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’.

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 overly stringent conditions of release can have a fundamental and unjustifiable impact on the accused’s life. An accused must not “needlessly suffer on being released”.

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. 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.

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1 R. v. St-Cloud, 2015 SCC 27, at para. 70
2 R. v. Antic, 2017 SCC 27
As “ministers of justice”, Crown Counsel must exercise principled restraint in all bail matters.

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. This often difficult decision is further complicated by the challenges inherent in predicting future conduct and accurately assessing risk. Even when Crown Counsel properly exercise their discretion and take into account the known risk factors, bail decisions made in accordance with this policy may still result in the safety of the public, a witness, or a victim being compromised in a particular matter. 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.

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 Introduction 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 advance 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
- 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, to encourage an accused to plead guilty, or make any other concession or admission.

Further, absent exceptional circumstances or a risk to public safety, Crown Counsel should not seek pre-trial detention unless a fit sentence upon conviction for the substantive offence would include incarceration.

Crown Counsel’s position on bail must be consistent with the “ladder principle”, which favours release at the earliest reasonable opportunity and on the least onerous terms, having regard to the grounds enumerated in section 515(10). Apart from limited exceptions, the default position is release on an undertaking, without conditions. For
every step up the ladder beyond that, the Crown bears the onus of showing cause why any more restrictive form of release is necessary.

In practice, the “ladder principle” requires that Crown Counsel be able to articulate a principled reason why a less restrictive release provision is not appropriate whenever a more restrictive bail provision is sought. This applies even in reverse onus situations.

In formulating a position on bail, Crown Counsel should consider the specific guidance regarding bail contained in the policies listed below. These policies emphasize the need to have particular regard for the safety of the public, including victims and other family members, but they do not supersede or displace the “ladder principle”:

- **Children and Vulnerable Youth – Crimes Against** ([CHI 1](#))
- **Intimate Partner Violence** ([IPV 1](#))
- **Sexual Offences against Adults** ([SEX 1](#))
- **Vulnerable Victims and Witnesses – Adult** ([VUL 1](#))

### 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 get access to bail.\(^5\)

Crown Counsel should avoid seeking any conditions that may tend to criminalize, or penalize, an accused’s particular life circumstances (such as 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, Crown Counsel must only seek conditions that are necessary to advance one or more of the purposes enumerated in section 515(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

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\(^5\) *R. v. Summers*, 2014 SCC 26, at para 66
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.⁶

In addition, the rates of victimization of Indigenous persons, especially for Indigenous women and girls, are significantly higher than those for non-Indigenous persons.⁷

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”.⁸

Where 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 and wishes to have the R v Gladue⁹ factors considered during the prosecution. Crown Counsel should ensure that this information is recorded on the file.

While a “Gladue Report” is not typically provided outside of a sentencing hearing, Crown Counsel must still consider any evidence submitted 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 that might in other circumstances influence a decision to seek detention or more stringent bail conditions, 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. As such, Crown Counsel must exercise principled restraint in bail matters with particular attention to the circumstances of Indigenous accused and should only seek detention of an Indigenous accused where:

- the accused’s previous history of failing to attend court makes it unlikely the matter will conclude on its merits; or

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⁶ R. v. Ipeelee, 2012 SCC 13
⁸ Ewert v. Canada, 2018 SCC 30, at paras 57 and 58
• the alleged offence is one of violence or bodily harm, or where the release on bail would otherwise reasonably result in 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 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. 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.

**Review of Police or Initial Bail Orders**

Police have powers of release under sections 499 or 503 of the *Criminal Code*. An accused may apply to a justice to review the conditions imposed by police under sections 499(3) or 503(2.2). On receipt of a Report to Crown Counsel, or on an application for review, Crown Counsel should review the terms of any police undertaking to ensure that it restricts the accused’s liberty only to the extent necessary to address the grounds enumerated in section 515(10), and are enforceable and sufficient to protect the victim, the victim’s family, witnesses, and the public. If the conditions do not meet this test, Crown Counsel should either:

• consider consenting to a bail review under sections 499(3) or 503(2.3), initiating an application for review under sections 499(4) or 503(2.3), or consenting to a variation under section 515.1 at the first reasonable opportunity to do so, where less restrictive terms would be sufficient; or,

• request a warrant and seek an amendment of the conditions under sections 499(4), 503(2.3), or 512 of the *Criminal Code*, if the terms are unenforceable or insufficient to protect the victim, the victim’s family, witnesses, and the public

Where, after the initial Crown decision on bail and the initial court order imposing bail conditions, Crown Counsel receives reliable new information that has bearing upon the practicability, utility, or likely effectiveness of an existing condition in achieving the purpose of a bail order, Crown Counsel should consider consenting to vary bail under section 515.1 of the *Criminal Code*.

On any review of a bail order, if Crown Counsel concludes that a condition of bail that is necessary could be less restrictive and still achieve the overall objectives of the order, Crown Counsel should propose any less restrictive alternatives.
Crown Counsel should apply the principles in the preceding paragraphs to applications to review bail brought under sections 520 or 521 of the *Criminal Code* whenever there is reliable new information bearing upon the practicability, utility, or likely effectiveness of an existing condition ordered by the bail judge or justice in achieving the purpose of the bail order.

**Charge Assessment of Alleged Breach**

Offences against the administration of justice, which include failures to comply with bail orders, continue to increase as a proportion of all reported crime in Canada. These offences result in findings of guilt at significantly higher rates than for other types of offences and, upon conviction, result in sentences of incarceration at much higher rates than for other offences. Convictions for offences against the administration of justice account for a very significant and growing segment of the custodial population in British Columbia.

Some breaches amount to willful defiance of the court and its lawful orders and may also create risk to public or victim safety. When they do, they call for an appropriate response. However, not every breach represents willful defiance or an increased risk to public or victim safety. 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 public or victim safety. Overly stringent enforcement in these circumstances can create or contribute to a cycle of breaches and over-incarceration.

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.

One exception to the approach outlined above is in regard to matters covered by *Intimate Partner Violence* (IPV 1). Since breach of a court order is an identified risk factor for future instances of intimate partner violence, it is important in those cases for Crown Counsel to consider approving charges, where otherwise appropriate, for breaches of bail.

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

- taking no action

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10 *Trends in Offences against the Administration of Justice*, Statistics Canada, 2015
11 *Trends in Offences against the Administration of Justice*, Statistics Canada, 2015
- referring for alternative measures
- reviewing the continued necessity of the condition alleged to be breached to the purpose of section 515(10) and amending or varying as necessary
- seeking a warrant for failure to appear (section 597), or breach of a bail condition (section 524), and conducting a further bail hearing to address the alleged breach with more appropriate terms and conditions

Prosecution of an alleged breach of bail will generally not be in the public interest if:

- the nature of the underlying substantive charge or the alleged breach is likely to result in an insignificant penalty
- the nature of the alleged breach is minor, technical, or involves conduct that is not in itself criminal, apart from relating to a term or condition of bail
- the accused lacks a history of multiple or serious breaches of the same bail order or section 524 warrant approvals in relation to it
- the alleged breach occurred as a consequence of an accused’s life circumstances (such as poverty, homelessness, addiction, mental or physical illness, or disability)
- \( R \ v \) Gladue factors have played a part in the Indigenous person’s coming into contact with the criminal justice system, and the alleged breach of bail did not involve violence, bodily harm, or other conduct that could reasonably result in risk to the safety or security of a victim, a witness, or the public
- the nature of the underlying substantive charge or the alleged breach is such that the social benefit to be gained by a prosecution is outweighed by the length and expense of conducting it

If the charge assessment standard is met, Crown Counsel should consider charging the alleged breach on the substantive Information giving rise to the bail order or, if the breach is incidental to a new substantive offence, on the same Information as the new substantive offence.

Where an accused is on multiple bail orders and allegedly breaches one or more of them, Crown Counsel should make every reasonable effort to bring all outstanding files before the court in order to avoid a situation where the accused might be bound by inconsistent bail orders and to ensure in each case that the least restrictive bail order that can reasonably achieve the objectives of section 515(10) is in place.