Policy: **Bail – Adults**		
Policy Code: **BAI 1**	Effective Date: November 22, 2022	Cross-references: CHA 1 CHI 1 GUI 1 IPV 1 SEX 1 VUL 1

Every person charged with an offence has the fundamental right to bail on reasonable terms and the right not to be denied reasonable bail without just cause.

The right to bail is inextricably linked to the presumption of innocence. Canadian law presumes that an accused person will be granted bail:

> *… the release of accused persons is the cardinal rule and detention, the exception … To automatically order detention would be contrary to the 'basic entitlement to be granted reasonable bail unless there is just cause to do otherwise'.*[1]

Pre-trial custody can affect the mental, social, and physical life of the accused and their family. An accused is presumed innocent and must not find it necessary to plead guilty solely to secure release. Even when the accused is not detained in custody, unnecessary or unreasonable conditions of release limit the liberty of someone who is presumed innocent and may potentially criminalize otherwise lawful behaviour.[2]

Despite the entrenchment of a constitutional right to reasonable bail, remand populations and the denial of bail have increased dramatically since the enactment of the *Charter of Rights and Freedoms*.[3] Beyond the strain this places on an already overburdened criminal justice system, the increase in the remand population disproportionately affects accused persons from disadvantaged and vulnerable communities and tends to increase the accused's risk of criminalization. It also exacerbates the already unacceptable over-representation of Indigenous persons within the Canadian criminal justice system.[4]

1 *R v St-Cloud*, 2015 SCC 27 at para 70
2 *R v Zora,* 2020 SCC 14 at para 25
3 *R v Antic,* 2017 SCC 27 at para 64
4 *R v Zora,* 2020 SCC 14 at para 79; Statistics Canada, "Adult and youth correctional statistics in Canada, 2018/2019", by Jameil Malakieh in Juristat Catalogue No 85-002-X (Ottawa: Statistics Canada, 2020) at 7, online < https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00016-eng.htm>

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. When proposing bail conditions, Crown Counsel should take into account the circumstances of the alleged offence and all known and reasonably foreseeable risk factors and seek the least restrictive bail conditions that can reduce the risk posed by the accused to an acceptable level.

In order for the justice system to operate fairly and effectively, Crown Counsel are required to make discretionary decisions about bail. As outlined in the *Guiding Principles* (GUI 1) of the Crown Counsel Policy Manual, when Crown Counsel make principled decisions in accordance with this policy, regardless of the outcome, the BC Prosecution Service and the Assistant Deputy Attorney General will support their decisions.

General

To be legally justifiable, pre-trial detention or any conditions placed on the release of an accused person must be necessary for one or more of the three purposes enumerated in section 515(10) of the *Criminal Code*:

- to ensure the accused's attendance in court
- for the protection or safety of the public, a victim, or a witness, having regard to all of the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice
- to maintain confidence in the administration of justice

It is not legally justifiable to seek pre-trial detention or bail conditions for any other purpose, including: to punish an accused, to enforce treatment of an accused's underlying mental health or addiction issues, to attempt to expedite the judicial process, or to encourage an accused to plead guilty or make any other concession or admission.[5]

In addition to the statutory grounds referred to in section 515(10) of the *Criminal Code*, Crown Counsel's position on bail must be informed by the "principle of restraint" codified in section 493.1.[6] The principle of restraint requires a judge to give primary consideration to the release of the accused at the earliest reasonable opportunity, on the least onerous

5 *R v Zora*, 2020 SCC 14 at para 85
6 *R v Zora*, 2020 SCC 14 at para 100

conditions that are appropriate in the circumstances and are reasonably practicable for the accused to comply with.

However, the principle of restraint must be interpreted in the context of the bail provisions as a whole and it does not preclude Crown Counsel from seeking detention or conditions on the release of the accused whenever that is appropriate.

Sections 515(1) through 515(2.03) of the *Criminal Code* make clear that, apart from limited exceptions, the judge presiding at a bail hearing must release the accused on a release order without conditions unless Crown Counsel shows cause why detention of the accused or a conditional release is justified.

Other than conditions which must be imposed or considered under section 515(4.1) to (4.3) of the *Criminal Code*, and a condition that the accused attend court, Crown Counsel should only propose conditions that are aimed at addressing the statutory grounds set out in section 515(10). In deciding what conditions, if any, to seek, Crown Counsel should consider the personal circumstances of the accused and the cumulative effect of the proposed conditions.[7]

Protecting public safety and maintaining confidence in the administration of justice

In some circumstances it is not only appropriate but necessary for Crown Counsel to take a more stringent approach to bail. For example, the policies listed below emphasize the need to have particular regard for the safety of the public, including victims and witnesses:

- *Child Victims and Witnesses* (CHI 1)
- *Intimate Partner Violence* (IPV 1)
- *Sexual Offences – Adult Victims* (SEX 1)
- *Vulnerable Victims and Witnesses* (VUL 1)

The protection or safety of the public is also a matter of concern in relation to repeat offenders, particularly repeat violent offenders.

For the purposes of this policy, a repeat violent offender includes anyone with one or more recent convictions for an offence against the person (under Part VIII of the *Criminal Code*) or an offence involving a weapon (as defined in section 2 of the *Criminal Code*). When a repeat violent offender is charged with an offence against the person or an offence involving a weapon, Crown Counsel must seek their detention unless they are satisfied, having regard to

7 *R v Zora*, 2020 SCC 14 at paras 25 and 89

all the circumstances, that the risk to public safety posed by the accused's release can be reduced to an acceptable level by bail conditions.

In considering the risk to public safety, Crown Counsel should consider any factors that may weigh in favour of seeking the accused's detention, including:

- at the time of arrest, the accused had one or more outstanding criminal charges alleging an offence against the person or an offence involving a weapon
- in committing the alleged offence, the accused allegedly breached a condition of a preventative recognizance, or a weapons prohibition imposed under the *Criminal Code*
- the reverse onus provisions in section 515(6) of the *Criminal Code*

Review of Police-Issued Undertakings

Police have the power to release an accused on an undertaking under sections 498(1)(c), 499(b), or 503(1.1) of the *Criminal Code*. In exercising that power, police are required by section 493.1 of the *Criminal Code* to give primary consideration to the release of the accused at the earliest reasonable opportunity, on the least onerous conditions that are appropriate in the circumstances and are reasonably practicable for the accused to comply with.

On receipt of a Report to Crown Counsel, Crown Counsel should review the terms of any police-issued undertaking. When the terms of the police-issued undertaking are unenforceable or insufficient to protect the victim, the victim's family, witnesses, and the public, Crown Counsel should request a warrant or apply to a justice under section 502(2) for a release order with different conditions. When less restrictive terms would be sufficient, Crown Counsel should consider whether a variation under section 502(2) is appropriate.

Charge Assessment of Alleged Breaches of Bail

When a breach of bail amounts to wilful defiance of the court or creates unacceptable risk to public or victim safety, it calls for an appropriate response. However, many breaches occur as a result of the accused's changing or challenging life circumstances, which can make strict compliance with conditions difficult. The latter types of breaches often do not raise significant concerns about wilful defiance of the court or public or victim safety.

As outlined in *Charge Assessment Guidelines* (CHA 1), even if the evidentiary test is met, justice does not require that every provable offence must be prosecuted. Prosecution should be reserved for cases requiring the full force of the criminal justice system, with all its available sanctions. When it is alleged that an accused has breached a condition of bail, Crown Counsel should consider all available alternatives before approving the laying of an Information charging a breach of bail.

Reasonable alternatives to a prosecution for an alleged breach of bail may include:

- reviewing the continued necessity of the condition alleged to be breached for the purposes of section 515(10) and amending or varying as necessary
- applying for the revocation of bail under section 524 of the *Criminal Code*
- alleging the circumstances of the breach of bail as part of the circumstances at the sentencing of a substantive offence arising from the same facts, in accordance with section 725(1)(c)

A charge under section 145(4) or 145(5) should only be approved when the remedies available through bail review and revocation would be insufficient.[8]

One exception to this approach is in regard to matters covered by the *Intimate Partner Violence* (IPV 1) policy: "as a breach of a court order is an identified risk factor for future violence, it is important for Crown Counsel to consider approving charges, when appropriate, for breaches of bail".

Impoverished and Vulnerable Persons

Impoverished and vulnerable accused persons, who lack either a support network of family and friends or financial means, are less able to access bail.[9] When making a decision about bail, section 493.2(b) of the *Criminal Code* requires a judge to give particular attention to the circumstances of accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release.

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). A condition will only be appropriate if it is necessary to address the accused's specific risks.[10]

Indigenous Persons

Numerous government commissions and reports, as well as the judgments of the Supreme Court of Canada, have recognized that discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice system.

The history of colonialism, displacement, and residential schools in Canada has translated into lower educational attainment, lower incomes, higher unemployment, higher rates of

8 *R v Zora*, 2020 SCC 14 at para 70
9 *R v Summers*, 2014 SCC 26 at para 66
10 *R v Zora*, 2020 SCC 14 at para 92

substance abuse and suicide, and higher levels of incarceration for Indigenous persons. The disproportionately high level of imprisonment also arises from bias against Indigenous people and from an institutional approach that is more inclined to refuse bail to them.[11]

In addition, the rates of victimization of Indigenous persons, especially for Indigenous women and girls, are significantly higher than those for non-Indigenous persons.[12]

The continuing consequences of colonialism for Indigenous persons in Canada provide the necessary context for bail considerations involving an Indigenous accused. These consequences "must be remedied by accounting for the unique systemic and background factors affecting Indigenous peoples, as well as their fundamentally different cultural values and world views."[13]

Indigenous Accused Persons – Bail Considerations

When Crown Counsel is uncertain of the accused's background, they should inquire of the accused, defence counsel, or the court, at the earliest reasonable opportunity, as to whether the accused identifies as an Indigenous person. Crown Counsel should ensure that this information is recorded on the file.

Crown Counsel must consider any information provided throughout the prosecution concerning the unique systemic or background factors that may have played a part in bringing an Indigenous accused before the court and the impact those factors, as well as the continuing consequences of colonialism, will have on the Indigenous accused's ongoing interaction with the criminal justice system.

Factors such as unemployment, housing instability, sureties without significant financial means, substance misuse problems unrelated to the alleged offence, or lack of sufficient connection to the community in which the offence allegedly occurred, may reflect the unique systemic or background factors identified in *R v Gladue*.[14] As such, Crown Counsel must exercise principled restraint in all decisions regarding bail and all bail proceedings, with particular attention to the circumstances of Indigenous accused. Crown Counsel should only seek detention of an Indigenous accused when:

- the accused's history of failing to attend court leaves no reasonable prospect that any form of release will enable the matter to conclude on its merits; or

11 *R v Ipeelee*, 2012 SCC 13
12 *Victimization of Aboriginal People in Canada, 2014*, Statistics Canada, 2016
13 *Ewert v Canada*, 2018 SCC 30 at paras 57-58; *R v Barton*, 2019 SCC 33 at paras 198-200
14 *R v Gladue* [1999] 1 S.C.R. 688

- the alleged offence is one of violence or bodily harm, or when the release on bail would otherwise result in an unacceptable risk to the safety or security of a victim, a witness, or the public

In assessing possible release plans for Indigenous accused, Crown Counsel:

- should only seek conditions that are reasonably necessary to address a risk to the safety or security of victims, witnesses, or the public or, given the accused's previous history of failing to attend court, to ensure the matter will conclude on its merits
- should consider the remoteness of the community in which the accused resides as well as the unique cultural connections or traditions within that community, and the challenges these may pose for enforcing what might otherwise be considered appropriate bail conditions in other communities
- must exercise principled restraint in the use of sureties

Section 493.2(a) of the *Criminal Code* requires a judge to give particular attention to the circumstances of Indigenous accused when deciding bail. In all bail proceedings, Crown Counsel should ensure that all appropriate information that is readily available to them about the circumstances of an Indigenous accused is also made available to the court.