown Counsel should not seek any conditions that may tend to criminalize, or penalize, an accused's particular life circumstances (e.g., poverty, homelessness, alcohol or drug addiction, mental or physical illness, or disability). Even where the particular life circumstances may relate to the circumstances of the underlying offence, a condition that is not reasonably practicable for the accused to comply with would not be reasonable.

In relation to Indigenous offenders, proposed bail conditions must be necessary to address risks to victims, witnesses and the public and should contemplate any challenges that compliance may pose, including remoteness of the community and unique cultural connections or traditions of the community.

While Crown policy states that the least restrictive bail conditions should be sought for an accused, special considerations will continue to apply in cases of intimate partner violence. Where intimate partner violence is the alleged offence, Crown Counsel are required to follow relevant bail guidelines contained in BCPS policy on Intimate Partner Violence (IPV 1).[2] Crown policy states that when formulating a position on bail in IPV cases, Crown should pay specific attention to the safety needs of victims, children and others potentially at risk, in light of relevant information related to the recognized risk factors outlined within Crown policy3. Further, when there are reasonable grounds to believe that the accused will cause severe bodily harm or death to a victim or another person, Crown is required to seek a detention order in conjunction with a "no contact" order under the Criminal Code. Pursuant to section 515 of the Criminal Code, the Crown must consider the strength of the case against the accused and the three grounds under which bail may be denied and detention required:

1. Where it is "necessary to ensure his or her attendance in court"
2. Where it is "necessary for the protection or safety of the public"
3. Where it is "necessary to maintain confidence in the administration of justice"

[2] BC Prosecution Service, Crown Counsel Policy Manual https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/ipv-1.pdf

[3] BC Prosecution Service, Crown Counsel Policy Intimate Partner Violence (IPV 1) Policy lists the following risk factors: Accused History: criminal violence, history of threats, violence, sexual assaults and criminal harassment, previous intimate partner violence, threats or abusive behaviour, court orders or history of violation of court orders, history of drug or alcohol abuse, employment instability, unemployment or financial problems, history of mental illness, suicidal ideation, threatened or attempted, weapons/firearms-access to, use or threats;

Where the Crown has reasonable grounds to believe there is a substantial likelihood of conviction, and that one of the three grounds for detention is met, the Crown will likely choose to seek detention of the accused pending trial. For example, where Crown has reasonable grounds to believe there is a substantial likelihood that the accused will cause severe bodily harm or death to a person, Crown will seek a detention order along with a no contact order. Pursuant to Crown IPV Policy, if the court does not order the detention of the accused when charged with intimate partner violence, the Crown must ask the court to impose conditions to protect the victim/survivor, their family and any other members of the public as required under section 515 (12) of the Criminal Code.

Where a detention order is not granted, Crown must ask the court to put into place protective conditions for the victim and others potentially at risk. In cases where the accused has previously been convicted of an IPV-related offence, Crown Counsel should "consider the impact of the reverse onus provision in Section 515(6)(b.1) of the Criminal Code" and request a detention order or other release conditions to protect victims. In addition, Crown Counsel should be mindful of section 718.201, which requires the court to consider the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Indigenous female victims.

Lastly, as a breach of a court order is an identified risk factor for future violence, Crown policy states that it is important for Crown Counsel to consider approving charges for breaches of bail, conditional sentence orders, and probation orders. In highest risk cases (where there is risk of substantial bodily harm or death), Crown should apply to revoke bail and seek a detention order. In other cases, not deemed highest risk, where there are concerns for the safety of victims and other persons, Crown should consider applying to revoke bail. For any breach involving

harm or threats to, or intimidation of, an intimate partner, if the Crown determines that there is a substantial likelihood of conviction, (one of the requirements to approve charges), generally there is a strong public interest in favour of prosecution. Even where the accused is not convicted of the original charge, in situations identified by the police as "highest risk", any breach of court order that can be substantiated with evidence should be prosecuted.

Crown policy specifies that all victims should be advised of the availability of victim services in their area and provided timely information about any charges laid, release conditions or other developments in their cases in accordance with the BC Victims of Crime Act, the federal Canadian Victims Bill of Rights and the policy on Victims of Crime – Providing Assistance & Information to (VIC 1).

Bail Variance:

Many survivors will involve the criminal justice system with the goal of obtaining protection from harm and treatment for the offender to end their partner's use of violence, not necessarily with the goal of ending their relationship.

Victim's Perception of Risk- victim's perception of personal safety, victim's perception of future violence;
Relationship History: current status of relationship (past, recent or pending separation; escalation in frequency/intensity of violence/abuse • children under 19 years of age living at home or a custody dispute • threats • forced sex • strangling, choking, or biting • stalking • information of relative social powerlessness of the victim (cultural or marginalization factors)

The criminal justice system, however, is not generally well-equipped to respond with situations where the relationship between the survivor and perpetrator is ongoing. The reality is that many couples resume contact after an assault, often despite the existence of a no-contact order. The reasons for resuming contact are varied, including threats and coercion by the accused, financial dependence, access to children, lack of resources and/or a desire for reconciliation.

When an accused makes an application to vary bail in order to resume contact with the survivor, it is important to ensure connection with the victim for safety planning, information about available resources, and informed decision making about if and un- der what conditions the victim will have contact with their partner/former partner as the risk of harm to the survivor and others may escalate after a report has been made to police and the offender made subject to bail conditions. It is also important to ensure that police and Community Corrections are informed of the application, and can relay any concerns to Crown about the proposed variance. Victim notification procedures (such as those that are available through the Victim Safety Unit to advise victims on matters such as release from custody and bail conditions of the accused) and formalized safety planning/risk management initiatives such as Inter Agency Case Assessment Teams can ensure that both victims and offenders are provided with necessary resources, support and information to enhance safety.

Crown will always be a party to an accused's application to change or vary a condition of bail after their initial release. If the Crown will not consent to the variation, the accused can bring an application for a bail review. In this scenario, the variation on the bail will be argued in front of a judge.

Where the accused person or the victim requests the removal of a bail condition prohibiting contact between the two parties, Crown Counsel is required by policy to:

"seek further information about the history of the relationship between the accused and the victim, and about the background of the accused from available sources such as the victim, bail supervisor, or the police. In determining whether to consent to a bail review, including any change in "no contact" or other conditions, Crown Counsel should consider any relevant change in circumstances as well as the nature of the changes being requested; the power dynamics in the relationship; the needs and safety of the victim, the victim's family, and other members of the public; and any history of intimate partner violence. Crown Counsel should only consent to a review of bail conditions where there has been a change in circumstances."

Crown IPV Policy also provides that, if the Crown has reasonable grounds to believe there are other protection orders in place affecting the accused, Crown should confirm with police/RCMP that the Report to Crown Counsel included any pertinent information about the orders as the accused and the complainant often do not have accurate information about the existence and status of civil proceedings. This would include but not limited to the Family Law Act orders, the former Family Relations Act orders, as well as orders made under the Child, Family and Community Service Act or the Divorce Act. The Crown has the same responsibility when considering a request to vary bail: to ensure that any other protection orders are considered.

Can Community Coordination for Women's Safety (CCWS) help?

If your community or region could benefit from assistance related to coordination, developing policy and promoting action, you can reach CCWS by:

Email: ccws@endingviolence.org

Phone: (604) 633-2506 ext.6